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MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

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MINUTES OF THE PROCEEDINGS

OF THE

LEGISLATIVE COUNCIL OF VICTORIA

SESSION 1982-85

VOLUME 4

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VOLUME 4

CONTENTS

LEGAL AND CONSTITUTIONAL COMMITTEE

A REPORT TO PARLIAMENT

on the

STATUTE LAW REVISION BILL 1984

Ordered to be printed

D. No. 39/1982-83-84

EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

FRIDAY 2 JULY 1982

34 JOINT INVESTIGATORY COMMITTEES - The Honourable W.A. Landeryou moved, by leave, That, contingent upon the enactment and coming into operation, this Session, of legislation to establish Joint Investigatory Committees:

* * * * * * * * *

(b) The Honourables Joan Coxsedge, J.H. Kennan, N.B. Reid and Haddon Storey be members of the Legal and Constitutional Committee.

* * * * * * * * *

Question - put and resolved in the affirmative.

WEDNESDAY 30 MARCH 1983

7 LEGAL AND CONSTITUTIONAL COMMITTEE - The Honourable W.A. Landeryou moved, by leave, That the Honourable B.W. Mier be a member of the Legal and Constitutional Committee.

Question - put and resolved in the affirmative.

TUESDAY 13 SEPTEMBER 1983

4 LEGAL AND CONSTITUTIONAL COMMITTEE - The Honourable Evan Walker moved, by leave, That the Honourable J.H. Kennan be discharged from attendance upon the Legal and Constitutional Committee.

Question - put and resolved in the affirmative.

WEDNESDAY 12 OCTOBER 1983

2 LEGAL AND CONSTITUTIONAL COMMITTEE - The Honourable Evan Walker moved, by leave, that the Honourable W.A. Landeryou be appointed a member of the Legal and Constitutional Committee.

Question - put and resolved in the affirmative.

EXTRACTED FROM THE VOTES AND PROCEEDINGS OF THE LEGISLATIVE ASSEMBLY

THURSDAY 1 JULY 1982

36 COMMITTEE APPOINTMENTS - motion made, by leave, and question -

That, contingent upon the coming into operation of the Parliamentary Committees (Joint Investigatory Committees) Act 1982 -

* * * * * * *

(b) Mr. Ebery. Mr. Evans (Ballarat North), Mr. Gray, Mr. Hill (Warrandyte), Mr. Hockley, Mr. Jasper, Mr. King* and Mr. Whiting be appointed members of the Legal and Constitutional Committee.

(Mr. Fordham) - put and agreed to.

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* Mr. King deceased on 28 January 1983. Succeeded on Committee by the Honourable B.W. Mier.

LEGAL AND CONSTITUTIONAL COMMITTEE

COMMITTEE MEMBERS

Mr. M.S. Whiting, M.P. (Chairman)

Mr. D.J.F. Gray, M.P. (Deputy Chairman)

The Honourable Joan Coxsedge, M.L.C.

Mr. W.T. Ebery, M.P.

Mr. A.T. Evans, M.P.

Mr. L.J. Hill, M.P.

Mr. G.S. Hockley, M.P.

Mr. K.S. Jasper, M.P.

The Honourable W.A. Landeryou, M.L.C.

The Honourable B.W. Mier, M.L.C.

The Honourable N.B. Reid, M.L.C.

The Honourable Haddon Storey, Q.C., M.L.C.

COMMITTEE STAFF

Dr. Jocelynne A. Scutt, Director of Research

Mr. Marcus Bromley, Secretary

Lisa O'Bryan, Research Officer

Mr. Gavin Jackson, Assistant Committee Clerk

Mrs. Marion Caraher, Stenographer

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Schedule 1 (continued)

SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1

6 That the item numbers contained in section 3(2) should be renumbered to take into account deletions of items as recommended in this Report and in accordance with the amended Schedule 1 appended to this Report.

RECOMMENDATION 2

45 The Committee recommends that items number 17, 18 and 19 should be omitted from the Bill, as touching upon substantive matters rather than those which are appropriately contained in a statute law revision bill.

RECOMMENDATION 3

46 The Committee further recommends that clarity should be brought to the provisions of the *Constitution Act* 1975 and those of the *Public Account Act* 1970 dealing with consolidated revenue and the consolidated fund. Accordingly, this matter should be referred to the Legal and Constitutional Committee for inquiry and report, with a view to the Committee making recommendations for eliminating the confusion which currently exists.

RECOMMENDATION 4

56 The Committee recommends that in item 157 the words "appointed by the" should be replaced by "appointed by".

RECOMMENDATION 5

69 The Committee recommends that item 58 should be deleted from the Bill.

RECOMMENDATION 6

77 The Committee recommends that item 176 should be made retrospective to 14 December 1982.

RECOMMENDATION 7

81 The Committee recommends that item 307 should be deleted from the Bill as being unnecessary.

RECOMMENDATION 8

84 Item 326 of the Bill should be amended to provide :

> In section 16(b) the expression "appointed under the *State Development Decentralization and Tourism Act* 1978" is repealed.

RECOMMENDATION 9

91 The Committee recommends that Act No. 1528 appearing in the Second Schedule should be amended to read *Dunolly Cemetery Act* 1897.

RECOMMENDATION 10

93 The Committee recommends that Act No. 9487 appearing in the Second Schedule should be amended to omit the expression "Whole Act" and replace it with the words "Sections 2 to 11".

RECOMMENDATION 11

94 The Committee recommends that the list of suggested amendments appended to this Report become a part of the Statute Law Revision Bill 1984 before it is passed into law.

REPORT

The Legal and Constitutional Committee has the honour to report as follows:

1 By joint resolution of the Legislative Council and the Legislative Assembly, agreed to on 27 March 1984, the proposals contained in the Statute Law Revision Bill were referred to the Legal and Constitutional Committee for inquiry, consideration and report.

2 The Committee heard evidence from :

Mr. Campbell Duncan, Legal Officer, Parliamentary Counsel's Office.

3 Explanatory memoranda dated 4 April 1984 and 10 April 1984 were received from Mr. Campbell Duncan, Legal Officer, Parliamentary Counsel's Office.

4 In his explanatory memorandum, Mr. Duncan pointed out that the Bill has two distinct components, namely Clause 3 and Schedule 1, and Clause 4 and Schedule 2. The provisions contained in Clause 3 and Schedule 1 are much the same in structure and purpose as recent statute law revision bills. Clause 4 and Schedule 2 contain provisions continuing on from the *Statute Law Revision (Repeals) Act* 1982 in removing "spent" provisions from the statute book. Generally, these provisions have a single effect upon commencement, such as Acts amending other Acts or abolishing statutory bodies. Once they have had this effect they have no continuing operation.

5 Clause 3. Clause 3(2) provides a series of dates on which various Schedule 1 items shall be "deemed" to have come into effect. Mostly, these "deemed" dates are necessary to ensure that amending Acts do (or did) their job properly, free from technical problems. The Committee approves of the inclusion in the Bill of clause 3, subject to the proviso that, due to a number of items being deleted from Schedule 1 of the Bill, the item numbers contained in each sub-clause of cl.3(2) should be altered to correspond with the deletions. The Committee appends to this Report an amended Schedule 1, with items deleted and renumbered accordingly, in accordance with the recommendations contained herein.

RECOMMENDATION 1

6 That the item numbers contained in clause 3(2) should be renumbered to take into account deletions of items as recommended in this Report and in accordance with the amended Schedule 1 appended to this Report.

7 Schedule 1 : The Committee's Approach. Items included in a Statute Law Revision Bill should be confined to matters such as the correction of references, spelling, printing, drafting, and grammatical errors and amendments which should have been made as consequential amendments simultaneously with the passage of legislation. The Bill is not intended to be the vehicle for substantive changes to the law.

8 Accordingly the Committee dealt with matters included in Schedule 1 of the Bill by dividing them into three categories, namely:

* Category 1 - correction of incorrect references to Acts, Ministers, Officials and Funds
* Category 2 - correction of grammatical, numbering, and referencing errors
* Category 3 - other items

Schedule 1 comprises 342 items. This is vastly more than have been contained in recent statute law revision bills. This is mainly due to a number of orders under the *Administrative Arrangements Act* 1983.

9 Those matters dealt with within Category 1 include :

* amendments consequential upon orders made under the *Administrative Arrangements Act* 1983
* amendments consequential upon changed short-title of Acts - including the *Public Service Act* 1974; *Community Welfare Services Act* 1970; and other Acts
* amendments consequential upon the *Public Account (Amendment) Act* 1970
* amendments which should have been made at the time of enactment of other Acts

10 Those matters dealt with within Category 2 were further subdivided into:

* grammatical and numbering errors (including misprints)

* errors in references - to other provisions, to persons, documents, office holders and so on

11 Category 3, other items, contains one proposed new item 43, to follow item 42 in the Bill.

12 In accordance with the procedure adopted with earlier statute law revision bills the Committee determined to carry out a "spot check" on certain items contained in Categories 1 and 2 of the Bill, to ensure that these items dealt correctly with the matters noted. For Category 3, the Committee sought information from Parliamentary Counsel and reports accordingly.

13 Category 1 - *Administrative Arrangements Act* 1983. Amendments consequential upon orders made under the Administrative Arrangements Act 1983 include items number:

1, 3, 8, 23, 24, 25, 34, 35, 36, 37, 38, 39, 40, 41, 56, 57, 62, 63, 76, 77, 78,79, 80, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 100, 101, 104, 106, 124, 126, 128, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 187, 188, 203, 221, 224(c), 229, 234(b)(i), 235(a), 236(a), 251, 252, 253, 254, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 272, 318, 319, 321, 323, 332, 333, 334, 337, 338(a), 339, 340 and 341(b).

The Committee "spot checked" items number 24, 38, 77, 84, 101, 126, 143, 252, 268 and 341(b).

14 These items appear in the original provision in the following form, with amendment proposed by the Statute Law Revision Bill 1984 as follows:

Item 24 : *Country Fire Authority Act* 1958

In section 21A for the words "Commissioner of Crown Lands and Survey" there shall be substituted the expression "Minister for Conservation, Forests and Lands".

s. 21A Notwithstanding anything to the contrary in any Act but subject to the provisions of section 8 of the *Crown Land (Reserves) Act* 1978 and by agreement with the COMMISSIONER OF CROWN LANDS AND SURVEY the Governor in Council may grant any unalienated Crown land to the Authority for the purposes of this Act at such price and upon such terms and conditions as the Governor in Council thinks fit.

As proposed to be amended by the Statute Law Revision Bill 1984 -

s.21A Notwithstanding anything to the contrary in any Act but subject to the provisions of section 8 of the *Crown Lands Reserves Act* 1978 and by agreement with the MINISTER FOR CONSERVATION, FORESTS AND LANDS the Governor in Council may grant any unalienated Crown land to the Authority for the purposes of this Act at such price and upon such terms and conditions as the Governor in Council thinks fit.

15 Item 38 : *Dandenong Valley Authority Act* 1963

In section 30(1) for the words "Commissioner of Crown Lands and Survey" there shall be substituted the expression "Minister for Conservation, Forests and Lands".

s.30(1) Notwithstanding anything in any Act -

(a) the Governor in Council, on the recommendation of the Minister of Water Supply after consultation with the COMMISSIONER OF CROWN LANDS AND SURVEY, may by Order published in the *Government Gazette* declare that any land of the Crown which forms or abuts on or is adjacent to the banks of any river within the district shall, subject to such conditions as the Governor in Council thinks fit, be placed under the management and control of the Authority for the purposes of this Act;

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 30(1) Notwithstanding anything in any Act -

(a) the Governor in Council, on the recommendation of the Minister of Water Supply after consultation with the MINISTER FOR

CONSERVATION, FORESTS AND LANDS, may by Order published in the *Government Gazette* declare that any land of the Crown which forms or abuts on or is adjacent to the banks of any river within the district shall, subject to such conditions as the Governor in Council thinks fit, be placed under the management and control of the Authority for the purposes of this Act;

16 Item 77 : *Forests Act* 1958

In section 3(3) the words "of Forests" are repealed.

s. 3(3) The Governor in Council may on joint recommendation of the Minister OF FORESTS and the Minister for Police and Emergency Services at any time by Order published in the *Government Gazette* excise from any fire protected area the whole or part of any urban fire districts proclaimed as such under the *Country Fire Authority Act* 1958 or any corresponding previous enactment.

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 3(3) The Governor in Council may on the joint recommendation of the Minister and the Minister for Police and Emergency Services at any time by Order published in the *Government Gazette* excise from any fire protected area the whole or part of any urban fire districts proclaimed as such under the *Country Fire Authority Act* 1958 or any corresponding previous enactment.

17 Item 84 : *Forests Act* 1958

In section 42(6) the words "of Lands the Minister of Forests" are repealed.

s. 42(6) The Governor in Council may at any time on the joint recommendation of the Minister OF LANDS THE MINISTER OF FORESTS and the Minister of Mines excise either temporarily or permanently from any reserved forest any portion thereof which is required for public use as mineral or medicinal springs, or for reservation for visitors to any waterfalls, caves, or places of natural beauty or interest or as health resorts or for sites for townships or for State schools, or for providing roads and means of access thereto or for irrigation purposes or water supply purposes ...

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 42(6) The Governor in Council may at any time on the joint recommendation of the Minister and the Minister of Mines excise either temporarily or permanently from any reserved forest any portion thereof which is required for public use as mineral or medicinal springs, or for reservation for visitors to any waterfalls, caves, or places of natural beauty or interest or as health resorts or for sites for townships or for State schools, or for providing roads and means of access thereto or for irrigation purposes or water supply purposes ...

18 Item 101 : *Gas and Fuel Corporation Act* 1958

In section 32(1)(b) for the words "Commissioner of Crown Lands and Survey" there shall be substituted the words "Minister for Conservation, Forests and Lands".

s. 32(1)(b) The following provisions shall apply with respect to lands taken purchased or acquired by the Corporation under this Act: -

(a) ...

(b) By agreement with the COMMISSIONER OF CROWN LANDS AND SURVEY or the public statutory body concerned the Corporation may purchase or acquire for the purposes of this Act any such Crown land or land vested in that body at such price or rent and upon such terms as are mutually agreed upon and in default of agreement under this paragraph the Governor in Council shall determine what land is to be purchased or acquired by the Corporation and the price of rent and terms of such purchase or acquisition;

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 32(1)(b) The following provisions shall apply with respect to lands taken purchased or acquired by the Corporation under this Act: -

(a) ...

(b) By agreement with the MINISTER FOR CONSERVATION, FORESTS AND LANDS or the public statutory body concerned the Corporation may purchase or acquire for the purposes of this Act any such Crown land or land vested in that body at such price or rent and upon such terms as are mutually agreed upon and in default of agreement under this paragraph the Governor in Council shall determine what land is to be purchased or acquired by the Corporation and the price or rent and terms of such purchase or acquisition;

19 Item 126 : *Land Act* 1970

In section 10(2) for the words "Crown Lands and Survey" there shall be substituted the expression "Conservation, Forests and Lands".

s. 10(2) Each such Board shall be appointed by the Governor in Council and shall consist of officers of the Department of CROWN LANDS AND SURVEY or other competent persons.

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 10(2) Each such Board shall be appointed by the Governor in Council and shall consist of officers of the Department of CONSERVATION, FORESTS AND LANDS or other competent persons.

20 Item 143 : *Land Conservation Act* 1970

In section 3(1)(e) for the words "Secretary for Lands" there shall be substituted the expression "Director-General of Conservation, Forests and Lands".

s. 3(1) For the purposes of this Act there shall be a Land Conservation Council consisting of -

(a) ...

(b) ...

(c) ...

(d) ...

(e) the SECRETARY FOR LANDS or his nominee; ...

As proposed to be amended by the Statute Law Revision Bill 1984

s. 3(1) For the purposes of this Act there shall be a Land Conservation Council consisting of -

(a) ...

(b) ...

(c) ...

(d) ...

(e) the DIRECTOR-GENERAL FOR CONSERVATION, FORESTS AND LANDS

21 Item 252 : *Survey Co-ordination Act* 1958

In the proviso to section 15(4) and in sections 20 and 21(2) and (3) for the words "of Lands" there shall be substituted the expression "for Conservation, Forests and Lands".

s. 15(4) ... Provided that where the Minister OF LANDS is satisfied, upon the application of the proper officer of any department or public authority, that the maintenance of any such mark or marks causes undue expense or inconvenience to such department or authority, he may by writing exempt such department or authority from such maintenance and thereafter such maintenance shall be carried out by the Surveyor-General or by such other department or public authority or by such committee of management or body of trustees as the Governor in Council by Order directs.

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 15(4) ... Provided that where the Minister for CONSERVATION, FORESTS AND LANDS is satisfied, upon the application of the proper officer of any department or public authority that the maintenance of any such mark or marks causes undue expense or inconvenience to such department or authority, he may by writing exempt such department or authority from such maintenance, and thereafter such maintenance shall be carried out by the Surveyor-General or by such other department or public authority or by such committee of management or body of trustees as the Governor in Council by Order directs.

s. 20 The Surveyor-General shall furnish to the Minister OF LANDS before the thirty-first day of July in each year a report upon the progress of surveys within Victoria under the Commonwealth national mapping scheme and upon the co-ordination of surveys under this Act with such surveys under the Commonwealth scheme and generally upon the administration of this

Act during the period of twelve months ended on the thirtieth day of June then last past, and a copy of such report shall be laid before each House of Parliament.

As proposed to be amended by the Statute Law Revision Bill 1984

s. 20 The Surveyor-General shall furnish to the Minister FOR CONSERVATION, FORESTS AND LANDS before the thirty-first day of July in each year a report upon the progress of surveys within Victoria under the Commonwealth national mapping scheme and upon the co-ordination of surveys under this Act with such surveys under the Commonwealth scheme and generally upon the administration of this Act during the period of twelve months ended on the thirtieth day of June then last past, and a copy of such report shall be laid before each House of Parliament.

s. 21(2) The Minister of the department concerned or the chairman or president of the public authority concerned or any such licensed surveyor as aforesaid may require that any decision of the Surveyor-General upon any such application as aforesaid be referred by the Minister OF LANDS to the Governor in Council who may by order exercise all or any of the powers of exemption hereinbefore provided, and the decision of the Governor in Council on any such matters shall be final.

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 21(2) The Minister of the department concerned or the chairman or president of the public authority concerned or any such licensed surveyor as aforesaid may require that any decision of the Surveyor-General upon any such application as aforesaid be referred by the Minister FOR CONSERVATION, FORESTS AND LANDS to the Governor in Council who may by order exercise all or any of the powers of exemption hereinbefore provided, and the decision of the Governor in Council on any such matters shall be final.

s. 21(3) The Minister of the department concerned or the chairman or president of the public authority concerned may require that any requisition of the Surveyor-General made pursuant to this Act be referred by the Minister OF LANDS to the Governor in Council who may Order cancel or confirm (either with or without modification) such requisition, and the decision of the Governor in Council shall be final.

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 21(3) The Minister of the department concerned or the chairman or president of the public authority concerned may require that any requisition of the Surveyor-General made pursuant to this Act be referred by the Minister FOR CONSERVATION, FORESTS AND LANDS to the Governor in Council who may Order cancel or confirm (either with or without modification) such requisition, and the decision of the Governor in Council shall be final.

22 Item 268 : *Town and Country Planning Act* 1961

In section 31(1)(b) for the word "Department" there shall be substituted the word "Ministry".

s. 31(1) A copy of every planning scheme shall within three months after the publication of approval thereof in the *Government Gazette* or within such further period as the Minister may in a particular case allow, be lodged by the Secretary for Planning or, if the Minister so directs, by the responsible authority -

(a) ...

(b) At the office of the DEPARTMENT; ...

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 31(1) A copy of every planning scheme shall within three months after the publication of approval thereof in the *Government Gazette* or within such further period as the Minister may in a particular case allow, be lodged by the Secretary for Planning or, if the Minister so directs, by the responsible authority -

(a) ...

(b) At the office of the MINISTRY; ...

23 Item 341(b) : *Wire Netting Act* 1958

In section 51 -

(b) in sub-section (6) for the words "Secretary for Lands" there shall be substituted the expression "Director-General of Conservation, Forests and Lands".

s. 51(6) In respect of all loans granted to shires under the provisions of this section all repayments shall be made to the Treasurer of Victoria, and the Treasurer shall have and exercise all rights powers and duties which by this Part are conferred or imposed upon the SECRETARY FOR LANDS.

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 51(6) In respect of all loans granted to shires under the provisions of this section all repayments shall be made to the Treasurer of Victoria, and the Treasurer shall have and exercise all rights powers and duties which by this Part are conferred or imposed upon the DIRECTOR-GENERAL FOR CONSERVATION, FORESTS AND LANDS.

24 Category 1 : *Public Service Act* 1974. Amendments consequential upon the changed short-title of the Public Service Act include items number :

2, 6, 9, 21, 65, 96, 149, 164, 167, 180, 216, 315 and 329.

The Committee checked all items in this category and highlights items number 2, 21 and 96 as typical examples.

25 These items appear in the original provision in the following form, with amendment by the Statute Law Revision Bill 1984 as follows :

Item 2 : *Agricultural Education Cadetships Act* 1969

> In section 4(2) for the expression *"Public Service Act* 1958" there shall be substituted the expression *"Public Service Act* 1974".

s. 4(2) A cadet referred to in sub-section (1) shall not during his course of training be subject to the *PUBLIC SERVICE ACT* 1958.

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 4(2) A cadet referred to in sub-section (1) shall not during his course of training be sbuject to the *PUBLIC SERVICE ACT* 1974.

26 Item 21 : *Co-operative Housing Societies Act* 1958

> In section 62(2) for the expression *"Public Service Act* 1958" there shall be substituted the expression *"Public Service Act* 1974".

s. 62(2) The registrar and all other persons employed in or in connexion with registrar shall be appointed pursuant to and shall hold their office or employment under and subject to the *PUBLIC SERVICE ACT* 1958.

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 62(2) The registrar and all other persons employed in or in connexion with registrar shall be appointed pursuant to and shall hold their office or employment under and subject to the *PUBLIC SERVICE ACT* 1974.

27 Item 96 : *Fruit and Vegetables Act* 1958.

In section 42 for the expression "*Public Service Act* 1958" there shall be substituted the expression "*Public Service Act* 1974".

s. 42 Subject to the *PUBLIC SERVICE ACT* 1958 inspectors may be appointed for the purpose of this Part.

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 42 Subject to the *PUBLIC SERVICE ACT* 1974 inspectors may be appointed for the purpose of this Part.

28 Category 1 : *Community Welfare Services Act* 1970. Amendments appear in this category which are consequential upon the changed short title of the Community Welfare Services Act including items number :

4, 29(b), 31, 32 and 33.

The Committee checked all items.

29 As examples, four of these items appear in the original provisions in the following form, with amendment proposed by the Statute Law Revision Bill 1984 as follows :

Item 4 : *Bail Act* 1977

In section 3 in the interpretation of "Prison" and in sections 4(2)(d)(ii) and 5(3) for the expression *"Social Welfare Act* 1970" there shall be substituted the expression *"Community Welfare Services Act* 1970".

s.3 In this Act unless inconsistent with the context of subject-matter -

...

"Prison" includes remand centre or youth training centre under the *SOCIAL WELFARE ACT* 1970 and any other place where persons may be detained in legal custody and "imprisonment" has a corresponding interpretation.

As proposed to be amended by the Statute Law Revision Bill 1984 -

...

"Prison" includes remand centre or youth training centre under the *COMMUNITY WELFARE SERVICES ACT* 1970 and any other place where persons may be detained in legal custody and "imprisonment" has a corresponding interpretation.

s. 4(2) Notwithstanding the generality of the provisions of sub-section (1) a court shall refuse bail -

(a) ...

(b) ...

(c) ...

(d) if the court is satisfied -

(i) ...

(ii) that the accused person should remain in custody for his own protection or, if he is a child or young person within the meaning of the *SOCIAL WELFARE ACT* 1970, for his own welfare; ...

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 4(2) Notwithstanding the generality of the provisions of sub-section (1) a court shall refuse bail -

(a) ...

(b) ...

(c) ...

(d) if the court is satisfied -

(i) ...

(ii) that the accused person should remain in custody for his own protection or, if he is a child or young person within the meaning of the *COMMUNITY WELFARE SERVICES ACT* 1970, for his own welfare; ...

s. 5(3) If a parent or guardian of a child or young person within the meaning of the *SOCIAL WELFARE ACT* 1970 consents to be surety for the child or young person for the purposes of this sub-section, the parent or guardian may be required to secure that the child or young person complies with any condition imposed on him under sub-section (2) ...

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 5(3) If a parent or guardian of a child or young person within the meaning of the *COMMUNITY WELFARE SERVICES ACT* 1970 consents to be surety for the child or young person for the purposes of this sub-section, the parent or guardian may be required to secure that the child or young person complies with any condition imposed on him under sub-section (2) ...

30 Item 31 : *Crimes Act* 1958

In section 493 for the expression "Part III of the *Social Welfare Act* 1970" there shall be

substituted the expression "Part IV of the *Community Welfare Services Act* 1970".

s. 493 Every sentence of imprisonment or of imprisonment or detention with hard labour which is passed for any indictable offence with or without whipping every sentence of attendance at an attendance centre or of week-end imprisonment, every award of imprisonment or attendance at an attendance centre or week-end imprisonment and every direction for detention in a youth training centre within the meaning of PART III OF THE *SOCIAL WELFARE ACT* 1970 for any offence punishable on summary conviction, shall be carried out in the manner for the time being provided by any Acts in force relating to prisons or penal establishments in that behalf according to the tenor of every such sentence.

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 493 Every sentence of imprisonment or of imprisonment or detention with hard labour which is passed for any indictable offence with or without whipping every sentence of attendance at an attendance centre or of week-end imprisonment, every award of imprisonment or attendance at an attendance centre or week-end imprisonment and every direction for detention in a youth training centre within the meaning of PART IV OF THE *COMMUNITY WELFARE SERVICES ACT* 1970 for any offence punishable on summary conviction, shall be carried out in the manner for the time being provided by any Acts in force relating to prisons or penal establishments in that behalf according to the tenor of every such sentence.

31 Item 32 : *Crimes Act* 1958

In section 502(4) for the expression "Division 4 of Part VII of the *Social Welfare Act* 1970" there

shall be substituted the expression "Division 4 of Part VIII of the *Community Welfare Services Act* 1970".

s. 502(4) Where a magistrates' court recommits any person to prison pursuant to the foregoing provisions of this section the provisions of DIVISION 4 OF PART VII OF THE *SOCIAL WELFARE ACT* 1970 shall apply as if the offender had just been convicted by that court and been sentenced to be imprisoned for a term equal to the unexpired portion of the term for which he is so committed to prison.

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 502(4) Where a magistrates' court recommits any person to prison pursuant to the foregoing provisions of this section the provisions of DIVISION 4 PART VIII OF THE *COMMUNITY WELFARE SERVICES ACT* 1970 shall apply as if the offender had just been convicted by that court and been sentenced to be imprisoned for a term equal to the unexpired portion of the term for which he is so committed to prison.

32 Item 33 : *Crimes Act* 1958

In sections 508(8) and 519(3) the expression *"Social Welfare Act* 1970" there shall be substituted the expression *"Community Welfare Services Act* 1970".

s. 508(8) In this section "hostel" means a hostel appointed as a youth hostel under the *SOCIAL WELFARE ACT* 1970".

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 508(8) In this section "hostel" means a hostel appointed as a youth hostel under the *COMMUNITY WELFARE SERVICES ACT* 1970".

s. 519(3) The provisions of section 129 of the *SOCIAL WELFARE ACT* 1970 shall extend and apply to and with respect to the case of a prisoner who is detained as mentioned in that section of that Act and who is charged with the breach of a probation order.

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 519(3) The provisions of section 129 of the *COMMUNITY WELFARE SERVICES ACT* 1970 shall extend and apply to and with respect to the case of a prisoner who is detained as mentioned in that section of that Act and who is charged with the breach of a probation order.

33 Category 1 : Other Acts. Amendments appear in this category which are consequential upon the changed short title of other Acts include items number :

95(b), 99(b), 246(b), 247, 249, and 297.

The relevant Acts include the *State Bank Act* 1958, the *Teaching Service Act* 1958 and the *Drainage Areas Act* 1958.

34 The Committee "spot checked" items number 95(b), 246(b), 247 and 297. As an example, two of these items appear in the original provision in the following form, with amendment proposed by the Statute Law Revision Bill 1984 as follows :

Item 95(b) : *Fruit and Vegetables Act* 1958

In section 21(3) -

(a) ...

(b) for the expression "*State Savings Bank Act* 1958" there shall be substituted the expression "*State Bank Act* 1958".

s. 21(3) The number and amount of half-yearly instalments shall be calculated according to a table prepared in the form of the tables in force for the repayment of advances made by the Commissioners of the State Savings Bank of Victoria under Division Three of Part III of the *STATE SAVINGS BANK ACT* 1958.

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 21(3) The number and amount of half-yearly instalments shall be calculated according to a table prepared in the form of the tables in force for the repayment of advances made by the Commissioners of the State Savings Bank of Victoria under Division Three of Part III of the *STATE BANK ACT* 1958.

35 Item 246(b) : *Superannuation Act* 1958

In section 3(1) in paragraph (a) of the interpretation "Officer" -

(a) ...

(b) for the expression "*Education Service Act* 1981 there shall be substituted the expression "*Teaching Service Act* 1981".

s. 3(1) "Officer" (a)(i) the permanent staff of the public service or education service -

Under and in accordance with the *Public Service Act* 1974 or the *EDUCATION SERVICE ACT* 1981 (as the case may be) or the corresponding previous enactments; ...

As proposed to be amended by Statute Law Revision Bill 1984 -

s. 3(1) "Officer" (a)(i) the permanent staff of the public service or education service -

Under and in accordance with the *Public Service Act* 1974 or the *TEACHING SERVICE ACT* 1981 (as the case may be) or the corresponding previous enactments; ...

36 Category 1 : *Public Account Act* 1970. Amendments consequential upon the Public Account Act include item numbers :

10, 17, 18, 19, 22, 28, 30, 97, 98, 152, 182, 196, 197(b), 198, 204, 215, 218, 222, 223, 224(a) and (b), 225, 226, 227, 228, 230, 232(b), 259, 317, 320, 322, 336, 338(b) and 341(a).

The Committee "spot checked" item numbers 17, 18, 19, 224(a), 224(b), 228(a), 228(b) and 232(b).

37 As an example, two of these items appear in the original provision in the following form, with amendment proposed by the Statute Law Revision Bill 1984 as follows :

Item 224(a) and (b) : *Soldier Settlement Act* 1958

In section 24 -

(a) in paragraph (a) of subsection (1) for the words "State Loans Repayment Fund" there shall be substituted the words "Consolidated Fund";

(b) in paragraph (b) of sub-section (1) for the words "Consolidated Revenue" there shall be substituted the words "Consolidated Fund" ...

s. 24(1) The value of any Crown land set apart pursuant to this Act or section twenty-four of the *Soldier Settlement Act* 1945 or the *Land Settlement (Acquisition) Act* 1943 and of the interest of the Crown in any land acquired pursuant to this Act or the said Acts shall -

(a) (if the land was land which might have been disposed of by the Board of Land and Works or which might be disposed of by the Minister under the *Closer Settlement Act* 1938) be paid by the Commission into the STATE LOANS REPAYMENT FUND out of loan moneys raised pursuant to this Act; and

(b) (in any other case) be entered in the accounts of the Commission as a liability to the CONSOLIDATED REVENUE, but without diminishing or affecting the power to raise loan moneys pursuant to this Act.

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 24(1) The value of any Crown land set apart pursuant to this Act or section twenty-four of the Soldier Settlement Act 1945 or the *Land Settlement (Acquisition) Act* 1943 and of the interest of the Crown in any land acquired pursuant to this Act or the said Acts shall -

(a) (if the land was land which might have been disposed of by the Board of Land and Works or which might be disposed of by the Minister under the *Closer Settlement Act* 1938) be paid by the Commission into the CONSOLIDATED FUND out of loan moneys raised pursuant to this Act; and

(b) (in any other case) be entered in the accounts of the Commission as a liability to the CONSOLIDATED FUND but without diminishing or affecting the power to raise loan moneys pursuant to this Act.

38 Item 232(b) : *Stamps Act* 1958

In section 137C -

(a) ...

(b) for the words "Consolidated Revenue there shall be substituted the words "Consolidated Fund".

s. 137C All sums received by the Transport Regulation Board under this subdivision shall be paid to the Treasurer of Victoria at such intervals and in such manner as is prescribed and shall be paid by the Treasurer into the CONSOLIDATED REVENUE.

As proposed to be amended by Statute Law Revision Bill 1984 -

s. 137C All sums received by the Transport Regulation Board under this subdivision shall be paid to the Treasurer of Victoria at such intervals and in such manner as is prescribed and shall be paid by the Treasurer into the CONSOLIDATED FUND.

39 Category 1 : *Public Account Act* 1970. When he gave evidence before the Committee, Mr. Duncan indicated that in his view item 19 should be omitted from the Bill, as removing the term "Consolidated Revenue" and substituting for it "Consolidated Fund" could not be classed as a matter appropriate to be dealt with in a Statute Law Revision Bill. The use of the terms "Consolidated Revenue" and "Consolidated Fund" imported a complexity into the Constitution Act which could not be solved by the expedient of statute law revision.

40 Items 17, 18 and 19 : *Constitution Act* 1975

In sections 89, 90 and 92 for the words "Consolidated Revenue" there shall be substituted the words "Consolidated Fund".

s. 89 All taxes imposts rates and duties and all territorial casual and other revenues of the Crown in right of the State of Victoria (including royalties) which the Parliament has power to appropriate shall form one CONSOLIDATED REVENUE to be appropriated for the public service of Victoria in the manner and subject to the charges hereinafter mentioned.

s. 90 The CONSOLIDATED REVENUE shall be permanently charged with all the costs charges and expenses incidental to the collection management and receipt thereof such costs charges and expenses being subject nevertheless to be reviewed and audited in such manner as shall be directed by any Act of Parliament.

s. 91 The CONSOLIDATED REVENUE arising from taxes duties rates and imposts levied by virtue of an Act and from the disposal of the waste lands of the Crown under any such Act made in pursuance of the authority herein contained shall be subject to be appropriated to such specific purposes as by an Act shall be provided in that behalf.

41 The Committee notes the comments of Dr. C.A. Saunders of the University of Melbourne Law Faculty, in which she puts the proposition that the meaning of the term "consolidated revenue" requires attention. She states :

> *It appears in sections 89, 90 and 92 [of the Constitution Act 1975] and clearly refers to the central account for the receipt of revenues which has been a feature of parliamentary government on the Westminster model since 1787. Potential confusion results however from the use of the term "Consolidated Fund" in section 93. The relation between the Consolidated Revenue and the Consolidated Fund created by the Public Account Act 1970 [illustrates] the problem.*

Dr. Saunders goes on to point out that the Public Account Act was primarily an amendment to the principal Act of 1958. However section 3 provided :

In the Constitution Act ... unless inconsistent with the context or subject matter -

(a) any reference to an account or fund under the title of "Consolidated Revenue" or "Consolidated Revenue Fund" shall be deemed to be a reference to the Consolidated Fund.

42 In 1975 the Constitution Act was re-enacted with references to the Consolidated Fund in section 93 and elsewhere included for the first time:

> *The references to the Consolidated Revenue in sections 89, 90 and 92 were preserved. It is unlikely that in these circumstances the term Consolidated Revenue could be construed to mean the Consolidated Fund. The reason for the maintenance of the distinction between the two is not obvious however. It [is also clear] that the confusion is compounded by the Public Account Act 1958 itself. (Emphasis added.)*

(See General Financial Arrangements Between the Commonwealth and Victoria 1981/82, Information Paper 3, Intergovernmental Relations in Victoria Programme, Law School, University of Melbourne, 1982, at pp. 6-7.)

43 The Committee believes that "consolidated revenue" is a legal historical term requiring substantive amendment if it is to be changed. The Committee accepts the view of Dr. Saunders that a general revision of the provisions in the *Constitution Act* 1975 and in the *Public Account Act* 1970 dealing with consolidated revenue and the consolidated fund is in order. In those instances where "consolidated revenue" has not been changed specifically in the Constitution Act - that is, in ss. 17, 18 and 19 - by way of the Public Account Act 1970 to "consolidated fund", the Committee believes it should not be changed simply by way of a statute law revision bill. It is persuaded further in this view by the fact that the Constitution Act was amended in 1975, but that the provisions referred to, despite that amendment, continue to refer to "Consolidated Revenue". Furthermore, the definition of Consolidated Fund in s.4 of the Public Account Act indicates that this term includes Consolidated Revenue and the Loan Fund. In addition, Consolidated Revenue is subject to

different political requirements - that is, through Parliamentary processes - from the Loans Fund.

44 The Committee therefore believes that it is inappropriate to accept the proposed amendment contained in item 17 of the Statute Law Revision Bill 1984. Items number 18 and 19 are similarly affected and should similarly be omitted from the Bill. However, the Committee further believes that the confusion created by the use of both terms and referred to by Dr. Saunders, should be resolved by reference of the question to this Committee. Subsequent to the Committee's inquiry, if deemed necessary, appropriate amendments should be made to relevant Acts by way of substantive legislation.

RECOMMENDATION 2

45 The Committee recommends that items number 17, 18 and 19 should be omitted from the Bill, as touching upon substantive matters rather than those which are appropriately contained in a statute law revision bill.

RECOMMENDATION 3

46 The Committee further recommends that clarity should be brought to the provisions of the *Constitution Act* 1975 and those of the *Public Account Act* 1970 dealing with consolidated revenue and the consolidated fund. Accordingly, this matter should be referred to the Legal and Constitutional Committee for inquiry and report, with a view to the Committee making recommendations for eliminating the confusion which currently exists.

47 Category 1 : Amendments by Enactment of Other Acts. Amendments which are required to be made, that should have been made at the time of enactment of other Acts, include items number :

26, 29(a), 81, 95(a), 99(a), 103, 105, 110, 111, 112, 118, 120, 150, 174, 193, 194, 197(a), 214, 217, 231, 232(a), 233, 234(b)(ii), 235(b), 236(b), 246(a), 248, 273, 300, 308, 309, 312, 313, 314, 316, 335 and 342.

The Committee "spot checked" items number 29(a), 110, 232(a), 233, 235(b), 248, 300, 314 and 342.

48 As an example, two of these items appear in the original provision in the following form, with amendment proposed by the Statute Law Revision Bill 1984 as follows :

Item 29(a) : *Crimes Act* 1958

In section 359(6) -
(a) for the expression "360, 361 and 362" there shall be substituted the expression "360 and 361"; ...

s. 359(6) In this section and in sections **360, 361 AND 362** "prison" means prison under Part IV of the *Social Welfare Act* 1970.

As proposed to be amended by Statute Law Revision Bill 1984 -

s. 359(6) In this section and in sections **360 and 361** "prison" means prison under Part IV of the *Community Welfare Services Act** 1970.
(*Act title changed by Item 29(b).)

Section 362 of the Crimes Act was repealed by Act No. 9008, s. 2(1).

49 Item 232(a) : *Stamps Act* 1958

In section 137C -
(a) for the words "Transport Regulation

Board" there shall be substituted the words "Road Traffic Authority"; ...

s. 137C All sums received by the TRANSPORT REGULATION BOARD under this subdivision shall be paid to the Treasurer of Victoria at such intervals and in such manner as is prescribed and shall be paid by the Treasurer into the Consolidated Revenue.

As proposed to be amended by Statute Law Revision Bill 1984 -

s. 137C All sums received by the ROAD TRAFFIC AUTHORITY under this subdivision shall be paid to the Treasurer of Victoria at such intervals and in such manner as is prescribed and shall be paid by the Treasurer into the Consolidated Revenue.

50 Category 2 : Correction of Grammatical and Numbering Errors. Amendments which are required to be made by way of correction of grammatical and numbering errors, including misprints, include items number :

5, 7, 12, 20, 44, 59, 60, 66, 67, 68, 69, 70, 71, 73, 75, 107, 109, 113, 114, 119, 121, 122, 123, 125, 127, 146, 153, 154, 157, 159, 160, 165, 172, 173, 175, 177, 181, 184, 185, 186, 190, 191, 192, 195, 199, 202, 219, 237, 238, 239, 241, 243, 244, 245, 255, 256, 260, 271, 274, 275, 276, 277, 278, 281, 282, 283, 284, 285, 286, 287, 288, 289, 291, 292, 293, 294, 295, 296, 298, 310, 311, 327, 331.

The Committee "spot checked" items number 20, 113, 121, 127, 154, 192, 245, 271, 277, 285.

51 As examples, four of these items appear in the original provision in the following form, with amendment proposed by the Statute Law Revision Bill 1984 as follows :

Item 20 : *Construction Industry Long Service Leave Act* 1983

In section 24(4)(a)(1) for the words "would been received" there shall be substituted the words "would have been received".

s.24(4) The amount of the long service leave charge under sub-section (1) or (2) shall be the prescribed percentage of -

(a) in respect of -

(i) a worker whose ordinary pay is less than the minimum rate of pay prescribed in the award applicable to him or where there is no award applicable to him in the award most applicable to the type of construction work performed by him - the ordinary pay which WOULD BEEN RECEIVED by him during the month if he had been paid at the minimum rate of pay prescribed in the award; or

(ii) any other worker - the ordinary pay actually received by him during the month; or ...

As proposed to be amended by the Statute Law Revision Bill 1984 -

s.24(4) The amount of the long service leave charge under sub-section (1) or (2) shall be the prescribed percentage of -

(a) in respect of -

(i) a worker whose ordinary pay is less than the minimum rate of pay prescribed in the award applicable to him or where there is no award applicable to him in the award most applicable to the type of construction work performed by him - the ordinary pay which WOULD HAVE BEEN RECEIVED by him during the month if he had been paid at the minimum rate of pay prescribed in the award; or

(ii) any other worker - the ordinary pay actually received by him during the month; or ...

52 Item 113 : *Historic Shipwrecks Act* 1981

In section 26 for the expression "(5) The" there shall be substituted the expression "(6) The".

s. 26 (1) ...

(2) ...

(3) ...

(4) ...

(5) Subject to the *Supreme Court Act* 1958, the Judges ...

(5) THE Science Museum of Victoria shall be the official place of lodgment of historic shipwrecks and historic relics which are the property of the Crown unless the Minister, after consulting the Minister for the Arts, otherwise determines.

As proposed to be amended by Statute Law Revision Bill 1984 -

s. 26 (1) ...

(2) ...

(3) ...

(4) ...

(5) Subject to the *Supreme Court Act* 1958, the Judges ...

(6) THE Science Museum of Victoria shall be the official place of lodgment of historic shipwrecks and historic relics which are the property of the Crown unless the Minister, after consulting the Minister for the Arts, otherwise determines.

53 Item 154 : *Magistrates (Summary Proceedings) Act* 1975

In section 78(3)(c)(i) for the expression "summary" there shall be substituted the word "summary".

s. 78(3)(c) In the case of indictable offences which are by this Act or any other Act now or hereafter in force authorized to be dealt with summarily -

(i) the procedure, until the justices sitting as a Magistrates' Court determine that the case shall be dealt with summarily shall subject to the provisions of section 71 be the same in all respects as if the offence were to be dealt with throughout as an indictable offence, but when the Magistrates' Court proceeds to deal with the offence summarily the procedure shall be the same from and after that time as if the offence were an offence punishable on summary conviction and the provisions of this Act as to offences punishable on SUMMARV conviction shall so far as applicable apply accordingly; ...

As proposed to be amended by the Statute Law Revision Bill 1984 -

s. 78(3)(c) In the case of indictable offences which are by this Act or any other Act now or hereafter in force authorized to be dealt with summarily -

(i) the procedure, until the justices sitting as a Magistrates' Court determine that the case shall be dealt with summarily shall subject to the provisions of section 71 be the same in all respects as if the offence were to be dealt with throughout as an indictable offence, but when the Magistrates' Court proceeds to deal with the offence summarily the procedure shall be the same from and after that time as if the offence were an offence punishable on summary conviction and the provisions of this Act as to offences punishable on SUMMARY conviction shall so far as applicable apply accordingly; ...

54 Item 277 : *Transport Act* 1983

In section 81(2) for the word "assets" there shall be substituted the word "asset".

s 81 (1) The Minister may from time to time after causing such investigations to be made as he thinks fit and after consulting with the Authorities concerned by Order under his hand published in the *Government Gazette* transfer such assets or liabilities as are specified in the Order from an Authority to another Authority.

(2) Any land or other ASSETS transferred by Order under sub-section (1) shall without any further authority upon publication of the Order in the *Government Gazette* vest in the Authority to which it is transferred and the Registrar of Titles and any other person responsible for the maintenance of any register or other records shall do all such things as are necessary to effect the transfer.

(3) ...

As proposed to be amended by Statute Law Revision Bill 1984 -

s 81 (1) The Minister may from time to time after causing such investigations to be made as he thinks fit and after consulting with the Authorities concerned by Order under his hand published in the *Government Gazette* transfer such assets or liabilities as are specified in the Order from an Authority to another Authority.

(2) Any land or other ASSET transferred by Order under sub-section (1) shall without any further authority upon publication of the Order in the *Government Gazette* vest in the Authority to which it is transferred and the Registrar of Titles and any other person responsible for the maintenance of any register or other records shall do all such things as are necessary to effect the transfer.

(3) ...

55 Category 2 : Item 157 : *Medical Practitioners Act* 1970. In evidence before the Committee, Mr. Duncan drew attention to item 157 which provides :

> In section 37(c) the words "appointed by the" are repealed.

s. 37(c) The remuneration of examiners APPOINTED BY and payments to be made to persons organizations bodies for the purpose of examinations as well as the remuneration and allowances of members of and persons authorized by the Hospitals Accreditation Committee for the purposes of inspecting approved institutions or any hospital or other institution which is an applicant for approval as an approved institution;

In the original s. 37(c) (prior to amendment by s. 13(2) of Act No. 9760 in 1981 and s. 9(2) of Act No. 9918 in 1983) the provision stated that the remuneration "of examiners APPOINTED BY THE Committee and payments to be made ...". Clearly, in amending the provision the words "appointed by" were erroneously left in, however "the" was in fact omitted. Thus, to clean up the provision, it is necessary only to delete "appointed by". Consequently, item 157 should be amended to provide that the words "appointed by" appear, rather than "appointed by the".

RECOMMENDATION 4

56 The Committee recommends that in item 157 the words "appointed by the" should be replaced by "appointed by".

57 Category 2 : Errors in References. Amendments which are required to be made by way of correction of errors in references to other provisions, to persons, documents, office holders and the like include items number :

11, 14, 15, 16, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 64, 72, 74, 102, 115, 116, 117, 129, 148, 151, 155, 156, 158, 161, 163, 166, 168, 169, 170, 178 179, 183, 189, 200, 201, 205, 206, 207, 208, 209, 210, 211, 212, 213, 220, 234(a), 240, 242, 250, 257, 258, 260, 279, 280, 290, 299, 301, 304, 305, 306, 330.

The Committee "spot checked" items number 11, 51, 64, 72, 178, 189, 257, 299, 301.

58 As examples, two of these items appear in the original provision in the following form, with amendment proposed by the Statute Law Revision Bill 1984 as follows :

Item 51 : *Employment Agents Act* 1983.

In section 13(4) for the expression "section 18" there shall be substituted the expression "section 19".

s.13 (1) Where -

(a) the licensing authority is satisfied that the premises at which the business in respect of which the licence was granted are no longer suitable in respect of a business of the class in question; ...

the licencing authority may revoke the licence.

...

...

(4) The revocation of a licence by the licensing authority shall not take effect until the time for appealing against the decision of the licensing authority has expired and, if such an appeal is duly brought, until it is disposed of pursuant to SECTION 18.

Section 18 of the *Employment Agents Act* 1983 deals with the power of the Tribunal established under section 14(2) of the Act to summon any person to appear before it to give evidence and to produce documents.

Section 19 of the *Employment Agents Act* 1983 deals with the procedure to be followed by the Tribunal in hearing any appeal under section 15, where an applicant is refused the grant of a licence, or a holder of a licence has that licence revoked by the licensing authority. It states in part :

"(1) Evidence material to any appeal before the Tribunal -

(a) may be given orally or in writing; and

(b) shall, if the Tribunal so requires, be given upon oath or upon affirmation or declaration instead of on oath where the same is permitted by law.

(6) The Tribunal shall entertain, enquire into and decide upon each appeal made to it under this section."

Section 13(4) as proposed to be amended by Statute Law Revision Bill 1984 -

s.13 (4) The revocation of a licence by the licensing authority shall not take effect until the time for appealing against the decision of the licensing authority has expired and, if such an appeal is duly brought, until it is disposed of pursuant to SECTION 19.

The Committee accepts the fact that this amendment is appropriate according to the context.

59 Item 72 : *Firearms Act* 1958.

In section 22(14) for the words "Chief Secretary" there shall be substituted the word "Minister".

s.22 (14) No fee shall be payable under this section on and after the first day of January, 1971, for the issue or renewal of a pistol licence with respect to any pistol which is used solely for the destruction of animals in accordance with the provisons of section 14 of the *Protection of Animals Act* 1966 and which is of a type approved by the CHIEF SECRETARY for the purposes of this sub-section

As proposed to be amended by Statute Law Revision Bill 1984 -

s.22 (14) No fee shall be payable under this section on and after the first day of January, 1971, for the issue or renewal of a pistol licence with respect to any pistol which is used solely for the destruction of animals in accordance with the provisons of section 14 of the *Protection of Animals Act* 1966 and which is of a type approved by the MINISTER for the purposes of this sub-section

60 Category 3 : Other Items. The items not listed in the other categories include items number :

27, 42, 43 (proposed new item to follow item 42), 58, 61, 94, 108, 147, 162, 176, 302, 303, 307, 325, 326, and 328.

61 Parliamentary Counsel explained these items as follows.

Item 27 : *Country Fire Authority (Amendment) Act* 1983

In section 24(h) for the word "three" there shall be substituted the word "four".

This item corrects a provision which amends section 55 of the *Country Fire Authority Act* 1958. The amending Act (*the Country Fire Authority (Amendment) Act* 1983) changes the title of "local advisory committees" to "local fire prevention committees". Section 24(h) of the amending Act makes the appropriate substitutions in section 55 of the principal Act, but erroneously refers to the term appearing "three" times. In fact it appears four times. Item 27 corrects this error, and is retrospective to the commencement of the amending Act, 13 December 1983.

62 Item 42 : *Drugs, Poisons and Controlled Substances Act* 1981.

In section 3 -

(a) sub-section (3) is repealed; and

(b) in sub-section (4) for the expression "sub-sections (2) and (3)" there shall be substituted the expression "sub-section (2)".

This item relates to permits issued under the now repealed *Poisons Act* 1962, in respect of certain substances. The substances involved are industrial and agricultural poison and what was called "domestic" poison (now called a "hazardous substance" - this change of name is made by section 3(1) of the *Drugs Poisons and Controlled Substances Act* 1981).

63 Under the *Drugs Poisons and Controlled Substances Act* 1981 as originally enacted, the Health Commission was not empowered to issue permits for these substances (section 21(1) of that Act). The transitional provisions of that Act continued in force all permits issued under section 11 of the old *Poisons Act 1962*, except permits in respect of those substances. In other words, only those permits which the Health Commission was not to be able to issue were to be cancelled (by section 3(3), read with section 3(4). However, the 1981 Act did not come into operation in its original form; it was substantially amended by the *Drugs Poisons and Controlled Substances Act* 1983

and came into operation as amended thereby. The 1983 Act removed the prohibition on the Health Commission granting permits in respect of those substances (section 16(h) of the 1983 Act). However, the automatic cancellation of old permits in respect of those substances remained. This is anomalous in that all other permits issued under s.11 of the *Poisons Act* 1962 were continued in force.

64 The Committee accepts the submission of Parliamentary Counsel that the original (proposed) automatic cancellation was a consequence of the prohibition on issue of new permits. The amending Act removed that prohibition, but failed to make a consequential removal of the cancellation provision in the principal Act. Item 42 operates to remove that automatic cancellation provision. To be effective, the item is retrospective to 18 December 1983.

65 Item 43 : *Drugs Poisons and Controlled Substances (Amendment) Act* 1983

> In section 12 (10)(a) after the expression 'other person'" there shall be inserted the expression "(where fourthly occurring)".

This item clarifies a reference in an amending Act (the *Drugs Poisons and Controlled Substances (Amendment) Act* 1983) to the place in the principal Act where certain words are to be inserted. The amending Act (in section 12(10)(a)) inserts certain words after the expression "that other person". In fact, that expression appears four times. The words could not be inserted after each occurrence of the expression and enable the provision to remain understandable. On reading the provision it becomes clear that for reasons of grammar and in accordance with the intention of Parliament when enacting the amending Act (that is, the intention to limit the class of goods which a trustee may require to be delivered up), the insertion should occur after the fourth occurrence of the expression, as provided in the item. To be effective the amendment is made retrospective to 18 December 1983.

66 Item 58 : *Estate Agents Act* 1980

> In section 64B(2) for the expression "(12)" there shall be substituted the expression "(2)".

According to Parliamentary Counsel, this item was included to correct what appeared to be a typographical error in section 64B(2) of the *Estate Agents Act* 1980 (as inserted by section 37 of the *Estate Agents (Amendment) Act* 1983). The provision involves a cross reference to powers and duties under an earlier section, "other than sub-section (1) or (12) of that section".

67 Upon checking, the cross reference appears to be correct. The Committee's view accords with that of Parliamentary Counsel that item 58 should be deleted from the Bill.

RECOMMENDATION 5

68 The Committee recommends that item 58 should be deleted from the Bill.

69 Item 61 : *Evidence (Commissions) Act* 1982

> In section 4(1) for the expression "(ba) section 17" there shall be substituted the expression "(bb) section 17".

This item corrects a paragraphing problem caused by two amending Acts, each of which inserted into section 4(1) of the *Evidence (Commissions) Act* 1982 a paragraph "(ba)". The item changes the second of these to "(bb)". The relevant amending Acts were the *Energy Consumption Levy Act* 1982, section 52 and the *Financial Institutions Duty Act* 1982, section 106.

70 Item 94 : *Freedom of Information Act* 1982

In section 33(5) for the expression "sub-section (3)" (where twice occurring) there shall be substituted the expression "sub-section (4)".

This item amends a cross-reference which occurs twice in section 33(5) of the *Freedom of Information Act* 1982. The present cross-reference is to section 33(3) of that Act. Parliamentary Counsel submitted to the Committee that it should, however, be to section 33(4).

s. 33(3) Where a request by a person other than a person referred to in sub-section (2) is made to an agency or Minister for access to a document containing information relating to the personal affairs of any person (including a deceased person) and the agency or Minister decides to grant access to the document, the agency or Minister (as the case may be) shall if practicable notify the person who is the subject of that information (or in the case of a deceased person, that person's next-of-kin) of the decision and of the right of appeal against the decision provided by section 50(2)(9e) to the person or, in the case of a deceased person, to the person's next-of-kin.

s. 33(4) Where a request is made to an agency or Minister for access to document of the agency, or an official document of the Minister that contains information of a medical or psychiatric nature concerning the person making the request and it appears to that principal officer of the agency or to the Minister, as the case may be, that the disclosure of the information to that person might be prejudicial to the physical or mental health or well-being of that person, the principal officer or Minister may direct that direct access to the document, so far as it contains that information, that would otherwise be given to that person is not to be given to him but is to be given instead to a legally qualified medical practitioner nominated by him and approved by the principal officer.

Because section 33(4) may require a medical opinion to be formed, it appears necessary that provision be made for the situation where the principal officer is not a medical practitioner. Section 33(5) makes provision for cases where the principal officer is not a medical practitioner but cross-refers to a request mentioned in section 33(3). That is, it provides :

> "Where but for this sub-section the principal officer of an agency to which the provisions of sub-section (3) may apply would not be a legally qualified medical practitioner, the agency shall appoint a legally qualified medical practitioner to be the principal officer of the agency for the purposes of sub-section (3)."

This appears clearly not to be the intention of Parliament, and the Committee accepts that it is appropriate to alter the cross-referencing provision as proposed in the Statute Law Revision Bill 1984.

71 Item 108 : *Health Commission (Amendment) Act* 1980

> For section 1(3) there shall be substituted the following sub-section :
>
> "(3) The several provisions of this Act except paragraph (a) of section 2 shall come into operation on the day on which it receives the Royal Assent, and paragraph (a) of section 2 shall be deemed to have come into operation immediately before the commencement of section 51(1) of the Principal Act".

Parliamentary Counsel was of the view that the amendment is necessary "to cure a problem in timing".

72 The *Health Commission (Amendment) Act* 1980, in section 2(a), purported to amend proposed amendments (to be effected by section 51(1) of the *Health Commission Act* 1977) before they occurred. That is, by making amendments to a "proposed" provision. In the opinion of Parliamentary Counsel, "the amendment to the proposed provision failed because the *Health Commission (Amendment) Act* 1980 received the Royal Assent on 9 December 1980, two days after section 51(1) of the *Health Commission Act* 1977 came into operation (on 7 December 1980).

73 This meant that the *Cancer Act* 1958 was amended by section 51(1) of the *Health Commission Act* 1977 as it stood prior to the *Health Commission (Amendment) Act* 1980 rather than, as intended, being amended by the 1980 Act. The effect of the amendment proposed in the Statute Law Revision Bill is to "deem" the amendment made by the *Health Commission (Amendment) Act* 1980 to have come into effect two days earlier than it in fact did, so that the new section of the *Cancer Act* 1958 is deemed to have been inserted as amended by the *Health Commission (Amendment) Act* 1980, which was the intention of the Parliament.

74 Item 147 : *Latrobe Valley Act* 1958

In section 65(2)(b) -

(a) for the expression "$5000" there shall be substituted the expression "50 penalty units"; and

(b) for the expression $2000" there shall be substituted the expression "20 penalty units".

Almost all penalties for offences under the Latrobe Valley Act 1958 were amended to be "penalty units" (by the *Water (Penalties and Borrowing Powers) Act* 1982). Two provisions for penalties under regulations under the Act were

not so amended. This item effects that amendment. It should be noted that as with a similar item contained in the Statute Law Revision Bill 1983, this item does not change the actual penalty (1 penalty unit is $100).

75 Item 162 : *Melbourne and Metropolitan Board of Works Act* 1958

In section 248A(2) for the expression "$200" there shall be substituted the expression "2 penalty units".

This item is similar to item 147, in that it substituted a "penalty units" penalty equivalent to the present "dollars" penalty contained in the section. This conversion was not made by section 34 of the *Melbourne and Metropolitan Board of Works (Administration) Act* 1982 which made similar conversions to other provisions of the *Melbourne and Metropolitan Board of Works Act* 1958.

76 Item 176 : *Motor Car (Registration and Drivers' Licences) Act* 1982

Section 7 is repealed.

This item repeals section 7 which purported to make amendments to section 20 of the *Motor Car Act* 1958, but by the time it came into operation on 1 February 1983 similar amendments had already been made by section 9 of the *Motor Car (Penalties) Act* 1982 which came into operation on 1 January 1983. The item is not retrospective, but Parliamentary Counsel recommended that it should be so (to 14 December 1982). If not made retrospective, section 7 of the later Act would have the effect of amending section 20 of the *Motor Car Act* 1982 as substituted by section 9 of the earlier Act. This would produce grammatical problems as follows "... the appropriate registration fee provided for in the Second Schedule provided for in the Second Schedule is first paid ..." The Committee accepts this and recommends accordingly.

RECOMMENDATION 6

77 The Committee recommends that item 176 should be made retrospective to 14 December 1982.

78 Item 302 : *Transport Act* 1983

> In Schedule 12 in the item relating to section 27A(1) of the *Motor Car Act* 1958 -
>
> (a) for the expression "sub-section (1)" there shall be substituted the expression "sub-section (10)"; and
>
> (b) for the expression "section 211(1)" there shall be substituted the expression "section 213(4)".

Checking on this item discloses that it is designed to overcome a straightforward referencing problem.

79 Item 303 : *Transport Act* 1983

> In Schedule 12 in the twenty-sixth item relating to the *Motor Car Act* 1958 the expression "37F(1)," is repealed.

That item purports to simultaneously both amend and repeal section 37F(1) of the *Motor Car Act* 1983. This is potentially confusing and misleading. Accordingly the purported amendment is deleted from the Schedule. The item is retrospective to 1 July 1983 to make it clear that on that day the only deed done to section 37F(1) of the *Motor Car Act* 1983 was its repeal.

80 Item 307 : *Transport Act* 1983

> In Schedule 12 in the item relating to Part II. of the Second Schedule of the *Superannuation Act* 1958 the words "or of the " are repealed.

On examination it appears that there is no grammatical error, which was the reason for inserting the item. Accordingly, item 307 is unnecessary and should be deleted.

RECOMMENDATION 7

81 The Committee recommends that item 307 should be deleted from the Bill as being unnecessary.

82 Items 325 and 326 : *Victorian Economic Development Corporation Act* 1981

These items amend the *Victorian Economic Development Corporation Act* 1981. The purpose of both items is to clarify the description of the "Victorian Promotions Committee" which was abolished by the VEDC Act. The existing description in section 16 (b) is clearly wrong - it refers to the "Victoria Promotions Committee appointed under the *State Development Decentralization and Tourism Act* 1978". No such committee was appointed under that Act. Accordingly, that description is repealed by item 326.

Item 325 inserts the correct description. The new description is consistent with another provision of the Act (section 18(2)) which refers to "the trusts declared by deed made and executed on 22 March 1956". It also accords with the finding in an Auditor-General's report, a copy of which was produced to the Committee. The item is deemed to have come into operation on 1 July 1981,

the day on which the Victoria Promotions Committee was abolished and its assets transferred.

83 Item 326 : *Victorian Economic Development Corporation Act* 1981

In perusing this Item, the Committee noted that as it appears in the Bill, the item states :

> In section 16(b) the expression "appointed under the *State Development Decentralization and Tourism Act* 1978 is repealed.

Clearly the intention was to place inverted commas after 1978, and the Committee recommends that this oversight be corrected.

RECOMMENDATION 8

84 Item 326 of the Bill should be amended to provide :

> In section 16(b) the expression "appointed under the *State Development Decentralization and Tourism Act* 1978" is repealed.

85 Item 328 : *Water (Penalties and Borrowing Powers) Act* 1982

This item repeals an ineffective amending item from the Schedule to the *Water (Penalties and Borrowing Powers) Act* 1982. It was ineffective as it purported to amend section 45(2) of the *Drainage of Land Act* 1975, which had been previously repealed by the *Planning Appeals Board Act* 1982.

86 Proposed New Item. On the advice of Parliamentary Counsel, the Committee is of the view that a new item should be inserted to follow immediately after Item 42 in Schedule 1. That Item should provide :

10,002 *Drugs, Poisons and Controlled Substances (Amendment) Act 1983*

In section 4(f) after the expression "drug of dependence" there shall be inserted the expression "(wherever occurring)".

The purpose of this provision of the amending Act was to change references in the principal Act (the *Drugs, Poisons and Controlled Substances (Amendment) Act* 1981) from "drug of dependence" to "drug of addiction". In one of the provisions in the principal Act (section 33(5)) the old term appeared four times. In the context it is clear that it should have been changed in all four places, because every time it is used it refers to an earlier use of the term "drug of addiction" (in section 33(3)). The purpose of this amendment is to give clear effect to that intention. It should be retrospective to 18 December 1983.

87 Clause 4 and Schedule 2. These provisions continue on from the *Statute Law Revision (Repeals) Act* 1982 in removing "spent" provisions. Generally, these are provisions that have a single effect upon commencement, such as Acts which amend other Acts or abolish statutory bodies. Once they have had this effect they have no continuing operation.

88 The *Statute Law Revision (Repeals) Act* 1982 repealed a large number of Acts passed between 1958 and 1979. This Bill repeals a number of spent pre-1958 Acts and a number of spent 1980 Acts.

89 The Committee perused the individual items contained in Schedule 2. and recommends two amendments.

90 Act No. 1528 : *Dunolly Cemetery Act* 1897. The Act appears in the Schedule as *Dunnolly Cemetery Act* 1897. This is incorrect.

RECOMMENDATION 9

91 The Committee recommends that Act No. 1528 appearing in the Second Schedule should be amended to read *Dunolly Cemetery Act* 1897.

92 Act No. 9487 : *Port Phillip Authority (Amendment) Act* 1980. In this item, the words "Whole Act" should be deleted to be replaced by the expression "Sections 2 to 11". The effect of this amendment is to retain section 12 of the Act. That section is a "sunset clause". That is, it provides that on the 3rd anniversary of the commencement of the Act the Port Phillip Authority shall cease to exist. The Act came into operation on 3 June 1981. Thus. section 12 is not "spent" and it is inappropriate to repeal it at this stage. The section will be spent on 3 June 1984.

RECOMMENDATION 10

93 The Committee recommends that Act No. 9487 appearing in the Second Schedule should be amended to omit the expression "Whole Act" and replace it with the words "Sections 2 to 11".

RECOMMENDATION 11

94 The Committee recommends that the list of suggested amendments appended to this Report become a part of the Statute Law Revision Bill 1984 before it is passed into law.

Committee Room,
2 May 1984

APPENDIX

STATUTE LAW REVISION BILL 1984

SUGGESTED AMENDMENTS

1 Clause 3, line 17, omit "27" and insert "24"

2 Clause 3, line 18, omit "42 and 43" and insert "39, 40 and 41".

3 Clause 3, line 19, omit "44" and insert "42".

4 Clause 3, lines 20 and 21, omit all words and expressions on these lines.

5 Clause 3, page 2, line 1, omit "75" and insert "72".

6 Clause 3, page 2, line 2, omit "108" and insert "105".

7 Clause 3, page 2, line 3, omit "109" and insert "106".

8 Clause 3, page 2, line 4, omit "116" and insert "113".

9 Clause 3, page 2, line 6, omit "148" and insert "145".

10 Clause 3, page 2, line 7, omit "151" and insert "148".

11 Clause 3, page 2, line 8, omit "155" and insert "152".

12 Clause 3, page 2, line 9, omit "158" and insert "155".

13 Clause 3, page 2, line 10, omit "163" and insert "160".

14 Clause 3, page 2, line 11, omit "165" and insert "162".

15 Clause 3, page 2, line 12, omit "168 to 172" and insert "165 to 169".

16 Clause 3, page 2, after line 12 insert the following :

"(q) Item 173 on 14 December 1982;".

17 Clause 3, page 2, line 13, omit "178 and 179" and insert "175 and 176".

18 Clause 3, page 2, line 14, omit "183" and insert "180".

19 Clause 3, page 2, line 15, omit "200" and insert "197".

20 Clause 3, page 2, line 16, omit "201 and 202" and insert "198 and 199".

21 Clause 3, page 2, line 17, omit "240 and 241" and insert "237 and 238".

22 Clause 3, page 2, line 18, omit "242" and insert "239".

23 Clause 3, page 2, line 19, omit "255 and 256" and insert "252 and 253".

24 Clause 3, page 2, line 20, omit "293 to 308" and insert "290 to 304".

25 Clause 3, page 2, line 21, omit "325 and 326" and insert "321 and 322".

26 Clause 3, page 2, line 22, omit "327" and insert "323".

27 Clause 3, page 2, line 23, omit "330" and insert "326".

28 Schedule 1, page 5, omit items 17, 18 and 19.

29 Schedule 1, page 8, after item 42 insert the following new item:

A.	10,002	*Drugs Poisons and controlled substances (Amendment)Act 1983.*	In section 4(f) after the expression "'drug of dependence'" there shall be inserted the expression "(wherever occurring)".

30 Schedule 1, page 9, omit item 58.

31 Schedule 1, page 20, item 157, after "by" omit "the".

32 Schedule 1, page 35, omit item 307.

33 Schedule 1, page 38, item 326, omit "1978 is" and insert '1978" is'.

34 Schedule 2, page 40, item relating to Act 1528, omit "Dunnolly" and insert "Dunolly".

35 Schedule 2, page 46, item relating to Act 9487, omit "Whole Act" and insert "Sections 2 to 11".

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LEGAL AND CONSTITUTIONAL COMMITTEE

A REPORT TO PARLIAMENT

on the

SUBORDINATE LEGISLATION (DEREGULATION) BILL 1983

Ordered to be printed

D. No. 44/1982-84

EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

FRIDAY 2 JULY 1982

34 JOINT INVESTIGATORY COMMITTEES - The Honourable W.A. Landeryou moved, by leave, That, contingent upon the enactment and coming into operation, this Session, of legislation to establish Joint Investigatory Committees:

* * * * * * * * *

(b) The Honourables Joan Coxsedge, J.H. Kennan, N.B. Reid and Haddon Storey be members of the Legal and Constitutional Committee;

* * * * * * * * *

Question - put and resolved in the affirmative.

WEDNESDAY 30 MARCH 1983

7 LEGAL AND CONSTITUTIONAL COMMITTEE - The Honourable W.A. Landeryou moved, by leave, That the Honourable B.W. Mier be a member of the Legal and Constitutional Committee.

Question - put and resolved in the affirmative.

TUESDAY 13 SEPTEMBER 1983

4 LEGAL AND CONSTITUTIONAL COMMITTEE - The Honourable Evan Walker moved, by leave, That the Honourable J.H. Kennan be discharged from attendance upon the Legal and Constitutional Committee.

Question - put and resolved in the affirmative.

WEDNESDAY 12 OCTOBER 1983

2 LEGAL AND CONSTITUTIONAL COMMITTEE - The Honourable Evan Walker moved, by leave, that the Honourable W.A. Landeryou be appointed a member of the Legal and Constitutional Committee.

Question - put and resolved in the affirmative.

EXTRACTED FROM THE VOTES AND PROCEEDINGS OF THE LEGISLATIVE ASSEMBLY

THURSDAY 1 JULY 1982

36 COMMITTEE APPOINTMENTS - motion made, by leave, and question -

That, contingent upon the coming into operation of the Parliamentary Committees (Joint Investigatory Committees) Act 1982 -

* * * * * * *

(b) Mr. Ebery. Mr. Evans (Ballarat North), Mr. Gray, Mr. Hill (Warrandyte), Mr. Hockley, Mr. Jasper, Mr. King* and Mr. Whiting be appointed members of the Legal and Constitutional Committee.

(Mr. Fordham) - put and agreed to.

---

* Mr. King deceased on 28 January 1983. Succeeded on Committee by the Honourable B.W. Mier.

LEGAL AND CONSTITUTIONAL COMMITTEE

COMMITTEE MEMBERS

Mr. M.S. Whiting, M.P. (Chairman)

Mr. D.J.F. Gray, M.P. (Deputy Chairman)

The Honourable Joan Coxsedge, M.L.C.

Mr. W.T. Ebery, M.P.

Mr. A.T. Evans, M.P.

Mr. L.J. Hill, M.P.

Mr. G.S. Hockley, M.P.

Mr. K.S. Jasper, M.P.

The Honourable W.A. Landeryou, M.L.C.

The Honourable B.W. Mier, M.L.C.

The Honourable N.B. Reid, M.L.C.

The Honourable Haddon Storey, Q.C., M.L.C.

COMMITTEE STAFF

Dr. Jocelynne A. Scutt, Director of Research

Mr. Marcus Bromley, Secretary

Mrs. Lisa O'Bryan, Research Officer

Mr. Mark Sneddon, Research Officer

Ms. Christine Skourletos, Research Assistant

Mrs. Marion Caraher, Stenographer

Mrs. Jennifer Hutchinson, Stenographer

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SUMMARY OF RECOMMENDATIONS

65 RECOMMENDATION 1

The Committee considers that it is essential for the current debate on the effectiveness or otherwise of delegated legislation to be taken into account by government. To this end, the Committee recommends that a legislative base should be provided for the introduction of procedures to ensure that delegated legislation making is in accordance with community needs. The principles to be followed by departments and authorities in the making of delegated legislation should also be contained in that Act.

69 RECOMMENDATION 2

The Committee accepts that principal legislation cannot deal with every conceivable issue which may arise in the pursuit of a particular policy outlined in that legislation. However, as far as possible principal legislation should spell out the policy guidelines to be followed by bodies vested with delegated powers to implement government policy as stated in a particular Act. Where delegated legislation deals with policy implementation, it should not go outside the boundaries laid down in the Principal Act, although its terms may further define the policy aims to be pursued under the principal legislation. The Committee therefore recommends that principal legislation should, as clearly and precisely as possible, indicate the boundaries of policy to be implemented by subordinate legislation passed in accordance with that principal legislation.

71 **RECOMMENDATION 3**

The Committee recommends that Parliament should establish a Scrutiny of Bills Sub-committee of the Legal and Constitutional Committee, that Committee to comment generally on Bills before the Parliament and, particularly, to comment to Parliament on the nature and scope of enabling clauses contained in Bills. The Scrutiny of Bills Sub-committee should have the responsibility of alerting the Parliament to any clause of a Bill which might be considered to :

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power;

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

That Sub-Committee should not have the authority to comment on policy.

76 **RECOMMENDATION 4**

The Committee endorses in principle the introduction of provisions "sunsetting" regulations after they have been in operation for a stated period. Departments and other bodies having oversight of regulations should be required to undertake periodic reviews of those regulations to justify their continuation.*

* The exact nature and terms of sunset provisions to be incorporated are outlined at pp. 253-279 in Part II of this Report, and Recommendations 21-30.

83 RECOMMENDATION 5

The Committee considers that in proposing subordinate legislation, it is necessary for departments and authorities to take into account, as far as possible, relevant financial and non-financial costs and benefits, and other relevant intangibles where appropriate, in the drawing up of that subordinate legislation. It therefore recommends that a formal review process be introduced incorporating these aspects in the nature of a regulatory impact statement procedure, prior to the introduction of subordinate legislation .

84 RECOMMENDATION 6

The Committee endorses the concept of regulatory agendas and recommends that each department and authority should, at regular intervals, draw up a regulatory agenda covering projected regulatory initiatives and action to be taken over a two to three year period, the agenda to act as a guide. However the Committee does not consider that, at this stage, any legislative requirement should be placed on departments and authorities to introduce regulatory agendas; nor should departments or authorities be "locked in" to any proposed programme contained in such an agenda.

90 RECOMMENDATION 7

The Committee considers that it is important to ensure that, where practicable, departments, authorities and other bodies formulating delegated legislation should consult with public interest groups, business, trades unions, community groups and other bodies having an interest in the content and form of delegated legislation. To that end, the Committee recommends that procedures which already exist should be continued, and where they do not, should be introduced to ensure that consultation is carried out in the appropriate case.

91 RECOMMENDATION 8

The Committee affirms that consultative processes by government departments and other bodies drawing up subordinate instruments of a legislative nature should be pursued with interested parties in relevant instances. Consequently, the Committee recommends that consultative mechanisms established or upgraded in accordance with Recommendation 7 should be made known to interested parties. The degree of consultation should be determined by the nature of the subordinate legislation, its importance to the economy and the community, and the potential effect upon governmental, community, and business operations.*

92 RECOMMENDATION 9

The Committee considers that it is important to ensure that public interest groups which have a role to play in consultation about government policies (including those pursued through delegated legislation) and which are under-resourced should be enabled to carry out that function, and that means should be found to ensure that such groups are able to perform a consultative role. To this end, the Committee recommends that government should explore possible means of providing funds for groups, whether by way of incentives to individuals or companies to fund them, by direct funding, or by other means, with suitable accountability provisions.

94 RECOMMENDATION 10

The Committee recommends that the powers of the Legal and Constitutional Committee in its Subordinate Legislation Sub-committee should not be

* The method of upgrading consultative mechanisms is spelled out in detail at pp. 332ff, 381, and 387ff, Recommendations 56 and 90 of this Report.

increased to take into account policy matters, but should be spelt out to ensure that subordinate legislation is framed in accordance with the terms of the Principal Act, as proposed in Recommendations 71-76.

96 **RECOMMENDATION 11**

The Committee recommends that a review should be carried out of all rules, regulations, orders and other subordinate instruments which come into being in exercise of prerogative power, with a view to ensuring that future subordinate legislation is dependent on the exercise of parliamentary powers, not upon residual powers as in the case of the royal prerogative.

101 **RECOMMENDATION 12**

The Committee recommends that no extra-parliamentary body should be established to review subordinate legislation, but rather that the Subordinate Legislation Sub-committee of the Legal and Constitutional Committee should continue to deal with that review.

104 **RECOMMENDATION 13**

The Committee considers that it is important to ensure that, where appropriate, laws are uniform throughout Australia. Where uniform legislation has been agreed to amongst the states, it is important that delegated legislation under a Principal Act should be, as far as possible, uniform. In this regard, the Committee recommends that where consultation processes are operative or are introduced, those processes should take place prior to the state and federal governments meeting to determine the content and structure of delegated legislation.

105 RECOMMENDATION 14

The Committee observes that the introduction of consultation and impact analysis procedures for delegated legislation has implications for the framing of delegated legislation passed in accordance with a Uniform Act. The Committee recommends that if other jurisdictions do not introduce review procedures, state consultative and regulatory impact methods should be utilised, where appropriate, prior to discussions with federal and state officers. Victorian officers participating in round table negotiation on the formulation of such delegated legislation should have the benefit of the information available from review prior to those discussions taking place.

106 RECOMMENDATION 15

The Committee recommends that the Victorian Government takes up with the federal and other state governments the question of revocation procedures in relation to subordinate legislation passed under uniform principal legislation, with a view to ensuring that regular review of such legislation becomes a policy where uniformity is agreed upon.

113 RECOMMENDATION 16

The Committee recommends that clause 1 of the Bill should be amended to provide :

> *This Act may be cited as the Subordinate Legislation (Review and Revocation Act) 1984.*

115 RECOMMENDATION 17

The Committee recommends that clause 3 of the Bill should be amended to read:

> *This Act shall come into operation on 1 July 1985.*

120 **RECOMMENDATION 18**

The Committee recommends that an amendment to the Subordinate Legislation Act 1962, to be included in the Subordinate Legislation (Deregulation) Bill 1983, should provide an orderly system for the use of types of subordinate legislation for particular executive exercises of power. That amendment should provide:

(a) Regulations : all subordinate instruments of a legislative nature should be promulgated as regulations.

(b) All other subordinate instruments - should be used for machinery provisions only, except as indicated below in relation to court rules and by-laws.

(c) Proclamations should be used only in relation to the date of coming into effect of an Act or dates of coming into effect of particular parts of an Act; or for the declaration of particular dates - such as a fire-hazard day, the emergency date of coming into operation of particular provisions or requirements, and the like.

(d) Orders in Council should be used only for machinery provisions, such as across-the-board rises in fees in accordance with a general government directive to departments and authorities as a result of CPI rises or any similar cost-estimate mechanism.

(e) By-laws should be used by local authorities (councils) only and not by any other bodies, departments, or authorities for the making of subordinate instruments. (That is, by-laws should be used only by authorities that are elected bodies.)

(f) Court rules should continue to be used as the means of making rules of court by way of subordinate instrument.

All subordinate instruments made by statutory authorities, government departments and bodies should be made in accordance with the above provision. That is, regulations for instruments of a legislative character; proclamations for the coming into operation of provisions or emergency or special dates; orders in council for mechanical or administrative matters only. University rules and regulations should be promulgated in the same way as subordinate instruments emitting from other statutory bodies - namely, they should be regulations where dealing with legislative matters; proclamations where dealing with particular dates; orders in council for mechanical matters or matters of an administrative nature only. All statutory rules - including regulations (which includes university rules and regulations and court rules, are, under the provision, to be published in the Government Gazette and to come in the usual way to the Legal and Constitutional Committee for oversight by its Subordinate Legislation Sub-committee. In accordance with this Recommendation, as a matter of urgency all existing Acts and subordinate legislation should be reviewed to ensure that enabling clauses are amended to conform with the proposed code and, in consequence thereof, subordinate legislation should be remade to conform with the code.

122 RECOMMENDATION 19

The Committee recommends that if Recommendation 18 is not accepted, a provision rationalising subordinate legislation along similar lines should be drawn up as an amendment to the Subordinate Legislation Act 1962, to clarify what form of subordinate instrument is to be used to what purpose by departments and other bodies vested with the power of delegated legislation. That code should, amongst other matters, establish clearly that legislative supplements to Acts should be called regulations, and that by-laws should be restricted to local councils. A form of subordinate instrument covering mechanical and administrative matters should be fixed upon. The code should also stipulate the forms of subordinate legislation which are to come within the purview of the Subordinate Legislation (Deregulation) Bill 1983.

123 RECOMMENDATION 20

The Committee recommends further that, if Recommendation 18 is not accepted, then as an interim measure whilst the subordinate legislation code is being drafted, a new sub-section (3A) should be added to clause 4 of the Subordinate Legislation (Deregulation) Bill 1983. This provision should ensure that (in addition to statutory rules as defined in section 2 of the Subordinate Legislation Act 1962) all other forms of subordinate legislation come within the terms of the Bill, with the onus lying upon the Attorney-General to determine what subordinate legislation should be excluded from the regulation review and revocation procedures of the Bill. Thus, the proposed sub-section (3) in clause 8 should stand, and a new sub-section (3A) should provide :

> *Subject to section 3, all forms of subordinate instrument must comply with the terms of this Act unless the Attorney-General, on the advice of the Legal and Constitutional Committee, declares by notice in writing published in the Government Gazette that an instrument or class of instrument not being a statutory rule within the meaning of paragraph (a), (b) or (c) of the interpretation of "statutory rule" is not of a legislative character but relates only to matters which are of a fundamentally declaratory or machinery nature. Those exempted matters should include limited interest regulations such as second-hand dealers' exemptions, staffing levels in the Police Department, and salary levels set by Public Service Board Determinations, as well as across the board fee rises.*

126 RECOMMENDATION 21

The Committee recommends that, due to the passage of the Subordinate Legislation (Revocation) Act 1984 which in effect incorporates the proposed section 3A(1)(a) of the Subordinate Legislation Act 1962 that proposed section should be deleted from clause 5 of the Bill.

128 **RECOMMENDATION 22**

The Committee recommends that the proposed section 3A(1)(a) in Clause 5 of the Bill should be replaced by a new section 3A(1)(a) in the following terms :

Unless sooner revoked, a statutory rule -

(a) made prior to 1 January 1962 and exempted from revocation by the Subordinate Legislation (Revocation) Act 1984 shall by virtue of this Act be revoked on 1 July 1985.

130 **RECOMMENDATION 23**

The Committee considers that it is necessary to apply sunset provisions automatically to delegated legislation. Accordingly, the Committee recommends that the proposed section 3A of clause 5 of the Subordinate Legislation Act 1962, as amended by Recommendation 21, should remain part of the Bill.

133 **RECOMMENDATION 24**

The Committee recommends that no provision for extension of time should be drawn into the proposed section 3A.*

135 **RECOMMENDATION 25**

The Committee recommends that, in the event of Recommendation 24 not being adopted in full by the Parliament and the Parliament considering that the

* Subject to the extraordinary case arising in the instance of refusal of request for exemption. (See further Clause 5 : Sunset (b) 10 Year Exemption, at p.271ff.)

sunset provisions should exist but with a possibility of a short extension being granted, on specified grounds, for the completion of review of a particular subordinate instrument, a new section 3A(1A)(a) should be inserted in clause 5 of the Subordinate (Deregulation) Bill 1983, to provide :

3A

(1A)(a) Where an extension of time is sought beyond the scheduled date of revocation of a subordinate instrument, the Minister having responsibility for administration of that particular instrument shall be required to make representation to the Legal and Constitutional Committee, setting out the grounds upon which such extension is sought.

(b) Where the Legal and Constitutional Committee certifies in writing that in its opinion, on representations by the relevant Minister, in the special circumstances of the particular case the public interest requires it, the date of revocation of a particular subordinate instrument should be extended by a period of not more than six months, then revocation shall take place on the expiration of that extended date.

(c) Where the Legal and Constitutional Committee certifies in writing that in its opinion, on representations by the relevant Minister, there are no special circumstances affecting the public interest and requiring extension, the date of revocation of a particular subordinate instrument shall take place as if no extension had been sought.

(d) Where the Legal and Constitutional Committee has made out a certificate in accordance with sub-sections (b) or (c) above, that certificate must be laid before both Houses of the Parliament as soon as is practicable after the making of that certificate.

(e) *The certificate of the Legal and Constitutional Committee as made out in accordance with subsections (b) or (c) above will be final, unless both Houses of the Parliament, by a majority in each House, overrule the decision of the Legal and Constitutional Committee as notified in the certificate.*

(f) *If both Houses of Parliament overrule the certificate of the Legal and Constitutional Committee, then in the case of sub-section (b) above, the date of revocation of the particular subordinate instrument will come into effect six months after the date laid down in section 3(1) of this Act; in the case of subsection (c) above, the date of revocation of the particular subordinate instrument will come into effect as laid down in section 3(1) of this Act.*

137 RECOMMENDATION 26

The Committee recommends that a further provision be inserted into clause 5 of the Subordinate Legislation (Deregulation) Bill 1983 to provide :

s.3A

(1B)(a) Where a Minister responsible for the administration of a particular subordinate instrument believes that, despite that instrument having been in operation for ten years and the revocation date being imminent, it is inappropriate in the particular circumstances of the case, and in the public interest, that the particular subordinate instrument should be revoked, the Minister may make a report to the Legal and Constitutional Committee requesting continuance of the subordinate instrument.

(b) *A report made under section 3A(1B)(a) to the Legal and Constitutional Committee should contain :*

(i) *the contents of the subordinate instrument;*

(ii) *an outline of its sphere of operation:*

(iii) *the aim of the instrument;*

(iv) *an outline of the consultative procedure which were undergone when the subordinate instrument was originally formulated;*

(v) *an assessment of the operation of the instrument over the period of its existence; and*

(vi) *an outline of the consultative procedures which have been undergone in the review process.*

(c) *The report made by the Minister in accordance with the foregoing subsection shall be published in the Government Gazette, a metropolitan daily newspaper and, where appropriate, a local newspaper, trade, business or professional journal and a community interest newspaper or circular.*

(d) *Where in consequence of publication of the report objections to the continuance of the subordinate instrument in unrevised form are received by the Minister within 30 days of that publication, the Minister shall forward those objections, together with any responses by the Minister, to the Legal and Constitutional Committee for consideration in its deliberations on the report.*

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(e) If, in the opinion of the Legal and Constitutional Committee, objections received under subsection (1B)(d) have not been properly taken into account by the Minister, the Committee may grant a further period of up to 30 days for those objections to be given adequate consideration by the Minister.

(f) Where the Legal and Constitutional Committee certifies in writing that in its opinion, on the report of the Minister, in the special circumstances of the particular case the public interest requires it, the subordinate instrument shall be granted a revocation date 10 years beyond the date upon which the Legal and Constitutional Committee issues its certificate under this section.

(g) Where the Legal and Constitutional Committee certifies in writing that in its opinion, on the report by the Minister, there are no special circumstances affecting the public interest and requiring the non-application of the scheduled revocation date, the date of revocation of the particular subordinate instrument shall take place as if no report under this section had been made to the Committee.

(h) The certificate of the Legal and Constitutional Committee as made out in accordance with sub-sections (e) or (f) above will be final, unless both Houses of the Parliament, by a majority in each House, overrule the decision of the Legal and Constitutional Committee as notified in the certificate.

(i) If both Houses of Parliament overrule the certificate of the Legal and Constitutional Committee, then in the case of sub-section (e) above, the revocation date of the subordinate instrument being the subject of the

certificate will come into effect ten years after the date upon which the Legal and Constitutional Committee issued its certificate under this section.

(j) If both Houses of Parliament overrule the certificate of the Legal and Constitutional Committee, then in the case of sub-section (f) above, the revocation date of the subordinate instrument being the subject of the certificate will come into effect as laid down in section 3(1) of this Act, except that the Committee may grant an extension of six months by certificate tabled in Parliament.

138 RECOMMENDATION 27

Where a 10 year exemption has been granted, the Committee recommends that an obligation should lie on the Government Printer, and upon the authority administering the delegated legislation, to mark clearly on the front of thestatutory rule that it has been granted a 10 year exemption and remains in the same form as at the original date on which it was passed. Further, when reprints of such a statutory rule are required, the reprint should carry the date upon which the 10 year exemption was granted and also indicate clearly beside this date that the exemption was granted and that the rule remains as it was passed on the original date, with amendments incorporated since that original date.

140 RECOMMENDATION 28

The Committee recommends that every department or other body responsible for formulating and administering delegated legislation require at least one officer to take on the duties of delegated legislation officer those duties to include responsibility for oversight of existing legislation to ensure that it is reviewed in accordance with sunset provisions contained in the Subordinate

Legislation (Deregulation) Bill 1983. Where an officer has already been designated as responsible for delegated legislation, that officer should also be made responsible for ensuring that delegated legislation is reviewed in accordance with sunset provisions contained in the Subordinate Legislation (Deregulation) Bill 1983.

141 **RECOMMENDATION 29**

The Subordinate Legislation (Deregulation) Bill should be amended to include a new provision 3A(1C) of clause 5 stating :

> *It shall be the responsibility of each department, authority or other body responsible for the administration of subordinate instruments to ensure that a review of all subordinate legislation is made under Acts it administers and for which it has responsibility before the 10 year life time of that legislation expires.*

143 **RECOMMENDATION 30**

The Committee recommends that, due to their inclusion in the Subordinate Legislation (Revocation) Act 1984, proposed sections 3A(2) and (3) of clause 5 of the Subordinate Legislation (Deregulation) Bill 1983 (contained in the Bill) should be omitted from the Bill and proposed section 3A(4) should be omitted from clause 5 of the Bill as being covered by the passage of the Interpretation of Legislation Act 1984.

147 **RECOMMENDATION 31**

The Committee recommends that the proposed section 6(2B) in clause 6 of the Subordinate Legislation (Deregulation) Bill 1983 should be amended so that the word "proposes" is replaced with the word "intends"; and the word "propose" is replaced with the word "declare".

149 RECOMMENDATION 32

The Committee recommends that in the proposed section 6(2B) of clause 6 of the Subordinate Legislation (Deregulation) Bill 1983 the words "considerations of natural justice" should be omitted.

150 RECOMMENDATION 33

In consequence of Recommendations 31 and 32, the Committee recommends that the proposed section 6(2B) of clause 6 of the Subordinate Regulation (Deregulation) Bill 1983 should be amended to provide :

> *(2B) Where the Legal and Constitutional Committee intends to adversely report on a statutory rule and it is of the opinion that the operation of the statutory rule should be suspended pending the consideration by Parliament of the statutory rule, the Legal and Constitutional Committee may declare in the report, that the operation of the statutory rule shall be suspended by notification to the Governor in Council.*

151 RECOMMENDATION 34

As a further consequence of Recommendations 31 and 33, the Committee recommends that the word "proposes", where it appears in proposed section 6(2C) of clause 6 of the Bill, should be amended to be replaced with the word "declares".

153 RECOMMENDATION 35

The Committee recommends that the time limit of seven days provided in the proposed sections 6(2C) and (2D) of clause 6 of the Subordinate Legislation(Deregulation) Bill 1983, during which a Minister should make a

recommendation to the Governor in Council to declare that a statutory rule should not, despite the report of the Legal and Constitutional Committee, be suspended, and the Governor in Council to make that declaration by publication in the Government Gazette, should remain in the Bill.

155 RECOMMENDATION 36

The Committee recommends that the Governor in Council should have the power to override a declaration that a statutory rule be suspended, pending consideration by the Parliament of the Legal and Constitutional Committee's report under the proposed sub-sections 6(2C) and 6(2D) of clause 6 of the Subordinate Legislation (Deregulation) Bill 1983.

157 RECOMMENDATION 37

The Committee recommends that a new section 6(2DA) should be inserted immediately following the proposed section 6(2D) in clause 6 the Subordinate Legislation (Deregulation) Bill 1983 to provide :

> *(2DA) If the Governor in Council does not under sub-section (2D) by Order in Council published in the Government Gazette declare that the operation of a statutory rule shall not be suspended and that the declaration of suspension by theLegal and Constitutional Committee shall be of no force or effect, the Governor in Council shall publish in the Government Gazette a notice to the effect that the statutory rule is suspended in accordance with the declaration of the Legal and Constitutional Committee pending consideration of the Committee's report by each House of Parliament.*

159 **RECOMMENDATION 38**

The Committee recommends that section 6 of the Subordinate Legislation Act 1962 should be repealed and replaced by the following proposed section, to be incorporated into the Subordinate Legislation (Deregulation) Bill 1983 :

Clause 6

Section 6 of the Subordinate Legislation Act 1962 shall be repealed and replaced with the following section :

6 ...

(2F) (1) Where -

(a) the power to make a statutory rule is expressed to be subject to the statutory rule being disallowed by Parliament; or

(b) a statutory rule has been reported on adversely by the Legal and Constitutional Committee

the statutory rule shall be disallowed unless each House of the Parliament passes a resolution of affirmation of the rule in accordance with the requirements of sub-section (2) of this section.

(2) Notice of a resolution to affirm a statutory rule must be given in the House in question on or before the eighteenth day upon which that House sits after the rule is laid before that House and the resolution must be passed on or before the twelfth day upon which that House sits after notice of the resolution has been given in that House but the power of either House to pass a resolution affirming the statutory rule shall not be affected by the prorogation or dissolution of Parliament or of either House of the Parliament and for the purpose of this section

the calculation of days upon which a House has sat shall be made as if there had been no such prorogation or dissolution.

(2A) Notice of resolution to affirm a statutory rule may be expressed to apply to the whole or to any part of the statutory rule and a resolution to affirm the whole or any part of a statutory rule shall have effect according to its tenor.

(3) Where a statutory rule is not affirmed by Parliament the failure of affirmation shall have the like effect to the repeal of an enactment.

In accordance with this Recommendation, an urgent review should be undertaken of the nature and extent of statutory rules which are subject to disallowance by Parliament (as covered by section 6(1)(a) of the Subordinate Legislation Act 1962) to determine whether they should be made in that way, or whether the power to make those rules should not be expressed to be subject to the statutory rule being disallowed by Parliament. If, following this review, it is considered that certain rules should be subject to such a procedure, it would be preferable to make them subject to affirmation by Parliament (to bring the provision into line with the remainder of the proposed new section 6) and therefore to replace the word "disallowed" where it appears in proposed section 6(1)(a) with the word "affirmed".

160 RECOMMENDATION 39

If Recommendation 38 is not accepted, then the Committee recommends that a new provision should be inserted into the Subordinate Legislation (Deregulation) Bill 1983 to provide for affirmative resolution by the Parliament if the declaration by the Legal and Constitutional Committee under proposed sections (2B) and (2C) of the Bill that a statutory rule be suspended, is not to be confirmed by the Parliament. That provision should state :

(2AA) Where a statutory rule has been adversely reported on by the Legal and Constitutional Committee and in accordance with sub-sections (2B) and (2C) of section 6 of this Act that Committee has declared suspension of the statutory rule, the suspension shall be upheld and the statutory rule disallowed unless each House of the Parliament passes a resolution to affirm the statutory rule in accordance with sub-section (2AB) of this section.

(2AB) Notice of a resolution to affirm a statutory rule adversely reported on by the Legal and Constitutional Committee in accordance with sub-sections (2B) and (2C) of section 6 of this Act must be given in the House in question on or before the eighteenth day upon which that House sits after the report of the Committee on the statutory rule is laid before that House and the resolution must be passed on or before the twelfth day upon which that House sits after notice of the resolution has been given in that House but the power of either House to pass a resolution affirming the statutory rule shall not be affected by the prorogation or dissolution of the Parliament or of either House of the Parliament and for the purpose of this section the calculation of days upon which a House has sat shall be made as if there had been no such prorogation or dissolution.

161 RECOMMENDATION 40

If Recommendation 39 is endorsed rather than Recommendation 38, the Committee further recommends that section 6 of the Subordinate Legislation Act 1962 should be amended to provide :

6(1) Subject to sub-section (2AA) of this section, where -

(a) *the power to make a statutory rule is expressed to be subject to the statutory rule being disallowed by Parliament; or*

(b) *a statutory rule has adversely been reported on by the Legal and Constitutional Committee - ...*

163 RECOMMENDATION 41

If the Parliament does not accept Recommendation 38 or Recommendation 39 of the Committee, the Committee recommends that a new provision should be inserted into clause 6 of the Subordinate Legislation (Deregulation) Bill 1983 to provide :

(2DA) Where the Governor in Council makes an Order in Council under sub-section (2D) that the suspension of a statutory rule as provided for by the Legal and Constitutional Committee in its report under section (2B) of this Act should be of no force or effect, that Order in Council should continue in effect unless or until the Parliament passes a resolution in accordance with section 6(1)(b) and (2) of this Act.

165 RECOMMENDATION 42

The Committee recommends that a provision should be inserted into the Subordinate Legislation (Deregulation) Bill 1983 to provide that where a statutory rule is declared by the Legal and Constitutional Committee to be suspended, and that suspension is not overridden by Governor in Council, the rule shall be deemed during the time of suspension to be void and of no effect, and that the deeming shall continue where the rule is not affirmed by the Parliament in debate under the proposed section 6 of the Subordinate Legislation Act 1962 (see Recommendation 38). Further, where the suspension of the Committee is overruled by Governor in Council, unless the Parliament

affirms the lifting of the suspension by debate in accordance with proposed section 6, the rule shall be deemed to have been void and of no effect from the time of declaration of suspension by the Committee. It should further be provided that if the adverse report of the Legal and Constitutional Committee is debated in the Parliament, then at that time the Parliament should have the option to determine whether acts done or not done under the rule should be dealt with as if the rule was void and of no effect.

168 RECOMMENDATION 43

The Committee recommends that support be given to the Government Printer's bimonthly and biannual newsletters, and that the Department of Property and Services should allocate funding and other resouces sufficient to ensure that a publicity campaign is undertaken to inform potential subscribers of Government Printer publications, in particular the Government Gazette and the bimonthly and biannual newsletters.

169 RECOMMENDATION 44

The Committee recommends that the Department of Property and Services, in conjunction with the Government Printing Office, should explore ways in which statutory rules can be more widely disseminated, particularly to local libraries, in the most cost-effective manner.

171 RECOMMENDATION 45

The Committee recommends that the proposed section 9B(1) of clause 7 should be amended to read :

> *(1) The Minister administering the Act under which any statutory rule is made shall ensure that a copy of the statutory rule printed in accordance with section 4 or where a reprint of the*

statutory rule has been prepared in accordance with section 9 a copy of the reprint and any subsequent amending statutory rule -

(a) can be purchased on demand by any member of the public during normal office hours from the Sales Branch of the Government Printing Office or some other appropriate public office specified by the Minister by a notice published in the Government Gazette; or

(b) is available for inspection by any member of the public without charge during normal office hours at the Department of the Minister or some other appropriate public office specified by the Minister by a notice published in the Government Gazette.

172 RECOMMENDATION 46

The Committee recommends that all Ministers should be required to ensure that where their departments have regional offices, those regional offices should carry at least one copy each of statutory rules and other delegated legislation administered by the department, to be available for perusal by the public. These offices should be specified by the Minister by a notice published in the Government Gazette as provided in the proposed section 9B(1) of clause 7 of the Subordinate Legislation (Deregulation) Bill 1983.

173 RECOMMENDATION 47

The Committee recommends that all Ministers should be required to ensure that where they have on site operations, where statutory rules or other subordinate legislation is relevant to the operations or works, these statutory rules or other subordinate legislation should be available on site for perusal by the public. Site offices should be required to be notified in the Government Gazette as

provided in the proposed section 9B(1) of clause 7 of the Subordinate Legislation (Deregulation) Bill 1983.

174 RECOMMENDATION 48

Recognising that the Government Gazette, although necessarily used for the dissemination of much government information and in particular the publication of statutory rules and other subordinate legislation, and being named in the Subordinate Legislation (Deregulation) Bill 1983 as a means of informing the public of the whereabouts of subordinate legislation for their perusal, is not readily identified or obtained by many members of the public in Victoria, the Committee recommends that the Minister for Administrative Services should explore (and put into effect) practical ways of ensuring that the Government Gazette reaches a wider public than is currently the case.

176 RECOMMENDATION 49

The Committee recommends that the proposed section 9B(2) in clause 7 be omitted from the Subordinate Legislation (Deregulation) Bill 1983.

177 RECOMMENDATION 50

The Committeee recommends that a new subsection (2) of proposed section 9B in clause 7 of the Subordinate Legislation (Deregulation) Bill 1983 should be drafted to provide :

> *(2) Where a statutory rule has come into force -*
>
> *(a) a person shall not be convicted of an offence consisting of a contravention of the statutory rule or provision in question unless it is proved that at the time of the alleged contravention a copy of the statutory rule or of*

the reprint of the statutory rule could be purchased or inspected as provided by subsection (1); and

(b) *a person shall not be prejudicially affected or made subject to any liability by the statutory rule or provision in question unless it is proved that at the relevant time a copy of the statutory rule could be purchased or inspected as provided by subsection (1).*

180 RECOMMENDATION 51

The Committee endorses in principle the proposal that guidelines for preparation of subordinate legislation and procedures to be followed in that preparation should be laid down in the Subordinate Legislation Act as a schedule, these guidelines to be prepared by the Attorney-General in consultation with the Legal and Constitutional Committee.*

181 RECOMMENDATION 52

The Committee endorses the inclusion of the proposed section 11 in the Subordinate Legislation (Deregulation) Bill 1983, subject to Recommendation 78.

* The content of these guidelines as proposed under the Subordinate Legislation (Deregulation) Bill 1983 will be discussed fully in this Report in Schedule 2 : Guidelines, at pp.381-403.).)

183 RECOMMENDATION 53

The Commmittee recommends that a new sub-section should be inserted in proposed section 12 to precede proposed section 12(1) in clause 8 of the Subordinate Legislation (Deregulation) Bill 1983. This would be numbered 12(A1), and provide :

> *(A1) Where a statutory rule is proposed to be made which relates only to matters which :*
>
> *(a) are made by way of proclamation; or*
>
> *(b) are made by way of order in council; or*
>
> *(c) deal with relations, organisations or procedures within or as between departments or statutory bodies;*
>
> *the preparation of a regulatory impact statement is not required.*

184 RECOMMENDATION 54

If the Committee's recommendation for a rationalisation of subordinate instruments is not adopted as an amendment to this Bill, then the Committee recommends that until such time as a subordinate instrument "code" is drafted in accordance with Recommendation 18 a new sub-section 12(A1) to precede proposed section 12(1) should be incorporated into clause 8 of the Subordinate Legislation (Deregulation) Bill 1983 to provide :

> *(1) Where a statutory rule is proposed to be made which relates only to matters which :*
>
> *(a) are of a fundamentally declaratory or machinery nature only; or*

(b) deal with relations, organisations or procedures within or as between departments or statutory bodies; or

(c) involve the setting of fees where a rise is made at the direction of the Department of Management and Budget as an across the board measure calculated in accordance with a Consumer Price Index rise or similar price rise indicator,

the preparation of a regulatory impact statement is not required.

The Committee further emphasises that with acceptance of Recommendation 18, this provision would necessarily be incorporated in the Bill as an interim measure until all enabling clauses in existing Acts, and subordinate instruments made under them, have been revised and amended in accordance with the code to be introduced by that Recommendation or Recommendation 19.

186 RECOMMENDATION 55

In consequence of Recommendation 53 the Committee recommends that the proposed section 12(1) of the Subordinate Legislation (Deregulation) Bill 1983 be amended to provide :

Subject to sub-section (A1) of this section, where a statutory rule is proposed to be made the following provisions shall apply :

(a) [as provided in the Subordinate Legislation (Deregulation) Bill 1983],

188 RECOMMENDATION 56

The Committee recommends that proposed section 12(1)(a) of the Subordinate Legislation (Deregulation) Bill 1983 should be redrafted to provide :

(a) A notice shall be published in the Government Gazette and in a daily newspaper, and where appropriate a trade, professional, business, and/or public interest journal, newsletter, newspaper or circular

190 RECOMMENDATION 57

The Committee recommends that the word "analysis" in section 12(1)(a)(ii) should be replaced with "statement", the provision to read :

(1)(a) ...

(ii) summarizing the results of the regulatory impact statement; ...

192 RECOMMENDATION 58

To ensure that adequate access to regulatory impact statements is available to those having a real interest in them, departments and authorities should adopt a sensible approach to providing copies of regulatory impact statements on request, within a reasonable time and at a reasonable fee where necessary.

194 RECOMMENDATION 59

The Committee recommends that proposed section 12(1)(a)(iv) should be amended to read :

inviting public comments and submissions within such time, being not less than 21 days from publication of the notice, as specified in the notice ...

If, after the Subordinate Legislation (Deregulation) Bill 1983 becomes law and comes into operation it becomes evident that the time period is too short, then

an appropriate amendment should be made increasing time for public comment and consultation.

196 RECOMMENDATION 60

The Committee endorses the inclusion of proposed section 12(1)(b) in clause 8 of the Bill, noting that it puts into statutory form a process which currently exists in many departments and authorities in relation to the formulation and review of regulations, and that consideration of comments and submissions received from outside the department or authority proposing a statutory rule is likely to enhance the regulation making process.

198 RECOMMENDATION 61

The Committee recommends that as the Parliamentary Counsel's task is to examine the legalities of proposed statutory rules, sub-section (1)(c)(i) of proposed section 12 in clause 8 should be deleted from the Subordinate Legislation (Deregulation) Bill 1983. However, provision should be made for the objectives sought to be achieved by a statutory rule to be made clear to Parliamentary Counsel and to all reading the rule. To that end, a statement of the objectives of the statutory rule should be contained in the preamble to the proposed rule, and should remain in the preamble when the rule comes into effect.

201 RECOMMENDATION 62

The Committee endorses the inclusion of proposed section 13(2) of clause 8 in the Subordinate Legislation (Deregulation) Bill 1983 in amended form, to read :

> *(2) It shall not be necessary to comply with section 12 or section 13(1) if -*

(a) the Premier certifies in writing that in her or his opinion in the special circumstances of the particular case the public interest requires that the proposed statutory rule should be submitted for making by or for the consent or approval of the Governor in Council without complying with sub-section (1); and

(b) a copy of the certificate is submitted with the proposed statutory rule.

205 RECOMMENDATION 63

The Committee recommends that proposed section 13(3)(e) of clause 8 should become 13(3)(ab), to appear immediately following 13(3)(a) :

(3) A proposed statutory rule shall be submitted to the Chief Parliamentary Counsel for advice as to whether the proposed statutory rule -

(a) appears to be within the powers conferred by the Act under which it is proposed to be made;

(ab) appears without clear and express authority being conferred by the Act under which the statutory rule is to be made -

(i) to have a retrospective effect;

(ii) to impose any tax, fee, fine, imprisonment or other penalty;

(iii) to shift the onus of proof to a person acused of an offence; or

(iv) to sub-delegate powers delegated by the Act; ...

207 **RECOMMENDATION 64**

The Committee recommends that proposed sub-section 13(3)(b) should be redrafted to read :

> *(b) appears to be within the general objectives of the Act under which it is proposed to be made; ...*

209 **RECOMMENDATION 65**

The Committee recommends that proposed section 13(3)(c) in clause 8 should be redrafted to read :

> *(c) appears to be consistent with and to achieve the objectives set out in the proposed statutory rule or, where the proposed statutory rule is to amend an existing statutory rule, the objectives set out in the existing statutory rule; ...*

211 **RECOMMENDATION 66**

The Committee recommends that section 13(3)(d) of clause 8 be redrafted to read :

> *(d) appears to be inconsistent with principles of justice and fairness*

213 **RECOMMENDATION 67**

The Committee recommends that proposed paragraphs (f) and (g) of section 13(3) of clause 8 remain a part of the Bill, but that paragraph (h) be omitted from the Bill.

216 RECOMMENDATION 68

The Committee does not believe it should be mandatory for departments or authorities to seek Department of Management and Budget advice on the costs likely to be incurred in administration of and compliance with proposed statutory rules of a fundamentally declaratory nature, involving internal departmental operations, or interdepartmental operations, or involving fee rises across the board. It therefore recommends that proposed section 13(4)(a) in clause 8 should be removed from the Subordinate Legislation (Deregulation) Bill 1983.

218 RECOMMENDATION 69

The Committee recommends that if proposed section 13(4)(a) in clause 8 is, despite Recommendation 68, retained in the Bill, then it should be redrafted to provide :

> *"the estimated costs likely to be incurred directly and indirectly in the administration of and compliance with the proposed statutory rule; or ..."*

220 RECOMMENDATION 70

The Committee recommends that one department be given the task of being an adviser to other departments and authorities on economic, social, community, and business factors affecting the possible application of proposed regulations and that that department should be the Department of Management and Budget or the Department of Industry, Commerce and Technology. The Committee emphasises, however, that the relevant department should be required to foster its ability to take into account social and community factors from a human rather than business perspective. Accordingly, the Committee recommends that proposed section 13(4)(b) in clause 8 should remain a provision of the Act.

223 RECOMMENDATION 71

The Committee recommends that proposed section 14(1)(h) should become (1)(ab), so that the proposed section reads :

> *(1) Where the Legal and Constitutional Committee considers that a statutory rule laid before Parliament under section 5 -*
>
> *(a) does not appear to be within the powers conferred by the Act under which the statutory rule was made;*
>
> *(ab) without clear and express authority being conferred by the Act under which the statutory rule was made -*
>
> *(i) has a retrospective effect;*
>
> *(ii) imposes any tax, fee, fine, imprisonment or other penalty;*
>
> *(iii) purports to shift the onus of proof to a person accused of an offence; or*
>
> *(iv) provides for the sub-delegation of powers delegated by the Act; ...*

225 RECOMMENDATION 72

The Committee recommends that the proposed section 14(1)(b) be amended to read :

> *(b) does not appear to be within the general objectives, intention or principles of the Act under which the statutory rule was made; ...*

227 **RECOMMENDATION 73**

The Committee recommends that proposed section 14(1)(c) should remain in Clause 8 of the Subordinate Legislation (Deregulation) Bill 1983.

229 **RECOMMENDATION 74**

The Committee recommends that proposed section 14(1)(d) should be amended to omit "controversy" to read :

> *(d) contains any matter or embodies any principles, which matter or principles should properly be dealt with by an Act and not by subordinate legislation; ...*

231 **RECOMMENDATION 75**

The Committee recommends that proposed sub-section 14(1)(f) in clause 8 be amended to remove the words "rules of natural justice" and replace them with the words "principles of justice and fairness" to provide :

> *is inconsistent with principles of justice and fairness*

233 **RECOMMENDATION 76**

The Committee recommends that the remaining provisions - proposed paragraphs (e), (f), (i), (j), and (k) of proposed section 14(1) of clause 8 remain a part of the Bill.

235 **RECOMMENDATION 77**

The Committee recommends that proposed section 14(2) of clause 8 remain part of the Bill, but that it be recast to provide :

(BA) A report of the Legal and Constitutional Committee under this section may contain such recommendations and declarations of suspension as the Committee considers appropriate, including :

(a) a recommendation that the statutory rule should be -

(i) disallowed in whole or in part; or

(ii) amended as suggested in the report; and

(b) a declaration that the statutory rule should be suspended in accordance with section 6 pending consideration by Parliament under this Act.

238 **RECOMMENDATION 78**

The Committee recommends that Schedule 1 be omitted from the Bill. Furthermore, sub-section (2) of proposed section 11 in clause 8 of the Bill should be omitted.

(In the event of Recommendation 78 not being accepted, the Committee proposes the following five recommendations (Recommendation 79 to Recommendation 83.)

241 **RECOMMENDATION 79**

The Committee recommends that paragraph 1 of Schedule 1 be omitted from the Bill and a "code" of subordinate legislation be incorporated into the Subordinate Legislation Act 1962 in accordance with Recommendation 18.

(Appropriate provision would necessarily be made so that subordinate legislation already existing would be covered.)

243 RECOMMENDATION 80

The Committee therefore endorses the inclusion of paragraph 2 in Schedule 1, and notes that under Schedule 2 guidelines are provided which ensure that departments and authorities should alert themselves to the necessity (if there is such a necessity) for consulting with other governmental bodies.*

245 RECOMMENDATION 81

The Committee recommends that where "cost" and "costs" appear in sub-paragraphs 3(d) and (f) of paragraph 3, these terms should be qualified to indicate that non-financial as well as financial costs and benefits are to be given adequate regard in reviewing proposed delegated legislation. To this end, those sub-paragraphs should be amended to provide :

(d) a proposed statutory rule embodies the alternative which achieves the objectives of that statutory rule at a financial and social cost which is less than the financial and social benefits which may result from the alternative:

...

(f) a detailed examination of the financial and social benefits and the financial and social costs is undertaken.

* For comments of the Committee on the content of these guidelines, see Schedule 2 : Guidelines with Respect to the Preparation and Content of Statutory Rules, at pp.381-403.

247 **RECOMMENDATION 82**

The Committee recommends that the question of which delegated legislation should or should not be subject to regulatory impact procedures should not be contained in a Schedule but in the body of the proposed Act in accordance with Recommendation 53 and to this end paragraph 4 of Schedule 1 of the Subordinate Legislation (Deregulation) Bill 1983 should be omitted from the Bill.

251 **RECOMMENDATION 83**

The Committee recommends that paragraphs 5 and 6 of Schedule 1 remain in the Bill, but, being unnecessary to the good operation of the proposed Act, paragraph 7 of Schedule 1 be omitted from the Subordinate Legislation (Deregulation) Bill 1983.

253 **RECOMMENDATION 84**

The Committee endorses the objectives underlying the procedures outlined in Schedule 2, and recommends the inclusion of such a Schedule in the Bill, taking into account amendments in accordance with the recommendations of this Report.

255 **RECOMMENDATION 85**

The Committee recommends that Schedule 2 should be amended to ensure that departments and authorities in proposing delegated legislation take into account tangible and intangible costs and benefits, advantages and disadvantages, and do not give undue emphasis to monetary costs. Those amendments should include a new paragraph AI stating :

> *A1 In this Schedule, wherever costs and benefits, advantages and disadvantages are referred to, social and economic costs and*

benefits, advantages and disadvantages, are required to be taken into account, and shall be given due consideration.

256 RECOMMENDATION 86

The Committee recommends that sub-paragraph 1(b)(iv) be amended to replace the words "are disproportionate to" with "less than".

257 RECOMMENDATION 87

Wherever "costs" and "disadvantages" are referred to, the provisions should refer equally to "benefits and "advantages". Consequently the Committee recommends that the following amendment* be made to the provisions of paragraph 1 :

(b) ...

(iv) Do not involve costs or disadvantages which are less than the benefits or advantages sought to be achieved.

(c) Alternate means of achieving those objectives (whether wholly or substantially and whether by way of self regulation, ... or otherwise) shall be considered and an evaluation made of the benefits and advantages expected to arise from each such alternative as compared with the costs and disadvantages, both direct and indirect, tangible and intangible.

...

(e) (i) Where a proposed statutory rule is likely to impose any appreciable burden, disadvantage or cost, whether direct or indirect, tangible or intangible, upon any sector ...

*Amending words are underlined

258 **RECOMMENDATION 88**

In accordance with Recommendation 85 the Committee recommends that the following amendment* be made to the provisions of paragraph 2 :

...

(d) *Among alternative approaches to any given regulatory objective, the alternative involving the least net cost or the greatest benefit to the community shall normally be chosen; and*

...

259 **RECOMMENDATION 89**

In accordance with Recommendation 85 the Committee recommends that the following amendment* be made to the provisions of paragraph 3 :

A statutory rule shall :

...

(d) *Adopt the means of achieving those objectives which appear likely to involve the least burden or the greatest advantage to the community;*

...

261 **RECOMMENDATION 90**

The Committee recommends that Schedule 2 be amended to make clear the interests which should be consulted, where appropriate. To this end, a new

* Amending words are underlined.

paragraph A2 is to be inserted to provide :

> *A2 In this Schedule, wherever consultation is required such consultation should take place with the public, community groups, special interest groups, trades unions, and business interests where appropriate.*

263 RECOMMENDATION 91

In accordance with non-sexist principles of language, the Committee recommends that sub-paragraph (f) of paragraph (3) of Schedule 2 should be redrafted to provide :

> *A statutory rule shall :*
>
> ...
>
> *(f) Be expressed plainly and unambiguously, consistently with the language of the enabling Act and in accordance with modern standards of drafting applying in the State of Victoria.*

265 RECOMMENDATION 92

The Committee recommends that sub-paragraph (g) of paragraph 4 of Schedule 2 be redrafted to read :

> *is inconsistent with principles of justice and fairness.*

266 RECOMMENDATION 93

The Committee recommends that sub-paragraph (h) of paragraph 4 of Schedule 2 be replaced as sub-paragraph (ab), so that the paragraph reads :

> *4 A statutory rule shall not :*

(a) *Exceed the powers conferred by the Act under which the rule purports to be made;*

(ab) *Without clear and express authority in the enabling Act -*

(i) *have any retrospective effect;*

(ii) *impose any tax or fee, or any fine, imprisonment or other penalty;*

(iii) *purport to shift the onus of proof to a person accused of an offence;*

(iv) *provide for any further delegation of powers delegated by the Act.*

268 RECOMMENDATION 94

The Committee recommends that no provision need be included in the guidelines emphasising the need to deal in a common sense manner with any proposed alternatives to regulation, but that in accordance with the Report on the Interpretation Bill 1982 and section 35 of the Interpretation of Legislation Act 1984 it should be taken by departments and other authorities proposing regulations that they need not search exhaustively for alternatives, nor should they presume that self regulation and/or the setting of performance standards is inevitably preferable to regulation.

270 RECOMMENDATION 95

The Committee recommends that paragraph 5 of Schedule 2 should be omitted from the Bill as being unnecessary.

271 RECOMMENDATION 96

If this recommendation is not endorsed by the Parliament, the Committee recommends that in accordance with the principle stated in the Report on the Interpretation Bill 1982 and with stated government policy following acceptance of that Report, the word "chairman" should be replaced by the title "chairperson".

273 RECOMMENDATION 97

The Committee recommends that a new paragraph 5 be inserted in the Subordinate Legislation (Deregulation) Bill providing :

> 5(a) *Where a regulatory impact statement has been prepared under Section 12 and a decision has been made that the statutory rule the subject of that regulatory impact statement should be made, the permanent head or chairperson of the department or statutory body making that determination shall, before it is submitted to the Governor in Council, publish that decision in the Government Gazette and a daily newspaper.*
>
> (b) *Where a regulatory impact statement has been prepared under Section 12 and a decision has been made that the statutory rule the subject of that regulatory impact statement should not be made, or that an alternative means should be used to carry out the object as stated in the regulatory impact statement, the permanent head or chairperson of the department or statutory body making that determination shall, before it is submitted to the Governor in Council, publish that decision in the Government Gazette and a daily newspaper.*

276 **RECOMMENDATION 98**

The Committee recommends that Schedule 3 of the Bill become Schedule 1, as this will give those dealing with the proposed Act a more immediate understanding of the regulatory impact statement procedure.

278 **RECOMMENDATION 99**

The Committee recommends that paragraph 3 of Schedule 3 be redrafted to provide :

> *A regulatory impact statement should include the following matters -*
>
> ...
>
> 3 *An assessment of the monetary and social costs and benefits of each alternative including resource allocation, administration and compliance costs and where the benefits and costs cannot be assessed solely in monetary terms an outline of the social costs and benefits.*

280 **RECOMMENDATION 100**

The Committee recommends that where the word "should" appears in Schedule 3 it be replaced by "shall" to read :

> *A regulatory impact statement shall include the following matters :*

283 **RECOMMENDATION 101**

The Committee recommends that in having regard to the recommendation of this Report and the content of the Subordinate Legislation (Deregulation) Bill 1983 generally, the Parliament recognise the need for resources to be available to the Committee for the carrying out of its increased functions.

REPORT

The Legal and Constitutional Committee has the honour to report as follows :

1 By resolution of the Legislative Council on 29 November and the Legislative Assembly on 30 November 1983, the proposals contained in the Subordinate Legislation (Deregulation) Bill 1983 were referred to the Legal and Constitutional Committee for inquiry, consideration and report.

2 The Committee heard evidence from :

The Hon. A.J. Hunt, M.L.C., Leader of the Opposition, Legislative Council, Parliament of Victoria

Mr. J. C. Finemore, O.B.E., Q.C., Chief Parliamentary Counsel

Mr. J. Butera, Parliamentary Counsel

Dr. R.F. Cranston, Senior Lecturer in Law, Australian National University

The Hon. P.S.M. Philips, M.L.C., Parliament of New South Wales

Professor M.G. Porter, Director, Centre of Policy Studies, Monash University

Dr. J. Pincus, Centre of Policy Studies, Monash Univesity

Mr. A.J. Forrester, Secretary, State Electricity Commission of Victoria

Mr. P.H. MacSporran, Managing Solicitor, State Electricity Commission of Victoria

Mr. H. Du Guesclin, Solicitor, State Electricity Commission of Victoria

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Senator A.J. Missen, Australian Parliament

Ms. A. Gorman, Director, Social Impacts

Mr. H. Raysmith, Director, Victorian Council of Social Service

Ms. H. Halliday, Victorian Council of Social Service

Mr. M.R. Knight, Director of Research, Natural Resources and Environment Committee of the Victorian Parliament (Formerly Chief Assessment Officer, Ministry for Conservation)

Mr. B.G. Marshall, Research Officer, Department of Community Welfare Services

Ms. B.E. Penrose, Research Officer, Department of Community Welfare Services

Mr. L.F. Jerrems, Chief Legal Officer, Melbourne and Metropolitan Board of Works

Members of the Law Institute of Victoria Ad Hoc Committee:

Mr. C. Barlow

Mr. R. Eager

Ms. E. Grimm

Mr. R. Hatch

Mr. E. Kyrou

Mr. R. Wright

Mr. P. Bolger, Executive Officer, Education Department

Mr. K.C. Crompton, Associate Director, Victorian Chamber of Manufactures

Dr. D.E. Hore, Deputy Director-General, Department of Agriculture

Mr. K.C. Wheatland, Secretary, Department of Agriculture

Ms. M.M. Powell, Subordinate Legislation Officer, Health Commission of Victoria

Mr. H. L. Race, Legislation Officer, Health Commission of Victoria

Mr. I.G. Baker, Director of Finance, Department of Management and Budget

Mr. R.B. Craigie, Policy and Planning Division, Department of Management and Budget

3 The Committee received written commentaries from :

The Hon. A.J. Hunt, M.L.C., Leader of the Opposition, Legislative Council, Parliament of Victoria

The Hon. P.S.M. Philips, M.L.C., Parliament of New South Wales

Mr. J. Butera, Parliamentary Counsel

Senator A.J. Missen, Australian Parliament

Mr. C. Arup, Lecturer, Department of Legal Studies, La Trobe University

Mr. K.P. O'Connor, Director, Policy and Research Division, Law Department

Mr. D. Brereton, Lecturer, Department of Legal Studies, La Trobe University

Professor G.S. Reid, Department of Politics, University of Western Australia

Professor E. Campbell, Faculty of Law, Monash University

Mr. P. Hanks, Faculty of Law, Monash University

Professor J.E. Richardson, Commonwealth Ombudsman

Centre of Policy Studies, Monash University

Law Institute of Victoria

Victorian Chamber of Manufactures

4 Additionally, the Committee's Director of Research gained valuable insights on the Bill's provisions in discussions with Professor Dennis Pearce, Dean of the Faculty of Law, Australian National University and formerly adviser to the Senate Scrutiny of Bills Committee; Professor Douglas Whalen, also of the Australian National University and presently adviser to the Senate Standing Committee on Subordinate Legislation and Dr. Jim Davis, Senior Lecturer in Law at the Australian National University and presently advisor to the Senate Scrutiny of Bills Committee. The Director of Research was also fortunate in having the opportunity of presenting a paper on the Bill at the Australian Study of Parliament Group Conference held in Brisbane in 1984; the response of participants to the ideas contained therein was of value in the writing of this Report.

5 The Committee sought the response of government departments, authorities and other bodies to the content of the Subordinate Legislation (Deregulation) Bill 1983 by writing to them enclosing a copy of the Bill and requesting their comments. Replies were received from a number of departments and authorities, including :

Dandenong Valley Authority
Department of Conservation, Forests and Lands
- Division of Conservation
- Division of Forests
- Division of Lands

Department of Management and Budget
Department of the Premier and Cabinet
Education Department
Gas and Fuel Corporation of Victoria
Melbourne and Metropolitan Board of Works
Ministry of Employment and Training
Ministry of Transport
- Port of Melbourne Authority
- Port of Portland Authority
- Road Construction Authority
- Road Traffic Authority

Ministry of Water Resources and Water Supply (now Rural Water Commission)
Rural Finance Commission
State Electricity Commission of Victoria
State Insurance Office
Victorian Ethnic Affairs Commission
Victorian Tourism Commission

6 The response from the Department of the Premier and Cabinet indicated that it had requested departments and authorities not to reply directly to the Committee, but rather to send their replies to the Department of the Premier and Cabinet so that it might coordinate a response. In the event, the

Department of the Premier and Cabinet put what it termed the government's position on the question of regulation review and revocation, and did not at that time inform the Committee of the content of the various departments' and authorities' submissions on the Bill.

6.1 In the Committee's view, this was unfortunate, in that it impeded the progress of consideration of the issues and report writing which were, to a significant degree, dependent upon the response of government departments and instrumentalities. Subsequently the Committee wrote to the Department of the Premier and Cabinet requesting copies of the submissions sent to it. As a result of this request the Committee was disappointed to receive from the Department a summary only of these submissions. The departments and authorities who expressed their views to the Department of the Premier and Cabinet included :

Education*
Gas and Fuel Corporation
Management and Budget*
State Electricity Commission*
Transport*
Agriculture
Community Welfare Services
Consumer Affairs
Health Commission
Industrial Affairs
Industry, Commerce and Technology
Labour and Industry
Law
Minerals and Energy

* These departments/authorities also forwarded their comments to the Legal and Constitutional Committee.

Planning and Environment
Police and Emergency Services
Youth, Sport and Recreation

The total number of departments/authorities who forwarded their comments to the Department of the Premier and Cabinet was 17 - five of which also forwarded them to the Committee.

6.2 The Committee notes that under the Parliamentary Committees Act 1968 it has power to send for (and receive) any papers and records relevant to its inquiries. It would be regrettable indeed if a Parliamentary Committee were constrained, by lack of co-operation of any government department or other authority or body, in particular the Department of the Premier and Cabinet, to utilise its powers under the Act.

6.3 To gain the views of departments, authorities and other bodies first hand, the Committee called a representative number of such bodies before it, to discuss in detail certain aspects of the Bill. A number of these appeared before the Committee and their evidence was most helpful. However, the Committee was disturbed to learn (on an informal basis) that, prior to the attendance of two departments to give evidence, a telex had been sent to all departments. The telex stated not only that departmental representatives should conform with the guidelines for public servants responding to Parliamentary Committee inquiries (see Appendix I), but also that representatives should adhere to the statement of the government on the question of regulation review and revocation. That statement was contained in a letter sent to the Committee from the Department of the Premier and Cabinet. (See Appendix II.)

6.4 Following this episode, one department appeared before the Committee stating that it had received "riding instructions" from the Department of the Premier and Cabinet as to how it should conduct itself before the Committee.

In the Committee's view these "instructions" went beyond the guidelines to public servants.

6.5 By formulating what it termed a policy statement as its response to the Committee and circulating it to government departments on this basis (requesting that they adhere to it) the Department of the Premier and Cabinet appears to have pre empted the findings of the Committee on the Subordinate Legislation (Deregulation) Bill 1983, which was referred by the Parliament to the Committee on a bi-partisan basis for review and report. Additionally, this served to inhibit witnesses unnecessarily in what appeared to be a non-controversial enquiry.

INTRODUCTION

7 Objectives and Outline of the Subordinate Legislation (Deregulation) Bill 1983. The Subordinate Legislation (Deregulation) Bill is designed to review the drafting, introduction, operation and life-time of regulations. It provides that where regulations are to be introduced, departments and other statutory bodies should consider alternative methods of meeting the needs which proposed regulations are to serve. Advance publicity should be given to the making of regulations; interested parties should be consulted; the Minister should review the process and ensure that the framing of regulations is the most apposite means of meeting the needs existing in the area perceived to require regulation. Guidelines for the procedure to be followed are incorporated in the legislation as a schedule being an interim measure until the Attorney-General and the Legal and Constitutional Committee draw up guidelines. Under the Bill the latter can be amended from time to time in consultation between the Victorian Parliamentary Legal and Constitutional Committee and the Attorney-General.

7.1 Where a decision is made by a department or other relevant authority that regulations should be introduced, a Regulatory Impact Statement must be prepared by the drafting body (unless otherwise exempt). The Explanatory Memorandum on the Framework of the Bill stipulates this as "in essence, a cost benefit analysis of the proposed regulations, ... [taking] into account both economic and social costs and benefits". It must be "properly thought through and evaluated". The making of an impact statement must be "advertised and comments sought from those affected by the proposal before submission of the statutory rule to the Governor in Council".

7.2 A legal review must be undertaken by Chief Parliamentary Counsel, to check the regulations' "clarity and validity, and their compliance with the guidelines" set out in the schedule to the Bill, before submission of the statutory rule to the Governor in Council.

7.3 A financial review must be undertaken by the Department of Management and Budget "to check the Regulatory Impact Statement to ensure that it has been properly prepared and appears to take into account all relevant factors". Under the Bill, if no impact statement has been required (because the regulations have been determined not to place a burden upon the public), the Department of Management and Budget must assess the likely cost of administration of and compliance with the regulations.

7.4 The Legal and Constitutional Committee of the Victorian Parliament is granted "very substantially broadened" powers under the Bill, to "in essence review validity, legal and social implications, equity, ... and a range of other matters". The Committee may recommend disallowance or amendment of a rule and, "where natural justice so requires", may (subject only to the veto of the Governor in Council on the recommendation of the responsible Minister) arrange for suspension of the regulation pending its consideration by Parliament.

7.5 Where matters are deemed to be "urgent" by the Premier, under a personal certificate stating that "in the special circumstances of the particular case, the public interest requires" it, regulations may enter a "fast track" waiving particular requirements set down by the Bill.

7.6 The Bill further provides, amongst other matters, that statutory rules must be readily available for purchase or inspection and a person cannot be convicted of an offence against a statutory rule unless it was available at the time of the alleged offence.

7.7 Additionally, sunset provisions are contained in the Bill. All regulations made prior to 1962 and never incorporated in bound volumes will be automatically repealed on 30 June 1984; all other regulations will be subject to a sunset time limit of 10 years. As regards the latter, under the Bill regulations

cannot be extended beyond the sunset period : sunsetting is automatic. However if an authority or department did wish to gain an "extension", in effect they could undertake the procedures for review and assessment outlined in the body of the Bill (including the making of a Regulatory Impact Statement in the appropriate case), then repromulgate the regulations as "new" regulations with a new date of commencement.

8 The Committee's Approach. The Subordinate Legislation (Deregulation) Bill and recommendations of the Committee must be seen against a backdrop of issues relating to delegated legislation generally, its history, and current controls - parliamentary, ministerial, judicial and administrative. Contemporary debate on regulation and its efficacy or otherwise, the need for review of the process, and the possible introduction of revocation procedures fixed in accordance with lifetimes of regulations established by Parliament, are equally important in placing the Bill and recommendations in context.

8.1 Part I of this Report ("Regulations Generally") covers these issues, as well as other matters which are of relevance to the formulation and proposed operation of the Subordinate Legislation (Deregulation) Bill.

8.2 Part II of the Report ("Subordinate Legislation (Deregulation) Bill 1983") covers the history of the Bill and recent government and other initiatives to establish review of regulation procedures and operation; it also analyses the individual provisions of the Bill, including each of the schedules.

8.3 The Committee generally endorses the principles expressed in the Bill. However its extensive inquiries, research and hearing of evidence from witnesses have caused it to recommend revision of particular aspects of the proposed legislation. These proposed revisions are contained in the recommendations of this Report.

PART I

REGULATIONS GENERALLY

DELEGATED LEGISLATION

Background Issues

9 Introduction. Delegated legislation or subordinate legislation is legislation which is said to be secondary to the laws which pass through Parliament. Its existence generally hangs upon a provision or provisions in a principal Act, authorising its formulation. In Victoria, the most common forms of enabling provisions (provisions which authorise the formulation of delegated or subordinate legislation) appearing in Acts are :

> *The Governor in Council may make regulations for or with respect to any matter or thing authorized or required to be prescribed by this Act or necessary to be prescribed for carrying out or giving effect to this Act.*

or

> *The Governor in Council may make regulations for or with respect to all matters that are required or permitted by this Act to be prescribed for carrying out or giving effect to this Act.*

or

> *The Governor in Council may make regulations for or with respect to all matters that are authorised or required by this Act to be prescribed for carrying out or giving effect to this Act.*

or

> *The Governor in Council may make regulations for or with respect to all matters required or permitted by this Act to be prescribed for carrying out or giving effect to this Act.*

or

> *The Governor in Council may make regulations for or with*

respect to any matter or thing authorized or required to be by this Act or necessary or expedient to be prescribed for carrying out or giving effect to this Act.

or

The Governor in Council may make regulations for or with respect to all matters which by this Act are required or permitted to be prescribed or which are necessary or expedient to be prescribed for carrying out or giving effect to this Act.

or

The Governor in Council may make regulations for or with respect to all matters which by this Act are required or permitted to be prescribed or are necessary to be prescribed for carrying out or giving effect to this Act.

(See Butera, Subordinate Legislation in Victoria, LLM Thesis, University of Melbourne, 1983, at p.59; see also Pearce, "The Interpretation and Drafting of Enabling Provisions and Regulations" in Second Commonwealth Conference on Delegated Legislation - Documents of the Conference, vol. 2, 1980, Canada, Appendix, at p. 199.)

9.1 When the Governor makes regulations in accordance with any such provision, it is said that subordinate or delegated legislation has been brought into effect, to accord with the intention of Parliament in passing the principal Act. The terms "delegated legislation" and "subordinate legislation" are used interchangeably. As Butera points out, the use of the word "subordinate" or "delegated" is intended to "establish that such laws are of a lesser nature than Acts of Parliament and are dependent on an Act of Parliament for their validity". (Subordinate Legislation in Victoria, LLM Thesis, University of Melbourne, 1983, at p. 4.)

9.2 Reid asserts that the expression "subordinate legislation" may be a

misnomer for some legislation that is made outside Parliament, under the aegis of an authorising Act. He says :

> *['Subordinate legislation' as a term] pre-judges a basic relationship in government. It assumes, without examination, that there is a legislative hierarchy, that there are superior laws and subordinate laws, superior legislators and subordinate legislators, and that the practice of delegating an authority to legislate is acceptable because, by definition, its exercise and its products are 'subordinate'.*

("Parliamentary Control of the Executive" in Commonwealth Conference of Delegated Legislation Committees, Vol. 3, 19, at p. 21.)

9.3 Other writers have taken up this point, deploring the use of delegated legislation and implying or stating explicitly that it is not controlled by Parliament. They say that delegation of legislative powers enables the executive (or even bureaucrats) to rule uncontrollably. (See further "The Growth of Delegated Legislation : An Historical Perspective", at p.28.) Has this criticism substance? Is "subordinate legislation" a misnomer?

9.4 The Subordinate Legislation Act 1962 (Victoria) uses the term "statutory rule" as an umbrella term covering types of subordinate legislation covered by that Act, however it is not sufficiently broad to cover all forms of legislative power which accrue to government departments, statutory bodies, or other bodies which may be authorised to make rules governing the community and/or the operation of such departments or bodies. The definition states :

> *2. (1) In this Act unless inconsistent with the context or subject-matter -*
>
> *"Statutory Rule" means -*

(a) any regulation or rule made by the Governor in Council;

(b) any regulation made by any body corporate or unincorporate the making of which is subject to the consent or approval of, or subject to being disallowed by, the Governor in Council;

(c) any rule order form scale or regulation which relates to any court or procedure practice or costs of any court; and

(d) any instrument of a legislative character made pursuant to the provisions of any Act which is an instrument of a class which has been declared by notice in writing under the hand of the Attorney-General published in the Government Gazette to be statutory rules -

but does not include any regulation or rule that is made by a local authority or by any person or body of persons having jurisdiction limited to a district or locality unless it is a statutory rule by virtue of the operation of paragraph (d) of this sub-section.

(2) Any declaration by the Attorney-General for the purposes of this section may be revoked by notice in writing under the hand of the Attorney-General published in the Government Gazette.

9.5 Although they are a percentage only of all subordinate legislation brought into being, the volume of statutory rules is relatively high. The annual number of statutory rules increased from 337 in 1970 to 501 in 1980. From 1 January 1983 to 31 December 1983 in Victoria 447 statutory rules were made. Over that period, many other pieces of subordinate legislation were made in a form other than that of statutory rules - such as orders in council,

proclamations, by-laws, rules and other instruments of a legislative character made pursuant to powers conferred by Victorian Parliamentary Acts but not declared by the Attorney-General to be statutory rules. The nature and extent of the various types of subordinate legislation is the starting point of any inquiry into the practice of delegation of legislative powers by the Parliament.

10 Types of Delegated Legislation. In 1983 Butera researched the principal public general Acts of Victoria, ascertaining that of 428 Acts, 356 "contained one or more provisions enabling the making of subordinate legislation in one or more different forms". He then examined and classified these provisions according to the type of subordinate legislation they empowered. He identified the types of subordinate legislation existing in Victoria as :

* regulations
* orders in council
* proclamations
* court rules
* by-laws and rules
* university statutes and regulations
* other instruments of a legislative character

(See Butera, Subordinate Legislation in Victoria, LLM. Thesis, University of Melbourne, 1983. The following section draws extensively upon this Thesis.)

10.1 Regulations. The following general statements are applicable to regulations :

(i) Regulations are subordinate legislation usually made by the Governor in Council.

(ii) Where regulations are made by an authority other than the Governor in Council the regulations are generally subject to the approval or consent of the Governor in Council. (Those requiring no such approval or consent are of limited scope.)

(iii) Regulations made by the Governor in Council may be subject to the approval of or be made on the recommendation or advice of an authority specified in the Act.

(iv) As the Acts in which the provisions appear are classified as public general Acts the matters in respect of which regulations are to be made could be classified as being of general application.

When it is said that regulations are made "by the Governor in Council" it is meant that they are made by the Governor, with the advice of the Executive Council : s. 3 Interpretation of Legislation Act 1984. The Executive Council is usually constituted by at least two State Ministers of the Crown and the Governor; by convention all Ministers are members of the Executive Council but not all attend each meeting. (Generally the Council consists of five persons, four Ministers and the Governor.) Some enabling Acts state that regulations are to be made "with approval" or "on the recommendation or advice of" a named statutory body or person. In such a case, where regulations are enacted under the provision, the instrument must state on its face that the regulations have in fact been made with the approval or on the recommendation or advice of that statutory body or person. (See Appendix IIIA for the standard form by which regulations are made, at p. 427.)

10.1.1 Regulations may be of a general character (intended to cover the field of a principal Act which has wide-ranging application) - as under the

Education Act 1958, for example; they may be of a more specific application (limited to particular localities or persons), as with regulations made under the Melbourne Wholesale Fruit and Vegetable Market Trust Act 1977 or the West Moorabool Water Board Act 1968. Under the Credit Act 1984 it is provided that regulations may be of general or specific application; section 167(2) of that Act states :

> *Except as otherwise expressly provided by this Act, the regulations may be of general or of specially limited application and may differ according to difference in time, place or circumstance.*

10.1.2 An Act may also empower regulations to be made which cover administrative rather than policy matters. These include regulations relating to procedures of statutory bodies or committees, meetings of such bodies or committees, remuneration and travel allowances, long service leave and record keeping. For example, Statutory Rule No. 284 of 1983 (Sunday Entertainment (Fees) Regulations 1983), came into being at a meeting of the Executive Council on 25 October 1983. The purpose was to give effect to the direction of the Treasurer to increase departmental fees and charges by at least 10 per cent. On the same day, the Council dealt with regulations made for the same purpose in relation to other Acts. The regulations included :

Boilers and Pressure Vessels (Certification of Welders) (Fees) Regulations 1983

Boilers and Pressure Vessels (General) (Fees) Regulations 1983

Boilers and Pressure Vessels (Steam Engine Drivers and Boiler Attendants) (Fees) Regulations 1983

Lifts and Cranes (Certification of Operators) (Fees) Regulations 1983

Scaffolding (Certification of Scaffolders) (Fees) Regulations 1983

Scaffolding (Certification of Scaffolding Inspectors) (Fees) Regulations 1983

Scaffolding (Fees) Regulations 1983

Again on 25 October 1983 four Ministers and the Governor were needed to bring into effect the Port of Melbourne Authority (Berth Charges) Regulations 1983, Amendment No. 2/1983. The purpose of this statutory rule was to amend the principal regulations by deleting the table of charges set out in Regulation 310 and inserting a new table of charges in Regulation 310 in its place.

10.2 Orders in Council. Butera comments that the following general statements are applicable to Orders in Council :

(i) Orders in council can be used as a means by which the Governor in Council is empowered to make subordinate legislation.

(ii) An Act enabling the Governor in Council to make subordinate legislation by an order in council may require that the order in council be made with the approval of or on the recommendation or advice of an authority specified in the Act.

(iii) Where subordinate legislation is empowered to be made by order in council the subject-matter may be of general or limited application.

(iv) Subordinate legislation of this type is generally of a less important nature than regulations.

Orders in council can be made only by the Governor in Council. The utilisation of orders in council for the making of subordinate legislation has apparently lessened since 1962 : "more recently enacted Acts use regulations and confine

the use of orders in council to particular situations". (At pp. 16-17. See Appendix IIIB for the standard form by which orders in council are made, at p. 429.)

10.3 Proclamations. General statements covering proclamations include :

(i) Proclamations can be used as a means by which the Governor or the Governor in Council is empowered to make subordinate legislation.

(ii) An Act enabling the Governor or the Governor in Council to make subordinate legislation by proclamation may require that the proclamation be made on the recommendation or advice or an authority specified in the Act.

(iii) Where subordinate legislation is empowered to be made by proclamation the subject-matter may be of general or limited application.

(iv) Subordinate legislation by proclamation is generally of a less important nature than regulations.

Proclamations are generally made in one of two situations : first, to notify the coming into operation of a particular Act or a specified provision (or provisions) of an Act, on assent by Governor in Council or the Crown; secondly, for the making of subordinate legislation. (Butera, at pp. 17-20. See Appendix IIIC for the standard form by which proclamations are made, at p. 430.)

10.4 Court Rules. These regulate practice and procedure of courts and include matters such as forms, costs, time limits, attendance, administration of affirmations or oaths, evidentiary matters, pleadings and duties of officers of the courts. (See Magistrates' Courts Act 1971, Magistrates (Summary Proceedings) Act 1975, County Court Act 1958, Supreme Court Act 1958;

also Butera, pp. 21-22.)

10.5 By-laws and Rules. Generally :

(i) The Governor in Council may be empowered to make rules.

(ii) An Act may empower an authority specified in the Act to make by-laws and rules.

(iii) Where an authority is empowered to make by-laws or rules the Act may require that the by-laws or rules be confirmed or approved by the Governor in Council before they can come into operation.

(iv) In addition to or in lieu of confirmation or approval by the Governor in Council an Act may confer power on the Governor in Council to amend or revoke by-laws by Order in Council.

(v) The subject-matter of by-laws and rules is usually of more limited application than regulations and the power is commonly conferred in respect of a particular area within which the authority is given jurisdiction.

10.6 University Statutes and Regulations. Subordinate legislation may be made by universities under their respective Acts and must be submitted to the Governor. (See for example section 31, Melbourne University Act 1958.) University regulations deal generally with "good government" of the university or college and staff, student, course and awarding of degrees matters. (See for example the Victorian Institute of Marine Sciences Act 1974; Melbourne University Act 1958; also Butera, at pp. 23-24.)

10.7 Other Instruments of a Legislative Character. This category includes notices by Governor in Council or notices, orders or determinations made by a minister or other authority empowered by a particular Act. (See Butera, pp. 24-25.)

11 Overlap of Delegated Legislation. Looking at the types of subordinate instruments available for use, the immediate question is why should some forms be chosen rather than others, and why should different forms apparently be equally appropriate in certain circumstances? Why varying forms of subordinate instrument to effect like results? It is not possible to state categorically that regulations are invariably the form used to deal with substantive issues, whilst other forms are used for mechanical or routine administrative matters. Sometimes regulations are used for administrative matters. (See para. 10.1.2.)

11.1 Orders in council are used for administrative purposes and for making subordinate legislation. They may be used :

* to extend the meaning of an interpretation in an Act or to limit the general effect of an interpretation in an Act or as a means of defining persons, objects or things to which an Act or provisions of an Act apply

* to apply or to exclude the application of the Act or provisions of the Act to persons, areas or circumstances specified by the order

* to exempt persons or things from compliance with the Act or provisions of the Act

* to enable or facilitate the implementation of the Act or provisions of the Act

* to constitute or incorporate bodies or define areas within which the Act or provisions of the Act are to apply or the bodies to operate and to enable consequential provisions to be made

* to prohibit or restrict conduct or activities specified in the order

(See generally Butera, p. 18 and Schedule 2.)

These are the same purposes as those for which the regulation making power is frequently used.

11.2 Proclamations can be made for the following purposes :

* to extend the meaning of an interpretation in an Act or to limit the general effect of an interpretation of an Act or as a means of defining persons, objects or things to which an Act or provisions of an Act apply

* to apply or to exclude the application of the relevant Act or provisions of the Act to persons, areas or circumstances specified by the proclamation

* to exempt persons or things from compliance with the Act or provisions of the Act

* to enable or facilitate the implementation of the Act or provisions of the Act

* to prohibit or restrict conduct or activities specified in the proclamation

* to declare a general or special state of emergency and to

enable consequential provisions to be made

(See generally Butera, pp. 20-21 and Schedule 3.)

Apart from the last three items above, regulations and orders in council are often used for each of the purposes for which proclamations are used.

11.2.1 As Butera states, it is "difficult to find any reason why in any particular Act a proclamation is used as a means of making subordinate legislation". Using the proclamation power may, however, take the subordinate legislation outside the strictures imposed by the Subordinate Legislation Act 1962. The unsatisfactory nature of the present position is illustrated in relation to the prescribing of drugs under the Poisons Act. Drugs are prescribed by way of proclamation, but the Act deems proclamations used for this purpose to be statutory rules. Thus although they are "proclamations", they are subject to the Subordinate Legislation Act 1962 by way of their being deemed to be statutory rules. Representatives of the Health Commission, in giving evidence before the Committee, pointed out that the retention of the word "proclamation" for this purpose was a matter of tradition only, having no other purpose or value.

11.3 By-laws and Rules. By-laws are another form of subordinate legislation which do not generally come within the Subordinate Legislation Act provisions, however some by-laws and rules are exceptions to this. Those made under the regulation making power of the Melbourne and Metropolitan Board of Works are, under section 241 of the Melbourne and Metropolitan Board of Works Act 1958, declared to be "statutory rules" and subject to the Subordinate Legislation Act; similarly by section 45 of the Psychological Practices Act 1965 rules made by the Victorian Psychological Council are "statutory rules" under the Subordinate Legislation Act.

11.3.1 In some instances, rules or by-laws are required to be laid before Parliament; some are made by Parliament; some are not subject to

confirmation or approval by the Governor in Council and are not subject to revocation by order in council. Examples of the third category are those made under the Markets Act 1958, the Workers Compensation Act 1958 and the Sewerage Districts Act 1958. Examples of the first category are particular rules made under the Legal Profession Practice Act 1958 and those made under the State Bank Act 1958. An example of the second category arises in the case of the Ombudsman Act 1973, where rules made under that Act are made by Parliament.

11.4 University Statutes and Regulations. There is an apparent anomaly in the area of university statutes and regulations. That is, "statute" is given a meaning akin, apparently, to "regulation". Section 30 of the Melbourne University Act 1958 speaks of "statutes" made under the Act. Section 30 provides that "No new statute or regulation of the University or alteration or repeal of any existing statute or regulation shall be of any force until approved by the graduate committee ..." Section 31 states :

> *All statutes and regulations made pursuant to this Act shall be reduced to writing, and the common seal of the University having been affixed thereto shall be submitted to the Governor to be allowed and countersigned by him; and if so allowed and countersigned shall be binding upon all persons members of the University and upon all candidates for degrees to be conferred by the same; and the production of a verified copy of any such statutes and regulations under the said seal shall be sufficient evidence of the authenticity of the same in all courts of justice and before persons acting judicially.*

The entire division dealing with subordinate legislation is, in fact, headed "Statutes and Regulations". No definition of "statute" appears in the Act.

11.4.1 No doubt this has an historical origin. However it is questionable whether history should overrule good sense. The way in which "statute" is

generally understood by Members of Parliament, lawyers, judges and members of the public is as "Act"; that is, as "principal legislation". It is not generally a term used to denote subordinate legislation, and its use is a recipe for confusion, in an area already overburdened with anomalies and unnecessary or meaningless distinctions.

11.5 Other Instruments of a Legislative Character. With other instruments of a legislative character, such as notices by the Governor in Council or notices, orders or determinations by a Minister or other authority empowered by the Act, the purposes for which they may be used include :

* extending the meaning of an interpretation in an Act or limiting the general effect of an interpretation in an Act or as a means of defining persons, objects or things to which an Act or provisions of an Act apply

* exempting persons or things from the application of the Act or provisions of the Act

* determining classifications, salaries and conditions applicable to persons in the public service or other government employment

* enabling or facilitating the implementation of the Act or provisions of the Act

* prohibiting or restricting conduct or activities specified

12 Criticism of Overlap. In 1980 the Subordinate Legislation Committee (now constituted as a sub-committee of the Legal and Constitutional Committee under the Parliamentary Committees Act 1968) drew the attention of Parliament to the unsystematic nature and use of subordinate legislation and the overlap between types. In its Final Report Upon a General

Inquiry into Subordinate Legislation (Consolidation and Review) that Committee said :

> *One matter which has exercised the Committee's mind over a number of years is the need for clarification of terms to provide a more recognisable and singular classification of delegated legislation. An examination of the provisions of various Acts to make subordinate legislation indicates the following diversity of types of instruments of delegated legislation presently in existence: -*

Act	*Instrument of Delegated Legislation*
Cancer Act 1958	*Regulations, Orders*
Explosives Act 1960	*Regulations, By-laws*
Marine Act 1958	*Regulations, Rules*
Marketing of Primary Products Act 1958	*Regulations, Proclamations, Orders*
Supreme Court Act 1958	*Regulations, Orders, Rules*

> *No standard guidelines are available as to the matters which should be contained in each of the instruments and it appears to be merely an historical selection of a title based on the terminology of the relevant Act.*

12.1 Butera comments that there appears to be "no difference between the provisions empowering the Governor in Council to make subordinate legislation by notices and those providing for orders in council to be used". (At pp. 25-26.) Further, in other cases the Governor in Council "is not involved or required to give any approval" and the Minister or authority has complete discretion as to the exercise of the power. Subordinate legislation effected in this way may relate to less important matters than subordinate legislation effected by previously noted methods - however again, the picture is unclear, and there are no firmly established standards or criteria governing the use of

this type of subordinate legislation in contradistinction to other types of subordinate legislation. That this is so has far reaching implications for oversight and control of regulation making. (See further "The Current Debate" at p.86; also Part II, "The Provisions of the Bill" at p.239 ff.)

THE GROWTH OF DELEGATED LEGISLATION

An Historical Perspective

13 The New Despotism? Are problems arising in the subordinate legislation field of recent origin, or do they derive from years past? In 1929 the then Lord Chief Justice of England, Hewart, wrote The New Despotism. The book deplored what Hewart saw as the unprecedented disposition of power flowing from Parliament to government departments by way of delegation of legislative authority to them. In his view this delegation was a new phenomenon, unseen in previous times. He wrote :

> *A little enquiry will serve to show that there is now, and for some years past has been a persistent influence at work which, whatever the motives or the intentions that support it may be thought to be, undoubtedly has the effect of placing a large and increasing field of departmental authority and activity beyond the reach of the ordinary law. Whether this influence ought to be encouraged, or whether it ought rather to be checked and limited, are questions into which, for the moment, it is not necessary to enter. But it does at least seem desirable that the influence itself should be clearly discerned, that its essential nature and tendency should be quite plainly exhibited, and that its various methods and manifestations should not be allowed to continue and multiply under a cloak of obscurity. The citizens of a State may indeed believe or boast that, at a given moment, they enjoy, or at any rate possess, a system of representative institutions, and that the ordinary law of the land, interpreted and administered by the regular Courts, is comprehensive enough and strong enough for all its proper purposes. But their belief will stand in need of revision if, in truth and in fact, an organised and diligent minority, equipped with convenient drafts, and employing after a fashion part of the machinery of representative institutions, is steadily increasing the range and the power of departmental authority and withdrawing its operations more and more from the jurisdiction of the Courts.* (At pp. 5-6.)

To Hewart, Ministers fell into the categories of despot or puppet. If despots, they possessed powers enabling them to rule without reference to the "rule of law"; if puppets, their bureaucratic masters had these powers.

13.1 Hewart argued that puppet or despot would achieve this purpose by :

* getting legislation passed in skeleton form

* filling up the gaps with his own rules, orders, and regulations

* making it difficult or impossible for Parliament to check the said rules, orders, and regulations

* securing for them the force of statute

* making his own decision final

* arranging that the fact of his decision shall be conclusive proof of its legality

* taking power to modify provisions of statutes

* and preventing and avoiding any sort of appeal to a court of law

He said there existed "... a mass of evidence [that] establishes the fact that there is in existence a persistent and well-contrived system, intended to produce, and in practice producing, a despotic power which at one and the same time places Government departments above the Sovereignty of Parliament and beyond the jurisdiction of the Courts". (At p. 21.)

14 Aftermath of "The New Despotism". The book resulted from a series of criticisms arising in the 1920s and climaxing with Hewart's

pronouncements. Law professors and the press entered the fray, protesting about the "usurpation of Parliamentary power by the bureaucracy", or the "too ready relinquishing" by Parliament of its powers and responsibilities to "faceless bureaucrats" having no accountability to the public. There was also the suggestion that administrative law was somehow "un-English", an unwelcome intrusion from the Continent. (See for example Allen, Bureaucracy Triumphant, 1931.)

14.1 Yet the views in The New Despotism were challenged by history and by contemporary writers. As far back as 1901 Ilbert considered delegated legislation to be an area of legal and administrative importance "as yet imperfectly explored" (Legislative Methods and Forms, London). Legislation by delegation was then by no means new. Later, in 1921 Carr's important work, Delegated Legislation, fully discussed the development of this method of government in Britain.

14.2 In Parliamentary Powers of English Government Departments, published in 1933, Willis challenged directly Hewart's proposition. Tracing the history of delegating Acts from the Statute of Proclamations passed in 1539 under the reign of King Henry VII up to the early 1930s, Willis pointed out "how respectable is their antiquity". His argument was that far from Parliament loosening its control over the legislative process, in the twentieth century Parliamentary surveillance had increased. He said :

> *When Lord Hewart speaks of the encroachments of the executive ... or appeals to the public to see that control of Parliament is reasserted [one might ask] What control? Twenty years ago Parliament never did more than discuss the general principle of a bill; today it laboriously goes through the clauses one by one, and when the bill has become law bombards the Minister with intimate questions about its operations. And there is no evidence that members were then less careless about the orders lying on the table. Nor is it safe to assume that there were then no grants of arbitrary*

power; for the nineteenth century Statute Book reveals that any prostitute near a military camp who refused to submit to a physical examination might be imprisoned, and that when the Board of Trade had reason to believe that any British ship was unfit to proceed to sea the Board might without more ado detain the ship for a survey."

(At p.20, citing the Contagious Diseases Act 1866, 29 & 30 Vict., c. 35, s. 28 and the Merchant Shipping Act 1873, 36 & 37 Vict., c. 85, s. 12. For a general historical review of delegated legislation see Report of the Committee on Ministers Powers, Cmnd 4060, 1932, London and Hewitt, The Control of Delegated Legislation, 1953 at chapter 1, "Origin and Development", pp. 13-29.)

14.3 As a direct consequence of the debate the Committee on Ministers Powers had been appointed by the British Government to review the use of delegated powers by government departments. Its terms of reference were "to consider the powers exercised by ... Ministers of the Crown by way of ... delegated legislation ... and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the Supremacy of the Law".

14.4 The Committee reported in 1932. It unearthed a statute of 1385 which it claimed as the earliest example of delegated power to legislate. And contrary to those denouncing the use of delegated legislation the Report revealed no general abuse of power. Rather, the Committee on Ministers Powers saw the practice of delegation as having "definite advantages, provided that the statutory powers are exercised and the statutory functions performed in the right way" : Cmnd 4060, at p. 4. But the Committee concluded that the question of advantage or disadvantage tended to miss the point, for :

... in truth whether good or bad, the development of the practice is inevitable. It is a natural reflection in the sphere of constitutional law, of changes in our ideas of government which have resulted from changes in political, social and economic ideas, and of changes in

the circumstances of our lives which have resulted from scientific discoveries. (At p. 5.)

14.5 Criticisms of delegated legislation, wrote the Ministers Powers Committee, are not to be ignored, but must be dealt with in a reasonable way, rather than by hyperbole :

> *Their true bearing is rather that there are dangers in the practice; that it is liable to abuse, and that safeguards are required. The problem which the critics raise is essentially one of devising the best safeguards.* (At p. 54.)

In the upshot, the Report recommended that all rules and regulations should be required by law to be published, and that a standing committee should be established by each House of Parliament "for the purpose of considering and reporting ... on every regulation and rule made in the exercise of delegated legislative power, and laid before the House in pursuance of statutory requirement". (At pp. 67-68.)

The Australian Experience

15 Origins of Delegated Legislation. In Australia, the pros and cons of "government by delegation" have similarly been canvassed. Pearce confirms that any suggestion that such a process of government has suddenly come upon us is erroneous. In Delegated Legislation in Australia and New Zealand, the leading Australian text, he notes that since Governors Phillip and Hobson "first read the delegated legislation proclaiming the respective establishment of the colonies that were to become Australia and New Zealand, legislation made by delegates of parliaments has governed the lives of members of the public in those countries".

15.1 Alford reviews early regulations introduced to affect the flow of convicts and assisted immigrants to the colonies. When assisted immigration

was first introduced, preference was given to unmarried women between the ages of fifteen and thirty years and members of working-class families. Alford comments :

> *Although the regulations governing assisted immigration to Australia were subsequently modified, the emphasis on assisting young unmarried female immigrants in at least equal proportions to unmarried male immigrants remained constant throughout the period.*

(Production or Reproduction? An Economic History of Women in Australia, 1788-1850, 1984, Melbourne, at p. 99.)

The private bounty system of immigration was introduced by way of regulations, to operate in conjunction with the government system. Bounties were paid to individuals and companies :

> *... proportionate to the number of eligible Emigrants whom they may introduce into the Colony from this Country, the Candidates for such Bounties being entrusted with the selection of the Emigrants and with whatever relates to the management of the voyage. Under the Government system on the other hand, the Emigrants have been selected and the ships engaged and dispatched by Government Officers in this County, acting under the Officer styled the Agent General for Emigration.*

(Land and Emigration Commissioners, enclosure in Russell to Gipps, 7 October 1840, quoted Alford, Production or Reproduction?, 1984, Melbourne, at p.99.)

15.2 Regulations dealt with the master-servant relationship, and with parcelling out of land. In 1818 Governor Macquarie issued a proclamation conferring jurisdiction in wage disputes upon magistrates. This applied to all classes of labour - convict and free, male and female and included provision for back payment of wages up to 10 pounds Sterling in cash or kind. Breaches of

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"acceptable conduct" included "any misdemeanour, miscarriage, or ill behaviour in such his or her Service or Employment". Authorities acknowledged that the master was placed in a most advantageous position as a result. (See Alford, Production or Reproduction?, at pp. 216-217.) On the matter of land, Alford reports that regulations governing free immigration to the colony of New South Wales published by the Colonial Office in 1818 "included the provision that no land grants were given to women". She comments :

> *Consistent with this was Governor Macquarie's subsequent refusal to grant land to women. Replying to one unmarried woman applicant, Miss Eliza Walsh, Macquarie asserted : 'I cannot comply with your request, it being contrary to the Regulations to give Grants of Land to Ladies. ... When pressed on the matter of government policy on land grants to women, Governor Macquarie acknowledged that he had not received any instructions at all, but had determined the policy himself, on the basis that women were 'incapable of cultivating land'.* (At p. 194.)

15.3 Whilst recognising that dangers exist in delegating legislative power and that these should be acknowledged, Pearce nonetheless refutes the argument of critics of delegated legislation that parliament should never delegate its powers, saying :

> *[Their] arguments ... proceed from basic assumptions as to the relative positions of the parliament and the executive in our form of government and as to the body that should be charged with the duty of producing legislation. Assuming for the moment that it is correct to say that, in our constitutional arrangements, the parliament is supreme, the fact that the parliament chooses to delegate part of its function to the executive does not mean that the parliament ceases to be supreme. The exercise of the power can be checked and, if it is being misused, it can be withdrawn. It must be stressed that legislative power can only be acquired if the parliament so provides. In any case, it is at least arguable that the parliament and*

the executive each have a role to play within the constitutional framework and neither is superior to the other.

(At p. 4; see also Griffith, "The Constitutional Significance of Delegated Legislation in England" (1950) 48 Michigan Law Review 1079.)

15.4 On the contention that legislation should not emanate from the executive, Pearce comments that this "simply flies in the face of history ... the executive has always produced legislation". He continues :

In practical terms also, it would be impossible for the parliament to attempt to become the sole source of legislation ... It is suggested, therefore, that criticism of delegated legislation directed to its abandonment is invalid both in constitutional theory and from the viewpoint of sheer practicality. (At p. 6.)

16 Developing Controls. Nonetheless, the English debate of the 1920s and 1930s was reflected in Australia, and some jurisdictions were prompted to look more closely than had previously been the case at powers of delegation; at parliamentary processes of delegation; and at the need for proper and adequate policing of the devolution of legislative powers onto government departments, statutory authorities and other bodies. Thus in 1932 by standing order the Senate Standing Committee on Regulations and Ordinances was established to scrutinise regulations passed under Commonwealth laws, ordinances of the Territories, rules and by-laws arising under Commonwealth Acts. Criteria adopted by that Committee were to ensure that any such delegated legislation :

(a) is in accordance with the relevant statute under which it is made;

(b) does not trespass unduly on personal rights and liberties;

(c) does not unduly make the rights and liberties of citizens

dependent upon administative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

(d) does not contain matter more appropriate for Parliamentary enactment.

Similar bodies, though comprising Members of both Houses, were established in 1937 in South Australia by way of joint standing order of the Houses, and in Victoria by the Subordinate Legislation Committee Act 1956. (See further "Parliamentary Committee Control", at pp.56; also Evans, "Interparliamentary Committee Contacts : Backbenchers of the World Unite?", paper presented to the Australasian Study of Parliament Group, Brisbane, May 1984.)

16.1 Some fifty years later at the first Commonwealth Conference of Delegated Legislation Committees, held in Canberra and comprising delegates from all Australian States, the Australian Government, Canada and two Provinces (Ontario and Saskatchewan), Ghana, India, Papua New Guinea, the United Kingdom, and Zambia, it was agreed that the delegation of the power to legislate is "essential and indeed desirable in the modern state". The Conference report concluded that it is "no longer seriously advanced, as it was by some authorities in the past, that the delegation of the power to legislate to the executive government is to be avoided and restricted". Delegates endorsed the views expressed in the Fourth Report (Statutory Instruments No.10) of the Joint Committee on Regulations and Other Statutory Instruments of the Canadian Parliament, when that Committee stated :

> *Subordinate legislation is an historically accepted means of governance. There is no longer any point in arguing that it is fundamentally improper or that it should be used only occasionally or for mere matters of detail. What is essential is to surround the making of subordinate legislation with procedural safeguards and measures of control so that the rights and liberties of the subject, which is the object of our constitutional order to protect while*

maintaining a viable system of government, may be secured as well under subordinate legislation as under statute. Subordinate legislation must not become a means, even unwittingly, of suppressing rights and liberties or of subverting parliamentary supremacy over the law. The Crown's power has never stood higher, the potential for its abuse has never been greater.

(Senate Standing Committee on Regulations and Ordinances, Vol I, Report of the Conference, 1981 AGPS, Canberra, at p.4.)

Rationale for Delegation of Legislative Power

17 Legitimate and Desirable Delegation. In 1947 Jaffe outlined the rationale underlying the delegation of legislative power. He wrote :

Power should be delegated where there is agreement that a task must be performed and it cannot be effectively performed by the legislature without the assistance of a delegate or without an expenditure of time so great as to lead to the neglect of equally important business.

(Jaffe, "An Essay on Delegation of Legislative Power" (1947) 47 Columbia Law Review 361.)

17.1 In The Control of Delegated Legislation Hewitt points out that urgency was given as the reason for the passage of the 1539 Statute of Proclamations, and this is one of the most frequently cited bases for delegating sometimes extensive powers in modern times. Emergency situations such as war mean that it is not possible to expend the time legislation would otherwise take in going through the Parliamentary process. In outlining his rationale for delegation, he expanded Jaffe's statement to include :

* emergency situations such as war, epidemics, or strikes

* lack of time for Parliament to deal adequately with all aspects dealt with by delegated powers

* limitation of knowledge of Parliament, including

  - technical knowledge : specialised provisions may be necessarily laid down by experts who are not Members of Parliament, but are better equipped to appreciate factors relevant to particular operations

  - familiarity with local conditions : as in the case of local council by-laws and planning provisions relevant to a relatively small locality, or not affecting the entire geographical jurisdiction of a particular parliament

  - unknown future conditions : where subordinate legislation may be necessary to regulate the flow of traffic or relieve congestion and modify regulations dealing with traffic flow as the need arises

* "political feeling" - as where an Act has been passed by a majority, but with considerable argument from the party or parties in opposition - this may mean that if it is necessary to return to Parliament every time administrative steps are required to be taken to put into effect the policies contained in the principal Act, "all the fires of controversy" may be relit; all the "arguments attending the original debate" may surface once more, thus making administration on judicial and uniform lines impossible

* experimentation - slow Parliamentary methods may inhibit legitimate experimentation and innovation, to the detriment of the community Parliament is designed to serve

Hewitt cautions, however, that necessary safeguards provided by Parliament against abuse of delegated power should be maintained. (The Control of

Delegated Legislation, at p. 7; also Stamp "Recent Tendencies Towards the Devolution of Legislative Functions to the Administration" (1924) Journal of Public Administration 26.)

17.2 Pearce makes reference to four circumstances in which delegation of powers "can be considered both legitimate and desirable" but similarly adds the rider - as long as adequate safeguards exist. His nominated four circumstances are :

* to save pressure on parliamentary time

* legislation too technical or detailed to be suitable for Parliamentary consideration

* legislation to deal with rapidly changing or uncertain situations

* legislative action in cases of emergency

17.3 He expands upon these circumstances, pointing out that less time is given over by Australian Parliaments for sitting; this deprives governments of time for passing essential legislation and Opposition Parties of "opportunities to demonstrate the deficiencies of governments". He continues :

> *The upshot of this is that parliaments become places where only broad policy issues can be considered. Debate on such issues is, in any case, that which Parliament is best equipped to carry on. It is also that which most readily and profitably attracts public attention. The details of administration fit ill in this scheme of things and hence are better left to delegated legislation. The decision whether there should be legislation on a topic is something of concern to the community at large. The arguments in favour and against must be publicly stated. But once the decision to legislate is*

taken, the details can be worked out by the executive - within limits specified in the empowering Act. (At p. 5.)

17.4 As for technicality and detail, parliaments "have neither the time nor the expertise to consider such matters". Pearce acknowledges that the onus is on Parliament to determine whether particular legislation is warranted, but "detail is best included in delegated legislation" once that determination is made. (Citing the Weights and Measures (National Standards) Regulations 1968 (Cth) and regulations relating to fire-drills, construction of water-tight holds, life-saving appliances and the like consequent upon the ratification of the 1967 U.N. Convention on Safety of Life at Sea : at pp. 5-6.)

17.5 Pearce gives the example of new drugs coming on to the market as an instance where delegation of powers is necessary to keep abreast of fluctuating circumstances which cannot readily be dealt with through Parliamentary processes. Any lists of prohibited drugs or drugs to be supplied on prescription only should not be rigid; new discoveries, reclassification, changing standards for drug analysis and control should be capable of relatively rapid follow-up. (At p. 6.) Regulations dealing with consumer protection and passed under the Trade Practices Act 1974 (Cth) would be another example of acceptable use of the subordinate legislative power. (See Bowne, "Consumer Act's Powers Are Wasted - Uniform Legislation Is Unnecessary When Problems Can Be Solved Within The Act" (1984) Business Review Weekly (12-18 May) 67.)

17.6 In times of emergency it is not always feasible to recall Parliament. The good of the community sometimes depends upon the ability of a government to act swiftly despite the fact that Parliament is not sitting. Broad outlines of legislation should be decided upon by Parliament in advance of conceivable emergency situations, but such legislation "should not detail what steps may be taken as they may not be adequate for the particular emergency". (At p. 6.) A good example of this need was outlined to the Committee in evidence by representatives of the Department of Agriculture in relation to

emergency regulations covering the sudden outbreak of foot and mouth disease amongst livestock, or fruit fly in orchard areas. (See Transcript 26 June 1984, at p.376.)

18 Necessary Control Mechanisms. At the same time Pearce, like Hewitt, the 1980 Commonwealth Conference of Delegated Legislation Committees and others, emphasises that in a democratic society the proper and relevant use of delegated powers should be maintained by the existence and operation of mechanisms adequate to ensure that abuses do not occur. He concludes that while it "has to be conceded that delegated legislation will always be with us, steps must be taken to ensure that executive convenience and paternalism does not lead to the making of legislation that is undesirable". Those steps involve the operation of parliamentary responsibility, ministerial responsibility, judicial review, and administrative review.

CONTROL OF DELEGATED LEGISLATION

Parliamentary Responsibility

19 Overriding Control. Parliament has ultimate control over delegated legislation. This control may be exercised by revoking, in an Act passed subsequent to the enabling Act, the power conferred upon the body making the delegated legislation; alternatively it may be exercised by passing a subsequent Act or amendment to vary the delegated power.

20 Interpretation and Parliament's Intention. The Interpretation of Legislation Act 1984 governs the exercise of delegated power in that it stipulates the way in which subordinate instruments should be interpreted. For example, section 22 provides that subordinate instruments are to be construed subject to the empowering Act:

> *(1) Every subordinate instrument shall be construed as operating to the full extent of, but so as not to exceed -*
>
> *(a) the legislative power of the State of Victoria; or*
>
> *(b) the power to make the subordinate instrument conferred by the Act under or pursuant to which it is made -*
>
> *to the intent that where a provision of a subordinate instrument, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid provision to the extent to which it is not in excess of that power and the remainder of the subordinate instrument and the application of that provision to other persons, subject-matters or circumstances shall not be affected.*
>
> *(2) The provisions of this section are in addition to, and not*

in derogation of, any provision of a subordinate instrument or of the Act under or pursuant to which a subordinate instrument is made relating to the construction, or extent of the operation, of that subordinate instrument.

Section 23 states that where an Act confers power to make a subordinate instrument, expressions used in such instrument shall, unless the contrary intention appears, have the same meanings as in the Act conferring power. As with Acts, subordinate instruments are to be interpreted by courts in accordance with section 35 of the Interpretation of Legislation Act, which provides :

In the interpretation of a provision of an Act or subordinate instrument -

(a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; and

(b) consideration may be given to any matter or document that is relevant including but not limited to -

(i) all indications provided by the Act or subordinate instrument as printed by authority, including punctuation;

(ii) reports of proceedings in any House of the Parliament;

(iii) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament; and

(iv) *reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry or other similar bodies.*

(See Legal and Constitutional Committee, Report on the Interpretation Bill 1982, 1983, Government Printer, Melbourne; Scutt, "Judicial Recourse to Extrinsic Materials : The Report of the Victorian Parliamentary Legal and Constitutional Committee" (1984) 58 (No. 4) Law Institute Journal 387; Scutt, Interpretation of Legislation : Victorian Parliamentary Legal and Constitutional Committee Report" (1984) 19 (No. 3) Australian Law News 26; Corns, "Purposeful Construction of Legislation and Judicial Autonomy" (1983) 58 (No. 4) Law Institute Journal 391; also Acts Interpretation (Amendment) Act 1984 (Cth), s.7 - new s.15AB covering interpretation of federal legislation by recourse to extrinsic aids; Federal Attorney-General's Department, "Use of Extrinsic Aids in the Interpretation of Federal Legislation" (1984) 19 (No. 5) Australian Law News 38.)

21 Enabling Clauses. Parliament has a further means of controlling delegated legislation, namely in its scrutiny of those clauses coming before it in Bills which confer power to make delegated legislation upon a particular government department, minister, statutory body or other authority. An enabling clause may be framed in very broad, general terms, or may be explicit as to the nature of the power conferred and the matter or matters upon which the relevant body is empowered to make regulations, proclamations, by-laws or other subordinate legislation; alternatively, it may combine the general with the explicit. In at least some cases, it is difficult to understand why enabling provisions are drafted to combine the two.

21.1 For example, the regulation making power conferred under the Drugs, Poisons and Controlled Substances Act 1981 is framed in broad general terms, and at the same time refers to specific uses of the power. Matters upon which regulations may be made are outlined in specific terms. The very

comprehensiveness of the regulation making power raises questions as to why it should be considered necessary to preserve also a general power. Section 129 in Part XI of that Act provides:

> ***s.129(1)*** *For the purpose of preventing the improper use of drugs of dependence and drugs of addiction and restricted substances or any preparation of them or any of them the Governor in Council may make regulations for or with respect to regulating or controlling the manufacture sale possession administration use supply distribution and storage of those substances and preparations and in particular, without affecting the generality of the foregoing provisions of this section or of any other provisions of this Act, for or with respect to -*
>
> *(a) regulating the issue by medical practitioners dentists or veterinary surgeons of prescriptions for any such substance or preparation and the dispensing of any such prescriptions;*
>
> *(aa) prohibiting either absolutely or subject to conditions the issue by medical practitioners, veterinary surgeons and dentists of prescriptions or orders or classes of prescriptions or orders for any such substance or preparation;*
>
> *(ab) prohibiting either absolutely or subject to conditions or in any specified circumstances or classes of circumstances the prescription, sale, supply, dispensing or administration of any such substance or preparation;*
>
> *(b) requiring persons engaged in the manufacture sale supply dispensing, administration, prescription and distribution of any such substance or preparation to keep books and records and furnish information in writing or otherwise;*

(c) *the custody accumulation administration use supply and storage of any such substance or preparation;*

(ca) *prohibiting either absolutely or subject to conditions or in any specified circumstances or classes of circumstances the prescription, sale, supply, dispensing or administration of any such substance or preparation;*

(d) *regulating the transfer or conveyance of any such substance or preparation;*

(e) *regulating the supply of any such substance or preparation to drug-dependent persons;*

(f) *regulating and controlling advertising by any person in relation to any such substances or preparations or any of them and prescribing the form and contents of such advertisements;*

(g) *generally prescribing all such matters and things as are necessary or convenient to be prescribed for carrying this Act into effect; and*

(h) *prescribing a penalty of not more than 100 penalty units for any contravention of or failure to comply with the regulations made under this section.*

21.2 After having stated in the preamble to section 129(1) that the Governor in Council may make regulations dealing with the regulation or control of manufacture, sale and so on, of substances and preparations, the paragraphs list exhaustively every apparently conceivable circumstance where such regulation or control might be required. The preamble also states that the generality of the regulation-making power shall not thereby be limited - then in effect restates this in paragraph (g).

21.3 Section 130 again reiterates the litany of "not limiting the generality" of the power conferred by section 129. Yet the section then goes on to specify matters which seem unlikely to limit the provisions of that section.

21.4 ***s.130.*** *The provisions of section 129 with respect to the making of regulations shall (without prejudice to the generality of the powers conferred by the said section) extend and apply to the making of regulations for or with respect to providing that any specified breach of the regulations made under the said section shall be regarded -*

(a) as infamous conduct in a professional respect within the meaning and for the purpose of any Act; or

(b) as conduct discreditable to a pharmacist within the meaning and for the purposes of section eighteen of the Pharmacists Act 1974; or

(c) as immoral conduct in connexion with the conduct of dental practice within the meaning and for the purposes of the Dentists Act 1972.

21.5 Section 131 makes no statement about "not limiting the generality" of the Governor in Council to make regulations, yet it is difficult to understand why such distinction should be made. Then, section 131(1)(a) inserts the "not limiting the generality" clause so that it applies only to the circumstances outlined in (a).

21.6 ***s.131.*** *For the purpose of protecting persons engaged in the manufacture sale use or distribution of special poisons or for the protection of the public from special poisons the Governor in Council may make regulations for or with respect to -*

(a) *prohibiting the possession manufacture sale supply distribution or use of any special poisons either absolutely or except under such circumstances or conditions as may be prescribed (including, without limiting the generality of the foregoing, prohibiting a person from having in his possession, manufacturing, selling, distributing or using any special poison or class of special poisons unless he is authorized by or licensed or permitted under this Act or the regulations so to do);*

(b) *prescribing any special poison to be an hallucinogenic drug for the purposes of Part VI;*

(c) *forms to be used for the purposes of section 20 of this Act;*

(d) *the issue, renewal, suspension and revocation of warrants and permits under section 20 applications for warrants and permits and the conditions to which the warrants and permits are to be subject;*

(e) *prescribing penalties not exceeding 100 penalty units for breach of any condition, limitation or restriction to which a warrant or permit under section 20 of this Act is subject;*

(f) *prescribing precautions to be taken in and regulating or controlling the manufacture storage use or handling of any such special poisons; and*

(g) *prescribing penalties not exceeding 100 penalty units for breaches of the regulations.*

21.7 This is not an end to the enabling clauses. The Act goes on further

to provide :

s.132. *The Governor in Council may make regulations for or with respect to -*

(a) *prescribing forms to be used for the purposes of this Act;*

(b) *the colouring of any poison or controlled substance;*

(c) *the sale supply and safe custody of poisons or controlled substances including the specifications of cupboards and other receptacles and the manner of storage of any poison or controlled substance;*

(d) *prohibiting the sale or supply of any product (whether by wholesale or by retail) or any class of products containing any poison or controlled substances unless the product or class of products is packaged in accordance with regulations made under this section and contains no more than a specified concentration of any specified poison or controlled substance;*

(e) *the minimum size of packages or containers in which poisons or controlled substances or any class of poisons or controlled substances may be sold or supplied or offered for sale or supply;*

(f) *specifying the containers in which any poison or controlled substance may be sold or supplied and prohibiting the use of such containers for other substances;*

Paragraphs (g), (h) and (i) repealed by section 13(3)(a) of the Drugs, Poisons and Controlled Substances (Amendment) Act 1983.]

(j) *prohibiting and controlling advertising by any person in relation to potent substances or any class of potent substances and prescribing the form and contents of such advertisements;*

(k) *providing for the dispensing of prescriptions for poisons or controlled substances issued by medical practitioners, dentists or veterinary surgeons in other States;*

(l) *labelling and specifying the particulars (including antidotes) to be included in labels attached to containers of poisons and controlled substances;*

(m) *application for and the issue renewal cancellation and suspension of licences permits and authorities issued under this Act;*

(n) *prescribing conditions limitations and restrictions to which licences warrants and permits issued under this Act shall be subject;*

(o) *prescribing fees (not exceeding the maximum fees fixed by Part II.) to be paid for the issue or renewal of licences and permits under this Act and prescribing proportionate fees where a licence or permit is granted during the currency of a year;*

(p) *the inspection of premises stocks books and any other documents relating to poisons or controlled substances;*

(q) *exempting from all or any of the provisions of this Act and the regulations substances or preparations containing any poison or controlled substance which by their nature are not capable of being used in evasion of this Act and the regulations or which are sold or supplied by a*

pharmacist or according to the prescription of a medical practitioner veterinary surgeon or dentist for any individual and specific case;

(r) particulars to be recorded in the Sale of Poisons Book and the procedure to be followed in relation to the sale or supply and recording of poisons or controlled substances;

(s) precautions to be observed in connexion with the sale or supply of poisons or controlled substances ordered by letter telegram cable radiogram or telex;

(t) specifying the persons or classes of persons authorized or entitled to purchase obtain use or be in possession of any poison or controlled substance;

(u) providing that all persons are authorized or entitled to purchase or obtain or have in their possession or use specified poisons or controlled substances or specified classes of poisons or controlled substances;

(v) providing for the disposal of automatic machines forfeited pursuant to the provisions of this Act;

(w) prohibiting the sale or supply of any poison or controlled substance by self-service methods other than any methods prescribed;

(x) prescribing a penalty of not more than 100 penalty units for any contravention of or failure to comply with the regulations;

(y) the administration and use of potent substances or any class of potent substance;

(z) regulating and controlling the issue by medical practitioners, dentists or veterinary surgeons of prescriptions for any potent substance and the dispensing of any such prescriptions;

(za) regulating and controlling the sale or supply by pharmacists of potent substances to persons without direction from a medical practitioner, veterinary surgeon or dentist;

(zb) prescribing the manner in which potent substances may be dispensed by pharmacists and the keeping of records of each transaction effected by a pharmacist;

(zc) regulating and controlling the dispensing and sale or supply of restricted substances by pharmacists without a prescription from a medical practitioner, dentist or veterinary surgeon in emergency circumstances to the extent that the quantity of any restricted substance so dispensed sold or supplied does not exceed three days medication or, where a restricted substance is or is contained in a pre-packed pharmaceutical preparation, the minimum standard package containing the preparation;

(zd) generally prescribing all such matters and things as are authorized or required to be prescribed or are necessary or convenient to be prescribed for carrying into effect the objects of this Act.

133. *Forms set out in any regulation made under this Act or forms to the like effect may be used for the purposes thereof and shall be sufficient in law.*

21.8 Again section 132 makes no overriding "not limiting the generality of" statement. Then, following a lengthy list of matters in relation to which regulations may be made, it provides in paragraph (zd) that regulations may be made "generally prescribing all such matters and things as are authorised or required ... or necesssary or convenient ..." for the carrying into effect of the objects of the Act.

21.9 Superfluity arises once more in that section 132(a) states that regulations may be made prescribing forms to be used for the purposes of the Act, whilst s.131(c) provides for regulations to be promulgated in relation to section 20 of the Act.

21.10 The drafting of the enabling provisions in this way tends to obfuscate, for those charged with the duty of drawing up regulations, the matters which are to be the subject of subordinate legislation. Regulation makers are faced with a morass of instructions with no clear indication of what the Parliament really wants. Owing to the verbosity of the enabling clauses readers and, most importantly, the regulators themselves are confronted with a situation which itself engenders confusion in an area which most particularly requires clarity.

21.11 Many of the matters could have been dealt with more briefly; some require no specific reference. Of course, the form of the provisions may be the result of representations from different interest groups, without proper co-ordination. This may lead to abuse and the frustration of the Parliament's intention.

21.12 Commenting on parliamentary control over empowering clauses, Pearce states :

The form of the empowering provision must be such that it does not

allow the making of whatever legislation on a matter seems appropriate to the delegate. Frequently, an Act of Parliament does little more than determine that controls over particular conduct should be exercised. No attempt is made to indicate what those controls should be. In some circumstances this is inevitable ... However, this situation is to be avoided if at all possible and empowering provisions should indicate with precision the matters on which delegated legislation can be made. Not only is this desirable from the point of view that there should be constraints on the power of the executive to make legislation, but also it is only where a defined legislative power is given that the courts can view legislative action by a delegate. (Delegated Legislation, at p. 9.)

21.13 Where delegated legislation exceeds the powers granted by the Act under which it is purported to be made, that legislation will be invalid. But as Pearce points out, the wider the grant of power, "the more limited is the courts' power of review" :

If the courts cannot review delegated legislation, there is one less check on the abuse of delegated power. Following on from this, the adoption of provisions which prevent the courts reviewing delegated legislation should be avoided. There is no good reason why the executive should be empowered to make regulations within specified limits and not have the question whether those limits have been exceeded available for testing. (At pp. 9-10.)

21.14 This issue was alluded to by the Subordinate Legislation Committee in its Final Report Upon a General Inquiry into Subordinate Legislation (Consolidation and Review). It said :

It is obvious to the Committee that departments are seeking legislation which contains a general regulation making power rather than setting out matters which are to be dealt with by subordinate

legislation. In these cases the Bill is drafted to lay down particular principles but reliance is placed on the contents of statutory rules for day to day administration and implementation of policy. Matters on which subordinate legislation may be made should be set out in precise and not general terms. If Parliament is to delegate powers such delegation should be beyond doubt and clearly limited.

21.15 That Committee went on to indicate problems of review of delegated legislation coming before it for consideration, saying :

> *... there is an increasing volume of statutory rules. The Committee believes that proper detail of the items under which subordinate legislation may be made would obviate unnecessary amendments and certainly lessen the volume of statutory rules. Too frequently the Committee has had to seek amending regulations to clarify intent and, in some instances, has found it necessary to advise departments that legislation is necessary to allow for the making of certain statutory rules.*
>
> *It is not the role of the Committee to examine regulation making clauses in Bills prior to submission to Parliament but it points out the inherent problems if this examination is not carried out during initial drafting."* (At pp. 6-7.)

(See also House of Commons, Third Report of the Special Committee on Statutory Instruments, Session 1968-1969, 1969, Ottawa.)

22 Parliamentary Control Generally. The problem facing Parliament in its role as overseer of delegated legislation both in relation to enabling clauses and generally, is the burden of work placed upon that body. Also Members of Parliament do not necessarily possess the requisite expertise to ensure that oversight is effective.

22.1 Referring to the Australian Parliament, but commenting generally upon the parliamentary process in Australia, Reid has said that the "relative decline in the significance of Parliament has been evident for many years". Reasons for this are the lack of persons concerned about the role of Parliament in a democracy; the division of Parliament into two "nominally powerful, and often conflicting" Houses, each accommodating competing factions - "each of which is usually divided between leaders and led"; furthermore, the official secretariat of Parliament is "fragmented into even more parts than the Parliament itself"; and, "following the Westminster style of government, both Houses grant important priorities in debate and decision making to Executive Ministers of State". In his view, the outcome has been that the lower House "has become the captive of the Executive Government of the day and is now a sadly repressed and debilitated Parliamentary Chamber." ("The Changing Political Framework" in The Political Process : Can it Cope? 1978, Sydney; see also Reid, "The Parliamentary Contribution to Law Making" (1980) 15 (1) Politics 40.)

22.2 These factors make it difficult for Parliament to adequately review all legislation coming before it. Rarely does a Bill appear in Parliament which does not come from the executive; as ultimately, Bills will (in the majority of cases) be passed on party lines, opportunities for review are reduced. In Victoria, in 1982 a total of 173 Bills were introduced and 141 passed into law; in 1983, the total passed was 166. It is therefore difficult to be assured that Parliament as a whole can be more diligent in scrutinising legislation, even limiting itself to enabling clauses which in effect take legislative powers out of its hands and place them in the hands of the executive.

23 Parliamentary Committee Control. However, the Victorian Parliament has devised procedures which are able to make the role of the Parliament more effective than would otherwise be the case : namely, by way of the previously referred to Subordinate Legislation Committee and the Legal and Constitutional Committee. The role of the Subordinate Legislation Committee upon its establishment by statute in 1956 was outlined as being :

... to consider whether the special attention of Parliament should be drawn to any regulation on the grounds that :

(a) the regulations appear not to be within the regulation-making power conferred by, or not to be in accord with the general objects of the Act pursuant to which they purport to be made;

(b) the form or purport of the regulations calls for elucidation;

(c) the regulations unduly trespass on rights previously established by law;

(d) the regulations unduly make rights dependent upon administrative and not upon judicial decisions; or

(e) the regulations contain matter which, in the opinion of the Committee, should properly be dealt with by an Act of Parliament and not by regulation.

Under the Act the Committee was given the power to recommend disallowance to Parliament, the disallowance to take effect upon resolution of both Houses. Similar Committees and procedures (although in a number of cases disallowance taking effect by resolution of one House only) exist in New South Wales, the Northern Territory, Queensland, South Australia, Tasmania, Western Australia and the Federal Parliament. (See Senate Standing Committee on Regulations and Ordinances, Commonwealth Conference of Delegated Legislation Committees, Vols. I, II and III, 1981 AGPS, Canberra.)

23.1 In 1982 by way of the Parliamentary Committees (Joint Investigatory Committees) Act the Subordinate Legislation Committee was incorporated as a Sub-committee of the Legal and Constitutional Committee, a joint Parliamentary Committee comprising Members from both Houses and

from each of the political parties.

23.2 Parliament has exercised control in providing that the functions of the Legal and Constitutional Committee are, amongst other matters :

> *(b) to consider whether the special attention of Parliament should be drawn to any regulations on the ground that -*
>
> *(i) the regulations appear not to be within the regulation-making power conferred by, or not to be in accord with the general objects of, the Act pursuant to which they purport to be made;*
>
> *(ii) the form or intention of the regulation requires explanation;*
>
> *(iii) the regulations unduly trespass on rights previously established by law;*
>
> *(iv) the regulations unduly make rights dependent upon administrative and not upon judicial decisions; or*
>
> *(v) the regulations contain matter which in the opinion of the Committee should properly be dealt with by Act of Parliament and not by regulations -*
>
> *and to make such reports and recommendations to the Council and the Assembly as it thinks desirable as a result of any such consideration.*

The Parliamentary Committees Act 1968 in section 3(1) defines "regulations " as :

> *(a) any regulation or rules which purport to be made under any*

Act of Parliament and which by such Act or any other Act are required to be laid before both Houses of Parliament; and

(b) *statutory rules within the meaning of the Subordinate Legislation Act 1962* : s . 3(1)

All subordinate legislation does not, therefore, come within the jurisdiction of the Legal and Constitutional Committee, for as previously pointed out, the Subordinate Legislation Act does not necessarily cover all forms of delegated legislation, and not all delegated legislation is required to be laid before both Houses of Parliament. (See generally Butera, Subordinate Legislation in Victoria and pp. 11-27 of this Report. This issue will be dealt with in Part II of this Report, "Provisions of the Bill", "Clause 4 : Declaration of Instrument which is not of a Legislative Character", at p.243 ff.)

24 Summing Up. The role of the Legal and Constitutional Committee is to continue oversight of all statutory rules, and to work on references coming to it from the Attorney-General and/or from the Parliament itself. The Committee acts in an advisory role to Parliament when Parliament refers to it any particular Bill which it considers requires in-depth review and report. Since its establishment, the Committee has dealt with a number of Bills in this way, including the Statute Law Revision Bill 1982; the Statute Law Revision (Repeals) Bill 1982; the Interpretation Bill 1982; the Statute Law Revision Bill 1984; and the Bill which is the subject of this Report, the Subordinate Legislation (Deregulation) Bill 1983. Whether, in order to improve its effectiveness in scrutiny of bills and subordinate legislation the role and powers of the Committee should be expanded and/or changed is a matter of direct importance to the present inquiry into the terms of the Subordinate Legislation (Deregulation) Bill. Indeed, Pearce recommends specifically that the form of empowering clauses is "a matter on which parliamentary committees that review delegated legislation could well act as advisers to the Parliament". This is a matter of concern to the Committee, particularly taking into account the functions of the Committee's Subordinate Legislation Sub-committee. It will be dealt with later in Part I of this Report, in "Enabling Provisions", at p.149 ff.

Ministerial Responsibility

25 Introduction. In the Australian system of elected government, it is generally held that government departments are responsible to their respective ministers; ministers are, ultimately, answerable to Parliament and, through Parliament, to the electorate. Thus, where legislative powers are delegated to ministers and their departments, theoretically the minister has control over the form of legislation that is drafted and put into effect, and the nature of the power thereby exercised. Theoretically, Parliament has control because the minister is answerable to Parliament and, through Parliament, to the people. This system is known as responsible government.

25.1 With statutory bodies and boards, less direct control is exercised by the responsible Minister. However ultimately a particular Minister bears responsibility for such bodies. The degree of control is dependent on the statute establishing the particular authority or other body. (On the issue of control of public bodies and of their regulation-making powers, see "Contemporary Issues", Sunset Provisions, at p. 160; and see generally Public Bodies Review Committee, Audit and Reporting of Public Bodies, 1981, Government Printer, Melbourne.)

26 Origins and Current Concerns. Yet is "ministerial responsibility" ultimately meaningful? Reid traces the development of responsible government and ministerial responsibility in the Australian colonies, concluding that Australia's colonial origins may affect the way the system operates today. ("Responsible Government and Ministerial Responsibility" (1980) 39 (3/4) Australian Journal of Public Administration 301.) Lumb makes a similar point, saying :

> *In the first seventy years of Australian constitutional development the Executive was not subject to parliamentary control. The officers of government were appointed by the Governor and the Secretary of State for the Colonies, and their executive status was*

therefore subordinate to and subject to the jurisdiction of those officials. It is true that ministers invariably held seats in the legislative body as official nominees, but while this made them subject to legislative criticism, it did not make them subject to legislative control.

(The Constitution of the Australian States, 4th ed., 1977, at p. 64.)

Spann looks at the past and draws conclusions for the twentieth century:

> *... Australians got responsible government, and did not receive it unwillingly. But some features of the old system survived. The existing structure of departments was only imperfectly assimilated to the new ministries ... The practice of giving public officials their own statutory powers, common before self-government, continued after it, and it was not an established convention that official heads of departments ... were subject in all matters to a minister. Indeed, in certain respects this has survived until the present day.*

(Government Administration in Australia, Sydney, 1979, at p. 34; and see particularly chapters 2 and 18.)

26.1 That there has been a concern about ministerial responsibility and control of bureaucracy in Australia, both on the Commonwealth level and in relation to state governments and administrations is evidenced by the volume of writing on the subject, and enquiries which have been held into public service bureaucracy, and parliamentary and ministerial control. (See for example the Bland Administrative Review Committee, approx. 12 unpublished reports, 1975-76, Canberra, ACT; Bland Committee of Inquiry into the Victorian Public Service, 1974, Government Printer, Melbourne; Royal Commission on Australian Government Administration, ("the Coombs Commission") 1976, AGPS, Canberra; New South Wales' Government Review of Administration ("the Wilenski Enquiry"); Review of Commonwealth Administration - Report ("the Reid Report") January 1983, AGPS, Canberra, ACT.) One of the reports

commissioned by the Coombs Royal Commission concerned the problems of accountability in a Westminster system with special reference to the concept of ministerial responsibility. Reid describes it as "the most penetrating examination of the notion of ministerial responsibility yet published in Australia". ("Responsibility and Accountability and the Coombs Inquiry" (1976) 35 (4) Australian Journal of Public Administration 320, at p. 322.)

26.2 The Report, written by Professor H.V. Emy of the Department of Politics at Monash University, concluded that ministerial responsibility and its attendant debates lie at the base of the problems of modern government. He said that on the surface, ministerial responsibility "is a doctrine of democratic accountability; inwardly it helps to preserve the values of a pre-democratic society". (Royal Commission on Australian Government Administration : Report, 1976, Canberra, Appendix vol. 1, at p. 32.) In summary, his view was :

* ministerial responsibility, as a system for ensuring accountability of both the executive and administrative arms of government, is defunct

* a new system of managing the administrative arm and ensuring its and the executive's accountability is required

* a new system is to be found in institutionalising a set of measures to be called "accountable management"

Emy says a system of control should be created within the system to ensure that the bureaucracy remains accountable to ministers, and through ministers, to the Parliament and the people. (At pp. 15, 47.)

27 Reliance on Public Servants and Advisers. Where delegated legislation is concerned, the strength of government departmental officers and their practical independence may give rise to a suggestion that control is not exercised sufficiently closely by ministers over its formulation. The growth of

administration may result in insufficient oversight by the responsible minister. In the case of statutory bodies, local authorities and other bodies which exercise delegated legislative power, the possibility of ministerial control will be even less. The degree of ministerial control and supervision is dependent upon the system established within each department for oversight of bureaucratic operations by the minister. In the case of statutory bodies and other instrumentalities, it has been the tradition for ministers to distance themselves on the basis that such bodies exercise their powers and functions with a degree of autonomy not available to government departments. Ultimately, where a minister does exercise control, she or he is to a very great degree dependent upon the advice of public servants.

28 Summing Up. The quality of advice is important, particularly in relation to subordinate legislation. A minister will in many cases have expertise in the particular portfolio area to which he or she is appointed; however this cannot always be counted on. Expertise will be developed, in many cases, "on the job" - however to a large degree this may well be dependent upon the quality of advice emanating from the minister's senior departmental advisers. It is important that ministerial responsibility be fostered by mechanisms which ensure that the quality of advice is set at as high a level as possible. Ministers should be equipped to judge the necessity of introducing subordinate legislation. They should also be assured that administrative officers proposing that power to pass subordinate legislation be exercised have themselves sought the highest degree of expertise available in formulating that proposal. One of the aims of the Subordinate Legislation (Deregulation) Bill is, in the Committee's view, to assist ministers to make decisions as to the need for and the value (or otherwise) of regulations in a particular area coming within the relevant portfolio. It is also designed to ensure that departmental officers advising the minister are equipped, as far as possible, to give the best advice. The efficacy of the Bill in this regard is addressed in Part II of this Report, particularly in Clause 8 - Examination of Proposed Statutory Rules, "Clause 8 : Proposed Section 13 - Examination of Proposed Statutory Rules by Department of Management and Budget" at p.356, ff; Clause 8 : Schedule 1 Guidelines, at p.373 ff; Clause 8 : Schedule 2

Guidelines, at p.381 ff; and "Schedule 3 - Provisions Applying to Regulatory Impact Statements" at p.404.)

Judicial Review

29 Judicial Safeguards Generally. Pearce outlines various safeguards which must be built into the system to ensure that Hewart's "blue print for despotism" does not become a reality. One important means of checking the abuse of delegated power is that of judicial review. Parliament may exclude the possibility of judicial review of delegated legislation, but only in the clearest terms. Courts are reluctant to acknowledge that they do not have jurisdiction. As was stated in William Cook Pty Ltd v Read [1940] V.L.R. 214 :

> *When a subordinate legislative body is given power to make rules limited to particular subject-matters, the ordinary principle is that it must not travel outside the area committed to it, and the protection of the subject against excursions by such body beyond its prescribed area is the power of the Court to declare such excursions ultra vires and null and void. This is very important protection against excessive exercise of power by subordinate bodies. It would require a clearly expressed intention by the Legislature to remove this safeguard against excess of the limited powers committed to such a body. It is an important encroachment upon the ordinary rule of law to make unimpeachable the acts of a subordinate body, even if it has gone beyond the express limits of the authority given to it.* (At 217-218.)

30 Limiting Judicial Review. Various formulae are used to prevent judicial review of the exercise of delegated power, such as the inclusion, in the enabling Act, of a provision stating that rules or regulations "shall be of the same effect as if they were contained in this Act", or that rules made and laid before Parliament and not disallowed will "be of full force and effect and be judicially noticed", or will have "force of law". Another method is to include a "conclusive evidence" clause, such as that contained in the Friendly Societies Act, 1890 which provided :

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> *The Registrar shall on being satisfied that any amendment of a rule is not contrary to the provisions of this Act issue to the society an acknowledgment of registry of the same which shall be conclusive evidence that the same is duly registered.*

The matter came before the High Court and it was held that such a provision does not prevent the court from reviewing the validity of a registered rule. Chief Justice Griffith said :

> *I think the true view is that the acknowledgment of registration is only conclusive that the things which could lawfully be done have been done, and that it cannot have the effect of declaring that a thing which could not be lawfully done has been lawfully done.* (At 1108.)

(See Carroll v Shillinglaw (1906) 3 CLR 1099; also Hewitt, The Control of Delegated Legislation, 1953, Wellington, New Zealand at pp.8-11; Pearce, Delegated Legislation in Australia and New Zealand, 1977 Melbourne, Part III generally and in particular at Chapter 14, p. 92.)

30.1 Pearce comments that it is clear from the cases that courts are reluctant to allow their power to review the validity of delegated legislation to be ousted, however "the courts cannot simply ignore the words of an Act" purporting to provide that the delegated legislation is to have effect as if enacted in the empowering Act. He says that courts "may limit the operation of the words, but some effect must be given to the legislative directive ... It has been conceded by the courts that [the] formula ... that the legislation, after having been made and notified, is to be treated as if it had been enacted in the Act giving power to make it ... markedly limits the basis on which the courts can question the validity of delegated legislation to which it relates - but it is not sufficient to exclude judicial review entirely". (At pp. 271-272. See also Institute of Patent Agents v Lockwood [1894] AC 347, per Herschell LC; also Hewitt, The Control of Delegated Legislation, 1953, at pp. 8-9.)

31 Judicial Test of Validity. As a general matter, the right of a court to determine the validity of delegated legislation is not in question. The test of validity has been laid down as involving five elements:

1 To determine the meaning for the words used in the Act of Parliament itself to describe the subordinate legislation which the Authority is authorised to make.

2 To determine the meaning of the subordinate legislation itself.

3 To decide whether the subordinate legislation complies with that description.

4 To determine the true scope of the measure.

5 In conjunction with the fourth element, to determine the legal effect of the measure.

(See Lord Diplock in McEldowney v Forde [1969] 2 All ER 1039: also Chief Justice Barwick in Esmonds Motors Pty Ltd v The Commonwealth (1970) 120 3 CLR 463; Justice Dixon in Swan Hill Corporation v Bradbury (1937) 56 CLR 746.)

31.1 In Delegated Legislation in Australia and New Zealand Pearce devotes a major part of the work to the judicial review of delegated legislation, outlining the grounds on which delegated legislation may be invalid as being directly related to the following principles :

* formal requirements have to be complied with when making the delegated legislation

* delegated legislation must deal with subjects that are within the scope of the power provided in the empowering Act

* dealing with subjects within the scope of the empowering Act,

the delegated legislation must not exceed the prescribed limits of the power granted by the empowering Act

* delegated legislation must be consistent with the Act under which it is made and should not be inconsistent with another Act or the general law

* delegated legislation must not be repugnant to the Act under which it was made, to another Act, or to the general law

* delegated legislation must be exercised for the purpose set out in the empowering Act and not for another purpose

* delegated legislation must not have an effect that "is so unreasonable that it cannot be regarded as falling within the contemplation of the legislature" in passing the Act enabling the making of delegated legislation

* after its meaning has been determined by the court, the operation of delegated legislation must not be such as to impose no certain obligation on the person affected by it

* invalidity may arise because the delegated legislation makes no provision itself for the subject with which it is concerned, but sub-delegates the power to legislate to another body (at pp.93-94)

32 Administrative Law Act. In 1978 the Victorian Parliament took a specialised approach to judicial review of administrative decisions, passing the Administrative Law Act.

32.1 In his second reading speech on the Act, the Attorney-General outlined the aims of the Bill as being :

(a) To set up a new procedure by general order for review, which will enable persons complaining of administrative decisions to seek a review, without having to select the particular prerogative writ that fits their case.

(b) To ensure that people are not prevented from challenging erroneous decisions merely because they cannot find out what was the tribunal's reason for deciding aginst them.

(c) To ensure that any persons whose interests are substantially affected by an erroneous decision shall be entitled to be heard to challenge it, whether or not they bring themselves within the technical rules relating to locus standi.

(d) To ensure that the power of the Supreme Court to review decisions shall not be restricted by the privative provisions appearing in various Acts, which operate merely to limit the power of the Supreme Court to do justice.

(Parliamentary Debates, 25 October 1978, at p. 5091.)

32.2 In conclusion the Attorney-General said :

The [Act] will clarify the law relating to prerogative writs. It does not extend the powers of the courts to tribunals that are not within their jurisdiction at present, nor does it extend the classes of persons who may have recourse to the courts. But the Bill will ensure that in appropriate cases ordinary citizens will be able more easily to seek the aid of the courts against injustice flowing from administrative decisions, by reason of the removal of technical and procedural obstacles that exist at present.

(Parliamentary Debates, 25 October 1978, at p. 5092.)

32.3 The Act came into operation on 1 May 1979 "to make provision with respect to the review of certain decisions made by certain administrative tribunals, and for other purposes". By section 3 of the Act any person affected by a decision of a tribunal may make application to the Supreme Court or a judge of that court for an order calling on the tribunal or the members of it, and also any party interested in maintaining the decision, to show cause why the decision should not be reviewed.

32.4 Such an application must be made no later than thirty days after the giving of notification of the decision or the reasons for it (whichever is the later). The applicant must be supported by evidence on affidavit showing a prima facie case for relief. If the court is satisfied that no matter of substantial importance is involved, or that "in all the circumstances such refusal will impose no substantial injustice upon the applicant" then, notwithstanding that there is a prima facie case, the court may refuse to grant the applicant relief.

32.5 Decisions which are covered by the Act include any

> ... *decision operating in law to determine a question affecting the rights of any person or to grant, deny, terminate, suspend or alter a privilege or licence and includes a refusal or failure to perform a duty or to exercise a power to make such a decision* : s.2

Persons who are entitled to relief under the Act - that is, those "affected" in relation to a decision - include any

> ... *person whether or not a party to proceedings, whose interest (being an interest that is greater than the interest of other members of the public) is or will or may be affected, directly or indirectly, to a substantial degree by a decision which has been made or is to be made or ought to have been made by the tribunal* : s.2

The bodies whose decisions come within the purview of the Act are those being

> ... *a person or body of persons (not being a court of law or a tribunal constituted or presided over by a Judge of the Supreme Court) who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice* : s.2

32.6 The court is empowered by section 9 to grant interim relief to an applicant "in order to prevent irreparable damage pending judicial review"; here, the court may by order suspend the operation or postpone the coming into effect of a decision made or to be made by a tribunal, or restrain the implementation of the decision for a period of fourteen days after reasons for the decision have been provided by the tribunal, "or for such further time as the Court or Judge shall deem fit".

32.7 The powers of the court in relation to relief are outlined in section 7 of the Act :

> ... *the Court or Judge may discharge the order or may exercise all or any of the jurisdiction or powers and grant all or any of the remedies which upon the material adduced and upon the grounds stated in the order might be exercised or granted in proceedings for or upon the return of any prerogative writ or any proceedings in action for quo warranto or in an action for a declaration of invalidity in respect of the decision or for an injunction to restrain the implementation thereof and may extend the period limited by statute for the making of the decision but shall not exercise any other jurisdiction or power or grant any other remedy.*

32.8 The Act was introduced to pave the way for positive relief for persons aggrieved. Like all new legislation, it has its positive and less positive

characteristics. On the whole it is a reform creating a climate wherein further advances may occur. The Committee received a number of comments about the operation of the Act. The Director of the Policy and Research Division of the Law Department wrote that in his view the Act is a "simple piece of legislation that is working well", containing as it does "a simple, speedy procedure for obtaining an order nisi and getting it listed". He continued :

> *[The Act] operates against any body obliged to accord natural justice. As the application of that concept widens, so does the operation of the Act ...*

He was, however, of the opinion that the Act had a limited scope, although "within its confines it is ... an excellent piece of legislation". He referred to the wider scope of the Administrative Decisions (Judicial Review) Act 1977 (Cth). (O'Connor, written submission, 12 July 1984, at p.1.)

32.9 Mr. P. Hanks, Senior Lecturer in Law at Monash University also saw the Act as limited :

> *I see [the Act] as doing no more than consolidating the procedures for judicial review of some administrative decisions and providing a limited right to demand reasons for some decisions. The limitation of the Act to those Administrative bodies which can be described as 'tribunals' is difficult to defend and is no doubt confusing ... I should think that a review of the Act should try to move it down the track taken by the Administrative Decisions (Judicial Review) Act 1977 (Cth.)*

(Written submission, 17 July 1984, at p. 1.)

32.10 Professor E. Campbell of the Faculty of Law at Monash University wrote :

My principal criticisms of the Act are -

(1) The availability of the statutory review procedure is far too narrowly defined and in that respect is less satisfactory than the provisions of O 54 of the RSC

(2) The duty to furnish reasons for decision is also far too limited in its sphere of action. The nature of the duty also needs to be clarified, perhaps along the lines of the reasons provisions in the [Administrative Decisions (Judicial Review)] Act.

(3) While section 12 of the Act removes a number of privative clauses in prior Acts there may be other such clauses, not caught by section 12, which ought to be overridden.

(Written submission, 12 July 1984, at p. 1.)

32.11 Campbell went on to add :

I would suggest also that if the Administrative Law Act 1978 were to be reviewed, attention should be given to the desirability of codifying the grounds on which applications for judicial review may be made, as in sections 5, 6 and 7 of the [Administrative Decisions (Judicial Review)] Act. It seems to me that at the very least review should be available for any error of law regardless of whether the alleged error appears on the face of the record.

(At p. 1; see also Campbell, The Administrative Law Act 1978 (Victoria), January 1984, paper delivered to the Law Institute/ Monash University Faculty of Law Continuing Legal Education Committee seminar, Melbourne; Campbell, State and Federal Judicial Review of Administrative Action, January 1984, paper delivered to Law Institute/Monash University Faculty of Law Continuing Legal Education Committee seminar, Melbourne.)

33 Semi-Judicial Review. And as well as judicial review, in Australia semi-judicial review mechanisms have been developed at federal level; latterly proposals for semi-judicial review mechanisms have also surfaced in some state jurisdictions. This increases oversight of the operation of delegated powers.

33.1 At federal level the Administrative Appeals Tribunal Act 1975 and the Administrative Decisions (Judicial Review) Act 1977 (the latter referred to by the commentators on the Administrative Law Act 1978) provide an additional tier of judicial control over administrative decisions, and thus over the operation of delegated legislation. The former Act (amended substantially in 1977) provides for "tribunal review" of administrative decisions and a systematised oversight mechanism of the degree to which administrative decisions are or ought to be subject to review by a court, tribunal or other body; the latter Act provides for judicial review by means of alternative methods to the traditional ones of the prerogative writs, injunction or declaratory judgment procedure.

33.1 The Administrative Appeals Tribunal is a semi-judicial body which has the power to undertake a full review of a decision on its merits : Re Becker and Minister for Immigration and Ethnic Affairs (1977) 15 A.L.R. 696, at 700; see also ss. 25, 43 Administrative Appeals Tribunal Act 1975. "Decisions" that may be reviewed in this way include :

* the making, suspending, revoking or refusal to make an order or determination

* the giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission

* the issuing, suspending, revoking or refusing to issue a licence, authority or other instrument

* the act of imposing a condition or restriction

* the making of a declaration, demand or requirement

* the retaining or refusal to deliver up an article

* the doing or refusing to do "any other act or thing"

(Section 3(3) Administrative Appeals Tribunal Act 1975 (Cth); also section 25(5) and the Schedule to the Act; and see generally Sykes, Lanham and Tracey, General Principles of Administrative Law, at Chapter 25 "Statutory Remedies - Federal", particularly pp.207-214.)

33.3 Under the Administrative Decisions (Judicial Review) Act 1977 (Cth) a person aggrieved by a decision to which the Act has application may apply for an order of review on particular grounds; the Act provides for the application to be made to the Federal Court of Australia constituted under the Federal Court of Australia Act 1976 (Cth). The phrase a "decision to which this Act applies" is defined in section 3(1) as "a decision of an administrative character made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not), under an enactment, other than a decision by the Governor General". The making of a decision or the failure to make a decision is spelled out widely in section 3(2) as including :

* the making, suspending, revoking or refusing to make an order giving, suspending, revoking, or refusal to give a certificate, direction, approval, consent or permission

* the issuing, suspending, revoking or refusing to issue a licence, authority or other instrument

* the imposing of a condition or restriction, making a declaration, demand or requirement

* the retaining or refusing to deliver up an article or doing or refusing to do any other act or thing

33.4 Grounds of review are specified in section 5 of the Act as being :

* a breach of the rules of natural justice

* nonobservance of procedures required by law to be observed in connection with the making of the decision

* lack of jurisdiction to make the decision

* nonauthorisation of the decision by the enactment in pursuance of which it was purported to be made

* error of law whether or not the error appears on the face of the record of the decision

* improper exercise of power where the decision purports to be made in pursuance of a power conferred by an enactment

* fraud

* no evidence or other material to justify the making of the decision

* the fact that the decision was "otherwise contrary to law"

"Improper exercise of power" is identified in section 5(2) as including :

* taking an irrelevant consideration into account

* failing to take a relevant consideration into account

* exercising a power for a purpose other than a purpose for which the power is conferred

* exercising a discretionary power in bad faith

* exercising a personal discretionary power at the direction or behest of another person

* exercising a discretionary power in accordance with a rule or policy without regard to the merits of the particular case

* an exercise of a power "that is so unreasonable that no reasonable person could have so exercised the power"

* an exercise of a power in such a way that the result of the exercise of the power is uncertain

* any other exercise of a power in a way that constitutes abuse of the power

(See generally General Principles of Administrative Law, at Chapter 25, "Statutory Remedies - Federal", particularly pp. 197-207.)

33.5 Some criticisms have been levelled at the Administrative Decisions (Judicial Review) Act. The supervisory jurisdiction of the Federal Court under the Act is not co-extensive with that of the High Court under section 75 of the Constitution. However an amendment to the Judiciary Act 1903 (Cth) was introduced to overcome the deficiency in jurisdiction : s. 39B. Currently the Administrative Review Council is reviewing the Administrative Decisions (Judicial Review) Act, and it seems that changes may result from that review. (See Administrative Review Council, Issues Paper, 1984, Canberra, ACT; also Griffith, "The Administrative Review Tribunal" (1984) 58 (No. 7) Law Institute Journal 822; Campbell, The Administrative Law Act 1978 (Victoria), January 1984, Melbourne; Campbell, State and Federal Judicial Review of Administrative Action, January 1984, Melbourne.)

34 Government Initiatives. As a matter of principle the Victorian Government is committed to the establishment of a system somewhat in the

nature of the federal system. The setting up of an Administrative Appeals Tribunal or a body with similar powers to those of the federal Administrative Appeals Tribunal is expected to provide the citizens of Victoria with rights in regard to administrative decisions (exceeding those laid down in the Administrative Law Act 1978) including decisions made in respect of subordinate legislation. (See Law Department, Report of the Policy and Research Division to Colloquium on Law Reform Agencies in Victoria, unpublished paper, 12 June 1984; Kennan, "Administrative Law : Development in Victoria" (1984) 58 (No. 7) Law Institute Journal 826.)

34.1 In contemplating this approach the Government is taking into account the views of experts in the field. For example, of proposals for change, Campbell comments that there is "much to be said for the view that the law governing how one initiates proceedings for judicial review should be set forth in a statute rather than tucked away in Rules of Court." She continues :

> *My main quibble with the 1978 Act is that it proceeds from what, in my view is a false premise, namely that the availability of the statutory procedure for review has to be confined to those cases in which written reasons for decisions may be demanded on request. I can understand the concern of those who might query the wisdom of the approach adopted by the framers of the [Administrative Decisions (Judicial Review) Act] which was to impose a duty to give written reasons for decision, upon request, in respect of every decision open to judicial review, subject to scheduled exceptions. But the simple point I would make is this : there is no necessary connection between the ambit of a statutory procedure for invoking a court's supervisory jurisdiction and the ambit of legislation imposing duties to give reason for decision. A statutory review procedure designed to combat the evils of what was tantamount to a remnant of the forms of action can and should be available regardless of whether those who are respondents to applications for review are obliged to furnish reasons for decisions.*

(State and Federal Judicial Review of Administrative Action, January 1984, at p. 28.)

34.2 The Supreme Court Act 1981 (UK) essentially took the approach which Campbell puts forward as being that which should be followed in Victoria. In her view any Victorian Act on judicial review generally "would need to be drafted in such a way as to cover all aspects of the Supreme Court's existing supervisory jurisdiction". In that respect she said :

> *I think the English model is the more appropriate for Victoria though I would not support the introduction of a requirement that the leave of the Court to proceed should be sought.*

(Written submission, 12 July 1984, at p. 2.)

35 Summing Up. Obviously, however, as with judicial review, the role of an administrative appeals tribunal - whether on the federal or taking into account the U.K. model - comes into play after delegated legislation has come into effect. The Committee recognises the essential nature of such review, by whatever means regulations are formulated, but also endorses the view that it is preferable that citizens not be placed in the position of having to seek justice through courts and tribunals: in essence, prevention is better than cure. The process of making regulations should be upgraded so that judicial or semi-judicial review is less often necessary. The Subordinate Legislation (Deregulation) Bill is designed to improve regulation making and as far as possible to ensure that delegated legislation will not be judicially offensive to a tribunal or court. The effectiveness of its provisions in that regard are discussed in Part II of this Report.

Administrative Review

36 Administrative Review Generally. The Australian Parliament and a number of state jurisdictions have created an additional means of oversight of delegated legislation by the appointment of Parliamentary Commissioners. The Western Australian Parliamentary Commissioner Act 1971 created the first such office in Australia, followed shortly by South Australia (the Ombudsman Act 1972), Victoria (the Ombudsman Act 1973), New South Wales (the Ombudsman Act 1974), Queensland (the Parliamentary Commissioner Act 1974), and the Australian Parliament (the Ombudsman Act 1976). Sykes, Lanham and Tracey distinguish the role of this office from the judicial function carried out by the courts, including Administrative Appeals Tribunals:

> *The modern Ombudsman's function is quite distinct from that of courts of law. While courts concern themselves with determining whether authorities have acted within their allotted powers or have exercised those powers in accordance with legal procedural requirements, the Ombudsman's function is concerned with the quality of administrative decisions and of the means adopted to reach those decisions. 'The most appropriate general description is that [the officer's] work is directed at the correction of cases of maladministration - a term which has been described as including bias, neglect, delay, inattention, incompetence, ineptitude, perversity, turpitude and arbitrariness.'*

(General Principles of Administrative Law, 1979, Sydney, citing Ellicott, Parliamentary Debates (House of Representatives) 4 June 1976, at p. 3068; they point out that the word "bias" is used in this area in a general sense and not in the legal sense used in relation to Judicial Review of Delegated Legislation - see "Delegated Legislation : Judicial Review", this Report at p. 65.)

36.1 Sykes, Lanham and Tracey outline the history of the office which originated in Scandinavia in 1809, when "a new Swedish Constitution created

the office of Justitieombudsman to oversee the performance of the duties of public officials and to prosecute the perpetrators of any unlawful acts." They continue :

> *During the next century the prosecutorial function diminished to insignificance and was replaced by a grievance procedure under which the Ombudsman sought to have remedied (by noncoercive means) those complaints which [the officer] considered justified ... The need for an officer to examine claims of maladministration was not acknowledged in Westminster-style democracies until fairly recent times. It was thought that such grievances could be effectively dealt with by Members of Parliament and it was only when it became apparent that the number and range of complaints, generated by the rapid expansion of bureaucratic structures, was too great that the task was handed to a Parliamentary Commissioner. New Zealand led the way in 1962 and Britain followed five years later* ... (At p. 220.)

37 Ombudsman Act. By section 14 of the Victorian Act, the officer is empowered to conduct an investigation as a consequence of a complaint, or of the officer's own motion. A complaint may be made by a person or a body of persons, corporate or unincorporate. No complaint is to be entertained if the complainant is not affected by the administrative action the subject of the complaint, unless :

* the complainant is a Member of Parliament acting on behalf of the aggrieved person

* the complainant is a person considered suitable by the officer to represent the interests of an aggrieved person who had died or who in the opinion of the officer is unable to act for her or himself

* having regard to all the circumstances the officer considers it

proper to entertain the complaint

37.1 The legislation provides that the principal function of the office "shall be to investigate any administrative action taken in any government department or public statutory body to which the Act applies, or by any officer or employee of a municipality". However the Parliamentary Commissioner is precluded from investigating any administrative action taken by :

* a court of law or a judge or a magistrate

* a board, tribunal, commission or other body presided over by a judge, magistrate, barrister, or solicitor presiding as such by virtue of a statutory requirement and appointment

* a person acting as legal adviser to the crown or as counsel for the crown in any proceedings

* a person in her or his capacity as trustee under the Trustee Act 1958

* the Auditor-General or

* the council of a municipality or a councillor of a municipality acting as such

Further limitations are spelled out as being that the Commissioner shall not conduct an investigation in respect of any matter where it appears to her or him that :

* the aggrieved person has or had a right of appeal, reference or review to or before a tribunal constituted by or under any enactment or by virtue of Crown prerogative

* the aggrieved person has or had a remedy by way of

proceedings in a court of law

(Section 13 Ombudsman Act 1973; under particular circumstances in the last two instances an investigation may be conducted by the officer.)

37.2 Section 2 of the Act defines "administrative action" as being "any action relating to a matter of administration", including

* a decision and an act
* the refusal or failure to take a decision or to perform an act
* the formulation of a proposal or intention
* the making of a recommendation (including a recommendation made to a Minister)

37.3 Investigations undertaken by the Commissioner are aimed at determining whether a complaint has substance. Under section 23 the administrative action complained of is defective if it :

* appears to have been taken contrary to law
* was unreasonable, unjust, oppressive or improperly discriminatory
* was in accordance with a rule of law or a provision of an enactment or practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory
* was taken in the exercise of a power or discretion, and was so taken for an improper purpose or on irrelevant grounds, or on the taking into account of irrelevant considerations

* was a decision that was made in the exercise of a power or discretion and the reasons for the decision were not, but should have been, given

* was based wholly or partly on a mistake of law or fact

* was wrong

37.4 The Victorian position has been criticised because the Act is interpreted restrictively so as to apparently confine the Commissioner to investigating only those administrative actions taking place at executive government level, and not those occurring in the legislative or judicial arena : Glenister v Dillon [1976] V.R. 550. In relation to this decision the Australian Ombudsman has said :

> *The decision which seems to be based on an old separation of powers, appears to prevent the Victorian Ombudsman from investigating official actions associated with the judicial process, for example, the actions of court registries. This is a view I do not accept and [at federal level] we have so far entertained such complaints without legal challenge.*

(Richardson, "The Ombudsman" (1984) 58 (No. 7) Law Institute Journal 814, at p.815; for a detailed discussion of cases decided to date in relation to the powers of the officer, see generally Sykes, Lanham and Tracey, General Principles of Administrative Law, at pp. 223-224.)

38 Broad Ranging Effect of Review. Again, in the context of regulation making and review recourse to this procedure is had after regulations have come into effect and decisions are made in relation to them. The Australian Ombudsman has made it clear that the ramifications of investigating a particular complaint go beyond resolution of that complaint alone; the Ombudsman may effect changes in law and regulation making as well as in

decision making. The first Annual Report stated :

> *My functions do not end at seeking the resolution of a complaint as an end in itself. Even a single complaint may be a symptom of a defective administrative practice or procedure. A succession of complaints in one area may provide stronger evidence and several heads of departments have expressed interest in being informed where this situation occurs. The Office's investigations of a complaint may reveal that though a practice or procedure is not itself defective, there is nevertheless room for improvement both in the interests of a higher level of departmental efficiency and of avoiding similar kinds of complaint recurring. The Ombudsman's operations should at all times be of assistance to good management. The additional role of the Ombudsman is specifically recognised in the Act. The Ombudsman may find that an action complained of was taken in accordance with a rule of law, a legislative provision or a practice, but he may further find that the rule of law, legislative provision or practice is unreasonable, unjust, oppressive or improperly discriminatory. The Deputy Ombudsman and I regard it as being an important adjunct of our activities to look beyond the mere settlement of a complaint.* (1978, AGPS, Canberra, ACT.)

(See generally Richardson, "The Ombudsman" (1984) 58 (No. 7) Law Institute Journal 814.)

39 Summing Up. The Committee appreciates the value of this approach and recognises the broadranging effect of the various Ombudsman's Acts on departmental practices. However, the Committee emphasises the need for regulation-making procedures which as far as possible eliminate the need for invoking powers under the Ombudsman Act which, like judicial review, involve plaintiffs or complainants in some costs and delays, however cost-efficient and prompt such an office might be. The Committee believes that procedures such as those proposed under the Subordinate Legislation (Deregulation) Bill may go some way toward realising this goal. (See further, Part II of this Report.)

THE CURRENT DEBATE

Introduction

40 Over-regulation Or Not? There has been a general acceptance, at least in Australia, that if there is effective operation of the various safeguards provided in the system for ensuring that delegated legislative powers are not abused, then delegation of legislative power is positive rather than negative, and is a useful and necessary concomitant of government. However, the current debate on delegated legislation has moved away from the simplistic question of whether or not public servants are exceeding their role, or the executive is acting in dictatorial fashion, to the place of delegated legislation in the governmental process. Is the community over-regulated? Is business, and thus the economy, stultified in its operations as a result of too ready resort to regulation by departmental officers and executive? Other matters of concern are whether the government resorts to regulation without questioning the possibility of alternatives; and whether there is room for consultation - or greater consultation - outside the administration and the executive, with those parties that are affected by current regulation and that may be affected through the introduction of more delegated legislation.

The Debate in North America

41 Background. The regulation reform or deregulation debate has long been afoot in the United States and, more recently, Canada. In the United States in the 1970s concern about governmental regulation was voiced by President Ford; that concern intensified during the Carter administration - an administration operating under the political colours of the Democratic Party - and solidified under the Reagan Republican administration. It resulted in measures being taken to cut down on regulation - or in some views, to rationalise regulation. In Canada moves were taken in 1978 at a meeting of First Ministers (equivalent to the Australian Premiers' meeting), when a communique was issued stating :

The burden of government regulation on the private sector should be reduced and the burden of overlapping federal and provincial jurisdictions should be eliminated. Procedures will be instituted to review the effects of regulatory actions on jobs and costs. First Ministers agreed that the whole matter of economic regulation at all levels of government should be referred to the Economic Council for recommendations for action, in consultation with the provinces and the private sector.

(Economic Council of Canada, Regulation Reference : A Preliminary Report to First Ministers, November 1978, Appendix I. Text of the Prime Minister's Letter to the Chairperson of the Economic Council of Canada, dated 12 July 1978.)

This formed the basis for joint action by the various governments to review governmental regulation.

42 Free to Choose? The Friedmans, in Free to Choose, are the classic United States' deregulators. They accept that when businesses operate, they do so in accordance with their own interest, and self-interest "will lead sellers to deceive their customers". Sellers will, according to the Friedmans, take advantage of their customers' innocence and ignorance "to overcharge them and pass off on them shoddy goods they do not want". As well, leaving the economy to operate in accordance with market forces may affect people other than those involved as buyers and sellers. The "air we breathe, the water we drink, the safety of the foods we eat" may be affected by the laissez faire approach. Accepting these criticisms of free marketing, the authors of Free to Choose question whether "the arrangements that have been recommended or adopted to meet them, to supplement the market, are well devised for that purpose". Or, on the contrary, is "the cure ... worse than the disease?" (At p.227.)

42.1 According to the Friedmans, the shoddy products "are all produced by governments or government-regulated industries. The outstanding products are all produced by private enterprise with little or no government

involvement". Yet, they assert :

> *... the public - or a large part of it - has been persuaded that private enterprises produce shoddy products, that we need ever-vigilant government employees to keep business from foisting off unsafe, vulnerable customers ...*
>
> *Government intervention in the marketplace is subject to laws of its own, not legislated laws, but scientific laws. It obeys forces and goes in directions that may have little relationship to the intentions or desires of its initiators or supporters. We have already examined this process in connection with welfare activity. It is present equally when government intervenes in the marketplace, whether to protect consumers against high prices or shoddy goods, to promote their safety, or to preserve the environment. Every act of intervention establishes positions of power. How that power will be used and for what purposes depends far more on the people who are in the best position to get control of that power and what their purposes are than on the aims and objectives of the initial sponsors of the intervention.* (At p.232.)

42.2 The Executive Director of the Federal Trade Commission in the United States acknowledges that government regulation cuts both ways, requiring reforms to improve good regulations and revocation to eliminate those that are bad. In a survey conducted by him of relationships between governments and business, he found "countless cases where rules and regulations imposed tremendous costs while delivering little if any benefit". He instances examples where this occurred :

1 Freight rates for one class of shippers were subsidized by another class of shippers. As a result, factories were located on the basis of false signals, real costs were hidden, and goods were shipped great distances at lower fares to be processed in higher-cost plants.

2 Catalytic converters were installed on automobiles for the purpose of reducing emissions. But, for the converters to operate properly, unleaded gas had to be used - and it is more expensive than regular. So cost-conscious drivers put leaded gas in their tanks, which turned the converters into "so much junk" and added more emissions to the environment than there would have been had engines been even slightly modified or some other plan introduced.

3 Petrochemical plants were required to reduce emissions at each and every stack by the same percentage. If instead managers had been given plant-wide targets and left free to attain them efficiently, the same degree of pollution control could have been achieved at much lower cost.

4 Petroleum companies that found oil on Alaska's North Slope and sought to bring it to the lower forty-eight states by way of the West Coast were barred from doing so by complex environmental rules. Logic would have dictated that the oil be shipped to Japanese refineries, which could have returned the refined product to the United States. But that was against federal law too. Instead, the crude oil is being shipped from Alaska to Texas, where it is unloaded and refined, all at considerable extra cost.

5 Precise fuel economy standards were prescribed for automakers to prod them into building the kind of cars that probably would have been produced and purchased voluntarily if the price of gasoline had been higher. But the price of gasoline was regulated so it could not rise; and the automakers had to ration their larger cars, which U.S. buyers wanted, while forcing smaller cars onto the market. Eventually, the price of gasoline was deregulated and the effects of the mandated fuel-economy scheme tended to

evaporate - for the time being, at least.

The list, writes Executive Director Yandle, could "go on and on". ("Bootleggers and Baptists - The Education of a Regulatory Economist", "Viewpoint" (1983) AEI Journal on Government and Society (May/June) 12.)

42.3 According to Yandle, regulation is manufactured for the benefit of the regulators themselves : regulation is designed not to minimise costs in the community or in business, but to minimise costs of regulators. Thus, he says, regulators are kept from choosing efficient ways of, say reducing emissions of hydrocarbons because they seek mainly to reduce their own :

* cost of making a mistake (simple rules applied across the board require fewer decisions where mistakes can be made)

* cost of enforcement (simple rules requiring uniform behaviour are easier to monitor and enforce than complex ones, and also "have a false ring of fairness")

* political costs (a legislator is likely to be unhappy with regulators who fail to behave in politically prudent ways - who fail in the legislators' view to remember the industries and the workers in his or her area)

(At p.13; see also Friedman and Friedman, Free to Choose, Chapter 7, "Who Protects the Consumer?", p.227ff.)

43 The Need For Regulation. For the other side, Tolchin and Tolchin contend that regulations are "the connective tissue" of American society, "The major protection against the excesses of technology whose rapid advances threaten [humanity's] genes, ... air and water, ... life itself. ("The Rush to Deregulate - Government is Unravelling an Entire Skein of Health and Safety Protections" (1983) New York Times Magazine (21 August) 59, at p.74; see also

Tolchin and Tolchin, Dismantling America - The Rush to Deregulate, 1983, New York.) They argue strongly against the stance taken by the Reagan Administration on deregulation, stating :

> *The goal is to reduce Government involvement in business, leaving the free market free so that American business can produce a new age of prosperity. But deregulation's most dramatic result has been the dangerous unravelling of an entire skein of health, safety and other citizen protections that has been decades in the making.* (At p.69.)

43.1 The Tolchins point out that regulatory agencies have not all come into being with the same political impetus. Regulatory agencies created in the early part of the United States' history of regulation were initiated by the business community, "primarily to protect [their] interests". Thus, railroading in the early years was subject to free market forces, but was brought under the control of regulations with the result that big business gained the greater part of the cargo and travellers market; it was the small business operator who was squeezed out. Small business operators then moved into the trucking business - and with the passage of time, "free market forces" were overtaken by the desire of bigger businesses to dominate : they lobbied to have regulations brought into effect to cut out the competition and free up the market so that they could operate without being undercut by smaller operations.

43.2 However, recently devised regulatory programmes were founded with a different philosophical underpinning :

> *As a result of the consumer and environmental movements of the late 1960s, Congress set up three new agencies - the [Environmental Protection Agency], [Occupational Health and Safety Agency] and the Consumer Product Safety Commission - and strengthened the powers of many other regulatory agencies. The goal was to protect the public and the worker in seeking safe workplaces, safe products*

and a healthy environment. One result was to increase the power of Congress and the agency bureaucrats over social policy, at the expense of the White House. (At p. 69.)

The Tolchins thesis is that control of the market place, aimed at making it more equitable, more protective of consumer rights, and more mindful of the health and safety of the community, has passed by "administrative fiat" to the President. As a result, safety standards have declined; the environment is in danger of being left at the mercy of companies which are unconcerned about the deleterious effects of pollution; and that consumers are now faced with purchasing products or making use of services which have not been pre-tested for faults or danger points.

44 Deregulation - Positive or Negative? Neither side of the argument is, however, clear cut. In the United States, those favouring review of regulation and regulatory procedures are not all free marketeers. Those in favour of regulation for health, safety, environmental and consumer protection reasons are often opposed to regulations conferring benefits upon business (often to the detriment of the community as a whole) and farmer producers (again without recognising the detriment that may thereby be imposed upon the general community). The "deregulators" are not wholly opposed to regulation; rather, they favour deregulation in some areas, and cling to the value of regulation in others - where regulation is perceived as "enhancing" the growth of the economy rather than impeding economic progress.

44.1 Both sides quote examples of deregulation of industries or areas of the economy as supporting their argument. For the deregulators it is said that the aeronautics business has profited from deregulation of the airlines in 1978, but this has not led to any reduction in safety controls. Thus in a special report in Businessweek in November 1983 it was reported that dismantling the Civil Aeronautics Board "frees the airlines to compete, but it does not mean scrapping the Federal Aviation Administration's safety rules under which airlines must operate". On the other hand, that same report acknowledges :

"To be sure, there are short term costs from deregulation". One of those costs is that Braniff and a number of smaller airlines have failed; Continental is "operating in Chapter II"; Eastern, Republic, and other airlines are "struggling to survive"; Florida Airlines declared itself bankrupt in July 1984. In the trucking industry where deregulation took place (together with deregulation of railroads) in 1980, more than 300 trucking companies, "many of them sizeable, have gone bankrupt". Furthermore, "the human cost of trucking deregulation has been high. Many workers have taken wage cuts ... Layoffs have left one-third of the Teamsters' trucking industry members without union jobs". But, concludes the report, "these costs must be seen against a broader backdrop". That backdrop is that, for example, 10,000 small new operators have entered the trucking industry and 14 new airlines have been launched since 1978 when deregulation "eased entry and gained more pricing and route flexibility". As well, "the savings to many shippers have been considerable ... There are 50 per cent more intrastate carriers now than there were in 1979 ..." (Special Report - "Deregulating America - The Benefits Begin to Show - In Productivity, Innovation and Prices" (1983) Businessweek (28 November) 38, at pp. 38-39.)

44.2 Tolchin and Tolchin cite the example of the coal mining industry, where policing of regulations governing strip mining has been the subject of cutbacks and generally restrictive budgetry procedures, which in their view result in de facto deregulation. They report that between 1978 and 1981 "the number of coal mine inspectors was cut by the Mine Safety and Health Administration from 1,940 to 1,684". During that same period, "mine deaths increased 50 per cent to 153". The President of the United Mine Workers is quoted as blaming the increase in fatalities on the reduction in inspectors and in the total mine safety budget. (Congress has since called for additional inspectors to police the still existing safety regulations.) (Tolchin and Tolchin, "The Rush to Deregulate" (1983) New York Times Magazine 21 August 1983, 68, at p. 72.) In their view the change in approach from the regulating body assuming an adversarial stance to one of "co-operation" has negative implications, and therefore presages ill for any plan which would deregulate the industry and leave the setting of safety standards to the mine owners and operators themselves :

The mine agency's director ... has initiated a new policy of 'compliance assistance plans' whereby inspectors are encouraged to give advice to companies in violation of safety regulations rather than initiate a punitive lawsuit. This switch from adversarial to a co-operative approach, on the part of Government agencies, has occurred in many regulatory agencies. Some companies that had once voluntarily cleaned up their wastes because of the threat of a lawsuit now tend to drag their heels ... (at p. 72.)

44.3 The example of the Environmental Protection Agency is also referred to by those in the debate who do not favour deregulation. Six Congressional committees investigated agency irregularities over a period of some several months :

... more than 20 appointees, including the administrator, ... were ultimately forced to leave ... The chief Congressional target ... was the Superfund, under which companies that dump toxic wastes contribute to the cleanup. The Federal Government uses the fund to award grants to private contractors. Such companies were also required to submit to 10-year reviews of their dump permits. But the Reagan Administration awarded some companies lifetime permits. In other cases, Congressional committees charged, agreements between agency officials and industry representatives allowed companies to avoid billions of dollars in cleanup costs. (At p.73.)

44.4 However, proponents say the aim of deregulation is to lessen labour costs and therefore free up finances for expansion of viable industries. "Labor costs in the deregulated sectors are being slashed", comments the Business Review Weekly. (At p. 39.) Labor unions in the airline industry "have agreed to new, more flexible work rules" :

... managements [have] had to switch from a regulated environment

which guaranteed that inefficient operators would not be forced out of business, to a world of price competition. They have had to learn to woo the consumer more than the regulator. They have also had to learn to define a market niche and to price by product line instead of by cross-subsidy, as well as to get costs down to compete with new entrants ... regulation, by subverting the working of the market, led to inefficiencies whose costs outweighed the benefits ... Moreover, the regulations themselves could be impenetrable. In trucking, by the 1970s, the Interstate Commerce Commission was reviewing more than 300, 000 tariffs a year ... (At pp.40-41.)

44.5 Where "re-regulators" have moved in to (in the view of the deregulators) reassert the need for government regulation, there are underlying reasons :

The pressures for reregulation ... are stronger in those sectors where deregulation is causing a redistribution of income. Income is being channelled from those who benefited from noncompetitive markets - consumers who purchased subsidized goods and services, workers who enjoyed inflated salaries and wages, and producers who basked in a protected environment - to the general public ... (At p.40.)

44.6 Advocates of deregulation acknowledge that the market will look very different when the full implications of dismantling agency interventions become known. Addressing the lifting of rules governing telephone operations, the director of financial management for the American Telephone and Telegraph Company acknowledges that the advent of competition "means telephone rates will no longer be set so low that almost everyone can afford telephone services. 'Prices will now move in a direction that more clearly reflects the cost of providing service'. Such a shift to cost-based pricing will cause a dramatic change in who pays for what ... Although business and long-distance rates will rise less - if not actually decline - there will be a ... jump in the cost of local service ... On balance, however, residential consumers

eventually will get better service if at somewhat higher rates, and business users will pay considerably less than they do now ..." In discussing these effects the Chair of United Telecommunications Incorporated acknowledges:

> *Some of the nation's poor will be hurt by the rise in rates. But rather than proposing to build subsidies into the rates to help the poor, many in the telephone industry are proposing government aid. 'There is no reason why there can't be welfare for phone service' ... Some are proposing that the government copy the Food Stamps program and issue 'telephone stamps', or even give welfare clients a free telephone hookup, charging them only for the calls they make.* (At p.48.)

44.7 Pointing out that such arguments are not very convincing to the public, deregulators see that the public is pressuring regulators and legislators to slow down deregulation as they are upset by the jump in the cost of local calls. However, "In the long run, deregulation of the telecommunications industry will benefit consumers, but we're concerned about the transition period." (At p.48.)

48 Economic Cost of Regulation - and Economic Benefit. There are diverse views about the economic cost of regulation. In Reforming Federal Regulation, published in 1983, Litan and Nordhaus conclude that federal regulation in the United States "clearly has a sizeable effect on the nation". Benefits and costs are produced in the order of $50 billion annually "and perhaps more". To regulation, Litan and Nordhaus attribute (at least in part) "the recent productivity slowdown": they state that it accounts "at most" for 25 per cent of the decline in productivity growth since 1973. At the same time, they acknowledge the "high imprecision" of calculation about impacts of regulation :

> *Severe conceptual problems impede the measurement and estimation of the benefits and costs of federal regulatory programs. Moreover, the underlying benefit and cost data are generally*

difficult to obtain. The available benefit and cost data ... are ... both sparse and inconsistent. No tracking system for regulation exists to provide snapshots of regulatory impacts over time, in the aggregate or in detail. Instead, we are forced to rely upon a series of studies of different regulatory programs conducted at different points in time through the use of different methodologies ... (At pp. 8-9.)

48.1 For Litan and Nordhaus, the very absence or haphazardness of the data shows that there is a necessity to "do something about" the current state of regulation in the United States. The inattention given by government or other political institutions to the nature of regulation and its effect on the economy, in a systematic and detailed way, is inexcusable. Regulation can be justified only by way of cost/benefit analysis, the systematic keeping of records relating to regulation effectiveness or otherwise, and it is necessary to institute a system which ensures that this is possible.

48.2 Yet Ruttenberg points out that it is unwise to attribute negative growth too readily to regulation. On the contrary, regulation in many instances leads to increased productivity. Analysing annual reports of Alcoa, Allied Chemicals, American Cyanamid, Armco Steel, Asarco, Atlantic Richfield, Bethlehem Steel, B.F. Goodrich, Conoco, Dow, Du Pont, Engelhard Minerals and Chemicals, Exxon, Firestone, Getty, Gulf and Western, Kaiser, Kennecott, Minnesota Mining and Manufacturing, Monsanto, Norton, Occidental, Phillips Petroleum, Republic Steel, Rockwell International, Shell, Standard Oil of Indiana, Stauffer Chemical, Tenneco, TRW, and Union Carbide, Ruttenberg states :

There is a wealth of empirical evidence that regulation is itself a major stimulus for new markets, new jobs, and - most importantly - for basic innovation ... First, of course, when corporations are forced to redesign products and processes to meet occupational health and safety or environmental goals the redesign is often

fundamental. Frequently, the new technology turns out to be better technology. It may be more productive or consume less energy.

Moreover, when government insists that products and processes meet certain safety or environmental standards, assured markets are created. One division of a conglomerate becomes the market for the pollution control technology of another division. Other companies soon become customers ...

("Regulation is the Mother of Invention" (1981) Working Papers (May/June) 42.)

48.3 She points out that public hearings considering proposed regulations relating to occupational health and safety often bring forth the objection from industry that the implementation of the proposals will result in financial losses to the economy. As an example, she cites proposed Occupational Safety and Health Agency draft regulations limiting worker exposure to vinyl chloride as directly related to workers in the plastics industry suffering from cancer. Nonetheless, Ruttenberg reports, "the industry warned that the proposed regulations could lead to the demise of the entire vinyl chloride industry, with losses of $65 to $90 billion to the national economy". Proposals for auto emissions and fuel economy standards met a similar complaint from the auto industry, as did proposals to reduce the amount of waste products dumped by the chemical industry into rivers and lakes, and those to control air pollution in the coal industry. Yet, says Ruttenberg :

... pollution control is one of American industry's fastest growing markets. Between 1972 and 1976, pollution control sales grew at between 16 and 22 per cent annually, compared to the growth rate in manufacturing generally of only 9 per cent. In 1977, pollution control sales totalled $1.7 billion, and this is projected to grow to $3.5 billion by 1983. (At p. 43.)

48.4 The Annual Reports of national companies clearly illustrate the

growth potential of industries of manufacturing processes which develop out of the setting of products standards or the formulation of health and safety requirements. The 1978 Annual Report of American Cyanamid shows "growth in its sales of organic flocculants was due in large measure to pollution control regulations". The Annual Report for the same year of Union Carbide fulminates :

> *We are the leader in supply of systems that use oxygen aeration gas for the biological oxidation of wastewater.* (Cited Ruttenberg, at p. 43.)

Stauffer Chemical's Annual Report for the 1979 financial year debated government regulation as a negative and positive factor in economic development within the company, concluding that in the long term opportunities exceed constraints :

> ... *Other opportunities exist in a new process for desulfurization of coal, sulphur dioxide abatement, extraction of metals from wastestreams, fermentation technology, and new methods of food preservation and production.*
>
> *The changing regulatory and social environment poses severe economic and technical challenges for the chemical industry that must be addressed and resolved to ensure a continuing capability for innovation. However, the longer-term prospect holds many opportunities for socially responsive and profitable development.* (Cited Ruttenberg, at pp. 43-44.)

48.5 Ruttenberg cites other economic developments :

* Monsanto's pollution control measures led in turn to basic improvements in sulphuric acid manufacturing

* to eliminate hydrocarbon venting, 3M devised a process that

substitutes water for petrochemical solvents - thus saving energy and reducing capital expenditures

* to serve markets created by the Environmental Protection Authority's waste-water and drinking water rules, Kennecott developed a new process for removing contaminants. The patented process produces activated carbon from less expensive raw materials than previously used, and led Kennecott to build a whole new plant in Oklahoma

* Kaiser Aluminum has devised an advanced dry-scrubbing system to reduce emissions in the aluminum reduction process

* Battelle Institute's Northwest Laboratories has developed an entirely new process that could reduce or even eliminate sulphur emissions in lead and zinc production

* American Cyanamid has developed for the steel industry a new carbide-based desulphurization agent. Spurred by the ready market, the company has doubled its manufacturing capacity for calcium carbide

These developments can be cited as "costs" or as "benefits", depending upon the perspective of the party undertaking the calculation : it costs a company money to build a new plant in Oklahoma - or anywhere - for example; on the other hand, the capital investment in buildings and machinery and other technology is a benefit, as is the provision of jobs; the gross national product is added to, rather than subtracted from.

49 Regulation and Innovation. It is often said that regulation stifles innovation. Yet health, safety and environmental standards can stimulate invention. Ruttenberg outlines a "small sample" of innovations brought about as a result of companies being required to embrace particular levels of protection for health and safety of workers and the preservation of the environment.

These include :

* in eliminating the pollution produced during conventional smelting operations, Cyprus Mines, a subsidiary of Occidental Petroleum, developed a new advanced process to turn copper ore directly into wire bars; the new process reduces capital and operating costs by 50 per cent

* in shipping coal by rail overland, Conoco left behind a trail of coal dust. A new spray device was invented to keep coal dust out of the environment, and also serves to save an estimated eighty tons of coal per trainload

* Republic Steel reports on a program involving the building of a new complex including two new electric furnaces and other advanced technology, stating that, costing in excess of $250 million, it should bring the steelmaking complex into compliance with federal and state pollution control requirements for both air and water while at the same time increasing steelmaking efficiency

49.1 Where companies have in the past allowed waste products to drain into lakes, rivers or the sea, or have buried them or left them in "slag heaps", regulatory requirements have forced them to utilise these products in imaginative ways - which have brought profits rather than losses. As an example, Du Pont was prevented by ocean-dumping regulations from draining chloride by-products into the sea. Iron chloride was then processed into an agent for use in water purification plants; the ferric chloride used in this way is superior to other water purification chemicals. Ruttenberg comments :

> *... even though knowledge of ferric chloride has existed for fifty years, and even though plants in the Midwest had been supplying ferric chloride to some East Coast municipalities for at least half a dozen years, it took Environment Protection Agency ocean-dumping*

regulations - by Du Pont's own admission - to 'push' them into manufacturing.

49.2 There are numerous similar examples :

* Getty Oil is building a unit at its Delmarva plant in Delaware to reduce the sulphur in fuels; the Delmarva plant provides electricity and steam to a Getty refinery; the units will convert the sulphur dioxide pollutant into sulphuric acid, which will in turn be sold to industrial users

* in Sweden, Helsingborgs Atervinnings AB has developed a method to transform selected industrial waste into highly combustible pellets with the same energy value as coal; the firm claims that roughly 20 per cent of the waste of Swedish industry, shops, and households (well over a million tons a year) could be converted into pellets, saving Sweden about 500,000 tons of oil every year

* Bethlehem Steel recycles 90 per cent of the water from its blast furnaces on the shores of Lake Erie rather than discharging 100 per cent of the polluted water into the lake

* Phillips Petroleum in 1977 introduced a process that recycles waste motor oil into a high quality lubricating oil base stock; the process overcomes severe environmental problems which were associated with older processes

49.3 In sum, Ruttenberg concludes that improving workplace safety and health will be an expensive process for some firms, necessitating financial outlays to introduce new plant and improved equipment. She says :

... in no way [is it] suggest[ed] that the job is always easy to

accomplish or always easy to afford. But it is true, in an increasing number of cases, that potential profit combined with the leverage of technology forcing regulation has been promoting products and processes for pollution control and hazard abatement that simultaneously promote both the health of workers and the health of industry ...

It is surprising that so many policy makers simply accept the assumption that regulation is nothing but a drag on productivity. To be sure, there are cases where regulation increases costs, and these must be justified in terms of the benefits to the health of the workforce and the larger public. But there are innumerable cases where regulation spawns far-flung benefits : basic innovations, productivity gains, energy savings, new markets, and profits. (At p. 47.)

United States Approach

50 Introduction. The United States' approach to regulation review has been perceptibly different from that in Canada, in that greater emphasis has been placed upon deregulation - the elimination of regulation by government - spurred by the dominant belief that regulation of itself is negative to business interests and impedes competition, which is seen as positive for economic growth. As far back as 1946 the Administrative Procedure Act (which also embodies the principles of freedom of information) determined that "due process" standards should apply to regulation processes adopted by federal government departments and agencies. The Act provides that regulations should be put forward in draft form by the relevant department or agency; that they should be published in the Federal Register; that an opportunity should be given to the public to comment on the regulations; that any comments so received should be reviewed by the agency or department and the version which takes them into account should be published in the Federal Register; that regulations so formulated should then be published in the Code of Federal Regulations so that it can come into force and be accessible to the public generally, as well as to all who may be affected.

51 The Carter Administration. In 1977 President Carter signed Executive Order No. 12044 establishing a new framework for managing the regulatory formulation, consultation and review process, focussing on three major areas of concern:

* the need for eliminating those regulations or regulatory agencies that have outlived their usefulness

* the need to improve the management of agency or departmental regulatory decision-making

* the need to concentrate attention on specific areas of regulation which presage particular concern - namely, health,

safety; environmental regulation; and other regulations pinpointed as impeding business development

In respect of the last item, the Carter regulatory reform programme was designed to determine whether objectives required to be met by regulation (but, it was suggested, not being met) could be pursued more effectively in other ways - for example, by free market incentives; the setting of general performance standards; by informational approaches (relying on consumers making sensible choices on the basis of full product information provided by the manufacturer); or by self regulation (voluntary standard setting by manufacturers or business). The rationale was that alternatives to regulations would achieve stated objectives in more efficient, less burdensome ways.

51.1 Under the Carter Executive Order, agencies or departments were obliged to analyse costs and benefits of major proposed regulations and outline reasons for choosing regulation as a way of effecting policy rather than alternative means; to ensure that the drafting and promulgation of regulations would be undertaken by senior officials rather than officers "down the line"; that public participation in the regulation making process would be made more effective; that existing regulations would be subject to regular review, eliminating those that have become obsolete; and that writing of regulations would be in "plain English".

51.2 Various bodies were fundamental to the Carter approach - the Office of Management and Budget was vested with the duty of overseeing implementation of the reforms, evaluating clarity of regulations, opportunities for public comment, reasons for choosing regulation rather than alternatives, and preparation of a "regulatory analysis" where considered necessary. The Calendar of Federal Regulations, published by the Regulatory Council and being a precis and analysis in brief of approximately 150 regulations that are "likely to have a substantial economic or public impact" had a continuing role. The Regulatory Analysis Review Group undertook a detailed examination of a limited number of regulatory analyses to provide an overview of techniques

used by agencies in drawing up regulations and reviewing them in accordance with the procedure outlined by the Executive Order. The Regulatory Analysis Review Group aimed to :

* *improve the quality of analysis provided by the agency to support regulations it proposed*

* *identify analytical problems common to agencies and attempt to resolve them*

* *ensure adequate consideration of less costly alternatives - those suggested by the agency concerned, as well as others which the Regulatory Analysis Review Group defined as relevant*

52 The Reagan Administration. When President Reagan came to office, further measures were taken to review regulation making procedures and, more, to deregulate when the opportunity arose. Executive Order 12291 promulgated on 17 February 1981 states in a preamble that its purpose is to "reduce the burden of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure [sic] well reasoned regulations". Regulations and rules covered by the Order include any agency statement "of general applicability and future effect" designed to implement, interpret, or prescribe law or policy, or describing the procedure or practice requirements of an agency. Certain matters are excluded from the order's operation, including regulations issued with respect to a military or foreign affairs function of the United States or regulations related to agency organisation, management, or personnel. Section 2 of the order outlines general requirements for the devising and introduction of regulations. It states :

In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, all agencies,

to the extent permitted by law, shall adhere to the following requirements :

(a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;

(b) Regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society;

(c) Regulatory objectives shall be chosen to maximize the net benefits to society;

(d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and

(e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the conditions of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

Certain rules or regulations are required to be subjected to a regulatory impact analysis. (On regulatory impact analyses, see Contemporary Issues, "Regulatory Impact Statements", at p.166. That section contains an outline of the requirements under Executive Order 12291; a copy of Executive Order 12291 appears at Appendix IV.) Additionally, the Order deals with "regulatory agendas". (This goes over some of the ground already covered by the Administrative Procedure Act 1946; see also the Regulatory Reform Act 1981 - hearings of the 97th Congress.)

52.1 Section 5 of the Order provides that each agency is required to

publish in October and April of each financial year "an agenda of proposed regulations that the agency has issued or expects to issue, and currently effective rules that are under agency review" pursuant to the Order. Each regulatory agenda must contain "at the minimum" :

(1) *A summary of the nature of each major rule being considered, the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any major rule for which the agency has issued a notice of proposed rulemaking;*

(2) *The name and telephone number of a knowledgeable agency official for each item on the agenda; and*

(3) *A list of existing regulations to be reviewed under the terms of this Order, and a brief discussion of each such regulation.*

The Director of the Office of Management and Budget may (subject to the direction of the Presidental Task Force on Regulatory Relief) require agencies to provide additional information in an agenda; and require publication of the agenda in any form.

53 Congress and Regulation Reform. The Regulatory Reform Act 1981 (Bill No. S1080) was introduced and passed by the Senate on 24 March 1982. It contained a number of features akin to Executive Orders No. 12044 and 12291. It was not enacted and both it and a similar House Bill (H746) lapsed. In April 1983 a new S1080 was introduced but by mid July had not gone to Committee. (See Congressional Record - Senate, 24 March 1982, pp. s2713-s2721; Congressional Quarterly Almanac, 97th Congress, 1st Session 1981, Volume XXXVII, pp.404-506.)

Canadian Approach

54 Introduction. In Canada some jurisdictions have passed Regulations Acts comparable with the United States' Administrative Procedures Act. Regulations Acts establish minimum legal procedural requirement for the drafting and passage of regulations and other statutory instruments. Other measures taken to police regulation-making include the Statutory Instruments Act of 1971 and the Standing Joint Committee of Parliament on Regulations and Other Statutory Instruments. (See generally Commonwealth Conference of Delegated Legislation Committees, Vols I, II and III, 1981, AGPS, Canberra.)

55 "Notice and Comment". In 1978 non-emergency "health, safety and fairness" regulations having a major impact on business came under a "notice and comment" procedure formulated by the Treasury Board. Each draft regulation made under statutes listed by the Board is required to be published at least sixty days before it is to be promulgated. It must be accompanied by a Socio-Economic Impact Analysis and statement of its legal standing. A Technical Advisory Group on Impact Assessments has been established within the Treasury Board to act as advisor to departments and agencies in drawing up their socio-economic impact analysis. Subsequently it has been proposed that economic regulations should be subjected to the same procedures as social regulations.

55.1 In 1979 an Interim Report was produced by the Economic Council of Canada as a result of a research programme of government regulation having a "substantial economic impact on the Canadian economy". Various problems were outlined as existing in regulatory promulgation at that time, including lack of notice to interested persons of new regulatory initiatives; inadequate consultation with interested persons at all stages during development of regulations; failure to take into account costs and benefits in formulation and promulgation regulations; failure to undertake regulatory reviews of existing regulations and activities taken in accordance with regulation; lack of any central coordination of regulatory activity; inadequate access by the public to

information about actions taken by government in the way of regulation; and lack of equal opportunity for participation in decision-making concerning the making of new regulations and the operation of existing regulatory programmes by persons or bodies having a legitimate and real interest. As a result, the Council proposed that :

* governments should provide advance notice of intention to propose major new regulations

* opportunity for consultation should be made

* before imposing major new regulations governments should assess costs and benefits of proposed regulations

* on a systematic basis governments should regularly evaluate existing regulatory programmes and agencies.

55.2 The Canadian Parliamentary Joint Committee on Regulations and other Statutory Instruments undertook a review of the Economic Council's report, giving its support to many of the proposals. It commented upon the need for notice and comment procedures for all new regulations; the requirement that any such procedure should be mandatory; and the necessity of ensuring that any consultation required to be undertaken should not be limited to persons or bodies having a particular interest in regulatory programmes : public interest groups and the community generally should be included as well as business interests. (See generally First and Second Commonwealth Conference of Delegated Legislation Committees.)

56 Ministry of Deregulation. At provincial level, some action has been taken in Canada. For example, in British Columbia a new Ministry - the Ministry of Deregulation - was established by executive decree in December 1978. Although it came into being some 18 months after the agreement reached at the First Ministers' Conference, its origins are traced directly to

that agreement. During that eighteen month period, action had been taken by individual ministries to reorganise "to reduce red tape". Additionally :

> ... *the Premier directed one year ago that each Ministry reduce by 10 per cent the number of forms it was using. A number of Ministers have already directed their Deputies to simplify, clarify and reorganize certain procedures within their own sections.*

(Ministry of Deregulation, Report, British Columbia, 11 May 1979, at p.1.)

56.1 The initial mandate of the Ministry of Deregulation was :

> ... *to eliminate unnecessary red tape and to review all regulations to ensure that these satisfy a useful and continuing public interest.* (At p.2.)

Commenting on the mandate, the Ministry of Deregulation in its 1979 report stated :

> *This mandate ... can be extended to an almost unlimited degree, ranging from the satisfying of small problems where regulation or interpretation may have exceeded its original intent, become insensitive or to overlap with other control systems, up to and including a fundamental review of the regulatory actions of Government itself, which would include analysing the execution of the regulatory process, suggesting fundamental changes in the way Government decisions are made, and proposing changes in the structures of Government necessary to avoid overlap. It could also include the removal of redundant legislation and regulations through improper draftmanship, all within the general framework of determining the 'public interest' involved in the existing regulatory processes.* (At p.2.)

56.2 The Ministry devoted its first three months of operation to establishing itself as an administrative operation. A referral centre was set up to answer specific complaints from the public relating to matters coming within the aegis of the Ministry. Many were referrable to the Ombudsman rather than to the Ministry.

56.3 The Minister of Deregulation outlined the policy of the government on administration of regulations, stating that it encompasses the following :

* every person is entitled to fair, just and reasonable consideration in the application of any regulation

* officials with the authority to act or decide under any regulation will be clearly designated

* officials and agencies will require such information or action as is provided for by law and will give a clear explanation of procedures to be followed

* a response or action by government in connection with any regulation will be undertaken within a reasonable time specified by the Minister responsible by law

* it is a prime responsibility of government officials and agencies to coordinate their activities so as to minimize inconvenience to the public

* a person to whom regulations apply is entitled to a clear statement of the reasons, and the right of appeal

* all communications, instructions and notices concerning the application of a regulation will be in plain language

(Quoted in Ministry of Deregulation, Report, British Columbia, 11 May 1979, at

pp. 3-4; the Department was subsequently disbanded, it being determined that, after the initial impetus it provided, regulation review and revocation could better be handled by individual departments controlling their respective regulations.)

56.4 The stated policy related to regulation in operation rather than to deregulation or regulation review. However the Ministry also contemplated action in relation to both those aspects. It stated as a principle that the "... heart of any Government deregulatory effort must be a mechanism to review the fundamental laws and regulations by which Government operates". Various issues arise, including :

* in the past management has allowed some regulations passed by order in council to lapse without formal repeal, so that it is not clear whether some of these regulations in fact continue to carry the force of law

* a number of orders in council are passed each week that are not regulations under the Regulations Act, and the line between the two is "very confused"

* the process by which orders in council are handled requires review, as management practices presently in force lead to a lack of clarity and uncertainty in the law and, thus, to a lack of clarity as to administrative practices being communicated to the bureaucracy and to the public

* some 100 statutes give private non-governmental, semi-governmental organisations the authority to adopt regulations or rules which carry the force of law, despite there being no requirement that these rules and regulations should have the endorsement of cabinet

* many rule-making bodies are under no obligation to publish

their rules or regulations, so they are not available to those affected

* few rules and regulations provide for a right of appeal

* the allocation of authority by the government should be weighted against the accountability and responsibility lying in the body or agency to which that authority is allocated

* minimal standards for the exercise of delegated authority should be set

* a careful and thorough review should be undertaken of all regulatory activity of the province with a view to eliminating or minimizing that regulatory regime wherever it interferes unduly with the operation of a free market

In relation to the last point, the Ministry commented :

> *... in the beginning of this process, the Government would be 'taking on' every entrenched and self-serving economic group in the Province and there would very likely be little political pay-off for having minimized the power and autonomy of these groups. On the other hand, a successful program of deregulating in this area is likely to reduce the overall costs of doing business and the cost of living in the Province and this would be a fundamentally worthwhile undertaking.*

(Ministry of Deregulation, Report, British Columbia, 11 May 1979, at pp. 13-14.)

56.5 In sum, the British Columbia Ministry of Deregulation concluded the task to be undertaken mainly centred around a review of all ministries to determine answers to specific questions, namely :

1 What deregulation activities are being carried on within a given Ministry, and what projects are being contemplated.

2 What regulations are in need of repeal, consolidation, or redrafting on a priority basis, as opposed to others that are routinely in need of redrafting.

3 What services are being provided by a Ministry which duplicates in part, or whole, a function carried out by another Ministry of the Provincial or Federal Government.

4 What practices or procedures presently in use should be simplified or eliminated in order to provide better service to the community.

The Debate in Australia

57 Social and Economic Regulation. The Australian approach to regulatory intervention by government for social and economic reasons derives in part from initiatives taken on the home ground, and in part from those taken in Britain. Sinclair traces the history of protectionism through economic regulation in Australia from the second half of the nineteenth century when Victoria's Tariff Act 1871 paved the way for the passage of subordinate legislation imposing substantial import duties on a wide range of manufactured goods, particularly clothing, boots and shoes. Initially New South Wales took a different approach - that of "free trade". This caused problems in the lead up to federation. (See "The Australian Policy Tradition - Protection All Round" in Australia - Poor White Nation of the Pacific?, Scutt editor, 1985 forthcoming, Sydney.)

57.1 With social regulation in Australia, as in England Factories and Shops Acts and delegated legislation made under them were passed in the respective colonies, often as a result of trades union moves or the work of "philanthropists" or "reformers". In the late nineteenth century reformers were outspoken in Australia and elsewhere about the need for protection of workers from the inhumane conditions and demands of the industrial workplace. Tracts were published by various organisations, including the Fabian Society, deploring work conditions and demanding restructuring and the introduction of worker protection. The conditions outlined by Besant in an article published in 1888 were replicated and fought against in Australia :

> *Bryant and May, now a limited liability company, paid last year a dividend of 23 per cent to its shareholders; two years ago it paid a dividend of 25 per cent, and the original [five pound Sterling] shares were then quoted for sale at [eighteen pounds Sterling, seven shillings and sixpence]. The highest dividend paid has been 38 per cent.*
>
> *Let us see how the money is made with which these monstrous*

dividends are paid ...

The hour for commencing work is 6.30 in summer and 8 in winter; work concludes at 6 p.m. Half-an-hour is allowed for breakfast and an hour for dinner. This long day of work is performed by young girls, who have to stand the whole of the time. A typical case is that of a girl of sixteen, a piece-worker; she earns four shillings a week, and lives with a sister, employed by the same firm, who 'earns good money as much as eight shillings or nine shillings a week'. Out of the earnings two shillings is paid for the rent of one room; the child lives on only bread-and-butter and tea, alike for breakfast and dinner, but related with dancing eyes that once a month she went to a meal where 'you get coffee, and bread and butter, and jam, and marmalade, and lots of it' ... The splendid salary of four shillings is subject to deductions in the shape of fines; if the feet are dirty, or the ground under the bench is left untidy, a fine of threepence is inflicted; for putting 'burnts' - matches that have caught fire during the work - on the bench one shilling has been forfeited, and one unhappy girl was once fined two shillings and sixpence for some unknown crime. If a girl leaves four or five matches on her bench when she goes for a fresh 'frame' she is fined threepence, and in some departments a fine of threepence is inflicted for talking. If a girl is late she is shut out for 'half the day', that is for the morning six hours, and fivepence is deducted out of her day's eightpence. One girl was fined one shilling for letting the web twist around a machine in the endeavour to save her fingers from being cut, and was sharply told to take care of the machine, 'never mind your fingers'. Another, who carried out the instructions and lost a finger thereby, was left unsupported while she was helpless. The wage covers the duty of submitting to an occasional blow from a foreman; one, who appears to be a gentleman of variable temper, 'clouts' them 'when he is mad'.

One department of the work consists in taking matches out of a frame and putting them into boxes; about three frames can be done

in an hour, and one halfpenny is paid for each frame emptied; only one frame is given out at a time, and the girls have to run downstairs and upstairs each time to fetch the frame, thus much increasing their fatigue. One of the delights of frame work is the accidental firing of the matches : when this happens the worker loses the work, and if the frame is injured she is fined or 'sacked'. Five shillings a week had been earned at this by one girl I talked to.

The 'fillers' get three shillings and fourpence a gross for filling boxes; at 'boxing', that is wrapping papers around the boxes, they can earn from four shillings and sixpence to five shillings a week. A very rapid 'filler' has been known to earn once 'as much as nine shillings' in a week and six shillings a week 'sometimes'. The making of boxes is not done in the factory; for these twopence farthing a gross is paid to people who work in their own homes, and 'find your own paste'. Daywork is a little better paid than piecework, and is done chiefly by married women, who earn as much sometimes as ten shillings a week, the piecework falling to the girls. Four women day workers, spoken of with reverent awe, earn - thirteen shillings a week.

A very bitter memory survives in the factory. Mr. Theodore Bryant, to show his admiration of Mr. Gladstone and the greatness of his own public spirit, bethought him to erect a statue to that eminent statesman. In order that his workgirls might have the privilege of contributing, he stopped one shilling each out of their wages, and further deprived them of half-a-day's work by closing the factory, 'giving them a holiday'. ('We don't want no holidays', said one of the girls pathetically, for - needless to say - the poorer employees of such a firm lose their wages when a holiday is 'given'.) So furious were the girls at this cruel plundering, that many went to the unveiling of the statue with stones and bricks in their pockets, and I was conscious of a wish that some of those bricks had made an impression on Mr. Bryant's conscience. Later they surrounded the statue - 'we paid for it' they cried savagely - shouting and yelling,

and a gruesome story is told that some cut their arms and let their blood trickle on the marble paid for, in very truth, by their blood ...

Such is a bald account of one form of white slavery as it exists in London. With chattel slaves Mr. Bryant could not have made his huge fortune, for he could not have fed, clothed, and housed them for four shillings a week each, and they would have had a definite money value which would have served as a protection. But who cares for the fate of these white wage slaves? Born in slums, driven to work while still children, undersized because underfed, oppressed because helpless, flung aside as soon as worked out, who cares if they die or go on the streets, provided only that the Bryant and May shareholders get their 23 per cent, and Mr. Theodore Bryant can erect statues and buy parks? Oh if we had but a people's Dante, to make a special circle in the Inferno for those who live on this misery, and suck wealth out of the starvation of helpless girls.

Failing a poet to hold up their conduct to the execration of posterity, enshrined in deathless verse, let us strive to touch their consciences, that is their pockets, and let us at least avoid being 'partakers of their sins', by abstaining from using their commodities.

("White Slavery in London" (1888) Link, 23 June; reprinted in Horowitz Murray, Other Lost Voices from 19th-Century England, 1982, N.Y., 346; and see Creighton, "The Industrial Safety, Health and Welfare Act 1981 (Vic.) - Radical Advance or Passing Phase?" (1983) 9 (4) Monash University Law Review 195.)

58 Necessity and Effectiveness of Regulation. In 1984 few in Australia would suggest that regulation was unnecessary in the nineteenth century to ensure that there was some protection for workers from exploitation. At the same time reservations exist in many quarters about current regulation, its necessity and its effectiveness. Cranston comments on the problems being articulated at various levels and in diverse forums today, concentrating upon

business regulation in the Australian context :

> *The causes of so-called 'regulatory failure' lie with the forces behind the emergence of business regulation; its actual form 'on the books'; the implementation of regulatory standards by the relevant agencies and by the courts; and the impact of business regulation in its social and economic context.*

("Regulation and Deregulation : General Issues" (1982) 5 (No.1) University of New South Wales Law Journal 1.)

He goes on to point out that the examination of these factors makes it "quickly apparent" why business regulation might be thought to have "failed" :

> *An examination of the way business regulation emerges might show that it was designed to advance business interests, so that it should not be surprising if it 'fails' to achieve a more general public benefit. Regulatory failure might also derive from the form taken by the legislation : there might be deficiencies with the techniques used; its substantive provisions might not be commensurate with what is generally conceived of as its purpose; and the discretion devolved to the relevant agencies might be so wide that they can subvert the legislative purpose. In addition to the design of regulatory legislation, another major source of regulatory failure might be with the agency responsible for implementing it. The law-makers might be to blame here - at least in the first instance - for giving an agency limited powers, for not providing the agency with sufficient resources, for the appointments they make at the senior level of the agency, or for not supporting the agency because of pressure exerted by the regulated. However, regulatory failure might also be attributed to the context within which regulatory agencies operate, and the way this affects the impact of regulatory legislation, rather than to the agencies themselves.* (At p.25.)

58.1 Cranston puts as an example the view that businesses might fail to implement regulatory standards "... because competitive pressures oblige them to adopt production or marketing schemes in which legal obligations are secondary" :

> *Moreover, the benefits of regulation might be such that it cannot be justified, or at least cannot be justified in its existing form, in the light of its costs. Frequently, arguments about regulatory failure based on the economic impact of regulation are often spurious (for example, concentrating on costs to the exclusion of benefits), neglect other values to which economic ends might be considered subservient, and fail to consider the distributional consequences of alternative courses of action such as deregulation.* (At p. 25.)

58.2 Back in 1965 in Australian Society Newton wrote :

> *... the Australian economy is in most important respects a regulated economy. It is not, to quote from 1962 Economic Survey ..., 'a preponderantly free enterprise economy, in which the great bulk of goods and services are provided in response to demand, local or foreign' - not at least in the traditional sense of such an economy, one in which 'normal market forces' determine the direction of resources. It is riddled with controls and interventions, quotas and fixed prices, subsidies and barriers to competition. Above all, it is in many respects, possibly in most important respects, a planned economy - although it may not seem so because the 'planning' which takes place is chaotic.*

("The Economy" in Australian Society, Davies editor, 1965, Melbourne, 247, at pp. 247-248.)

58.3 Commenting on this in 1980, Dr. Allan Fels, then with Monash University, pointed out that Newton was equally concerned with "the relatively

unconstrained power of many firms to regulate their behaviour", as with the effects of government intervention. In his view, twenty years after Newton's assessment, it was correct to say that the powers of firms to regulate their own behaviour had not increased, but government regulation "has been on the increase in Australia as elsewhere". (Theories of Economic Regulation and their Application to Australia, paper delivered to the Conference on Government Regulation of Industry, Institute of Industrial Economics, University of Newcastle, 10-11 November 1980, Newcastle.)

58.4 Taking as given that governmental intervention has increased, Fels puts the view that this gives rise to "a number of important questions" :

(a) *Why has regulation increased so much recently? When is regulation necessary? Has the likelihood of market failure been exaggerated in particular cases? What are the effects and costs of regulation? Does government failure replace market failure? In the changed economic environment of the 1980s, with a slower growth rate, can regulation be afforded? Has government overreached itself in trying to regulate so many economic activities? Should there be deregulation?*

(b) *Given that there will be regulation in an affluent economy in which so much economic behaviour by individuals affects others, have the best ways been chosen of modifying individuals and firm behaviour to conform with the general interest? Has sufficient reliance been placed, for example, on the provision of incentives to achieve desirable results or have less efficient means of achieving regulatory goals been chosen?*

(c) *Are there conflicts between different regulatory policies, for example environmental protection and energy conservation? Are there conflicts between regulatory policies and other economic policies, for example policies which aim to promote*

more competition?

(d) *In view of the widespread existence of regulation, what modifications are required in order that economic theory corresponds more closely to reality?*

(e) *Finally, ... [w]hich economic interests does regulation serve? Does it serve the general interest (in the sense in which this term is used in economics) or sectional interests? Why do some industries seemingly desire regulation? What characteristics of the political process lead to producer interests predominating over consumer interests in many cases? These questions about the political economy of regulation concern income distribution as much as, or more than, efficient resource allocation matters.* (At pp. 2-3.)

59 Studies on Federal Regulation. Fels explores these questions in the context of a number of regulatory agencies established at federal level ostensibly to assist market forces to operate in a way most conducive to community needs and benefits. In relation to the Prices Justification Tribunal, after exploring the thesis that such an agency operates to the detriment of community interests rather than in favour of them, and that it serves industry rather than the general interest, Fels concludes :

> *... there is little substance to the suggestion that the [Prices Justification Tribunal] is anything other than it seems to be - a body established to prevent unjustified price rises and to curb possible abuses of market power.* (At p.22.)*

* The Prices Justification Tribunal was abolished by the federal government in accordance with recommendations of the Review of Commonwealth Functions 1981.

59.1 Of the Trade Practices Act 1974 (Cth) Fels concludes that the proposition that it resulted from pressures exerted against government by sectional interest groups concerned at gaining benefits for themselves at the expense of the community, and that it operates to support those sectional groups, is incorrect. He says that "[d]espite some isolated cases of successful avoidance of the main thrust of the legislation, there can be little doubt that the ... legislation and its associated institutions have accomplished the opposite of [the thesis that 'as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit'] ... The impact of the Act in promoting competition far outweighs any gains made by sectional groups in recent years in obtaining legislation favourable to their own interests". (At p. 26.)

59.2 In sum, Fels concludes that general federal regulatory bodies "do not preserve producer interests". This, then runs directly counter to the thesis of the Friedmans and other United States theorists who have posited otherwise. "Rather", Fels continues, federal regulatory bodies "are set up as a counter to sectional pressures". (At p. 27; and see The Debate in North America, at p.96; Friedman and Friedman, Free to Choose, 1980, New York; Stigler, "The Theory of Economic Regulation" (1971) 2(1) Bell Journal of Economics and Management Science 3; Posner "Theories of Economic Regulation" (1974) 5 (2) Bell Journal of Economics and Management Science 335.)

60 Studies on State Regulation. At state level, little systematic research has been conducted into the economic and social implications of regulation. Pincus and Withers synthesise information available about the operation of the land transport industry in various states. They point out that subsidised railway services, tonne-km taxes on road transport, and licences and permits for road operators have been the major instruments of federal and state regulation :

> *Such regulations began in the 1930s to reduce competition for the State-owned railway, to minimise deficits and to permit the pursuit*

of various non-efficiency objectives, for example, common-carrier commitments, through cross-subsidisation ...

("Economics of Regulation" in Surveys of Australian Economics, volume 3, Gruen, editor, 1983, Sydney, 7, at p. 32.)

60.1 Australian policies were influenced by the United Kingdom Salter Report in 1932, recommending regulation of road transport to reduce the "wastes of competition in road transport". In 1954 interstate road transport was deregulated and, according to one researcher, stability and efficiency resulted. (Joy, "Unregulated Road Haulage : The Australian Experience" (1964) 16 (No.2) Oxford Economic Papers (July), cited Pincus and Withers, "Economics of Regulation", at p. 32.) According to Pincus and Withers, analysis by various researchers "leaves road-rail regulation primarily as railway protection" :

> *While Australian regulation here does not reduce competition between road hauliers, it does reduce competition between road and rail and, overall, between transport and transport substitutes. Of course for tonne-km taxes and permit charges to cause misallocation in favour of rail they must be in excess of an appropriate charge for road maintenance costs, and rail supply prices must reflect true rail costs. Many believe this is the case ... but little quantitative evidence is provided.*
>
> *The evidence for inefficiency is thus indicative only. Illustrative examples are provided of changes in freight patterns after deregulation in 1954, and in South Australia, New South Wales and Queensland where there has been more recent deregulation with regard to tonne-km taxes and permits. Which relative prices are appropriate is still not established ... [N]o study has systematically estimated the effects of regulation itself upon traffic patterns and hence costed the impact of regulation.* (At p. 33.)

60.2 But in some cases, the authors argue, it is possible to contend that regulations favour the regulated group rather than the community or the consumer. This is instanced by the research on taxi licensing in the Australian Capital Territory : Swan argues on the basis of examining the system that "licensing raises fares and increases delays for service. The only benefits got to existing owners of taxi-plates and the licensing administrators". (On Buying a Job : The Regulation of Taxicabs in Canberra, Policy Monograph No. 1, 1979, Centre for Independent Studies, Sydney; cited Pincus and Withers, "Economics of Regulation", at p. 53.) The Builders Licensing Board in New South Wales operates on an administrative budget of $4 million "to disqualify an average of five licence holders per year and to suspend fifteen other licences for short periods", according to a study carried out by Sieper in 1978. (Consumer Protection - Boon or Bane?, paper presented at the Centre for Independent Studies Conference, Macquarie University, Sydney, 1978; cited Pincus and Withers, "Economics of Regulation", at p. 53.) Pincus and Withers ask rhetorically whether this is "[a] case of successful, if costly, deterrence?"

60.3 Some research on the effects of regulatory measures introduced by way of subordinate legislation reveals the legacy of old fashioned ideas, often linked with sex discriminatory attitudes and behaviour. The New South Wales Review of Government Administration ("the Wilenski Report") pointed out that under regulations, cleaners in Government Stores are differentially treated with respect to hours of work : women are limited to 33 hours whilst men work 40 hours per week; women are temporary employees whilst men are permanent. Such differentiations, enforced through subordinate legislation, effectively bar women from participating in occupations, yet do not protect their health. (Report of the Review of Government Administration, 1978, Sydney, at p. 1983.) As has been pointed out, in addition to discrimination in principal legislation :

> *More indirect but equally discriminatory legal barriers exist in the way of 'protective' measures. For example, under the New South Wales' Factories, Shops and Industries Act special provisions specify the weights that women and males under eighteen years are*

precluded from lifting; this means that they are precluded from participating in some occupations. Special regulations may be made for female employees, and special facilities for women are required under the regulations. Because the rules for women and men are different, employers are discouraged from admitting women to jobs. Some [subordinate] legislation requires job applicants to be of a particular height, weight and chest measurement - although this has no relationship to tasks to be performed in that job.

(Scutt, "Education, Employment and Australian Women" in 1980 WEL Papers, 1980, Melbourne, 29, at p.30; also Scutt, "Legislating for the Right to be Equal : Women, the Law and Social Policy" in Women, Social Welfare and the State, 1983, Baldock and Cass, editors, Sydney, 223.)

60.4 A study carried out by Refshauge for the New South Wales Anti-Discrimination Board showed clearly that weight lifting regulations did not serve a positive purpose in the iron and steel industry. As a result of the restrictions on women, women were prevented from competing for jobs in the industry; men carried heavy loads, but this was detrimental to their welfare, resulting in a high number of claims for workers' compensation as a result of injuries. In papers presented to conferences in her private capacity, Refshauge has put the view that rather than applying the weight lifting limitations to men, it would be more practical to eliminate lifting in the industry : it serves no purpose apart from enabling the men concerned to live up to a "macho" image. According to her study, men traditionally cart heavy loads, quite unnecessarily, to affirm their masculinity. Some tasks involve heavy lifting when it is unnecessary. In one case, a system organised to lift heavy sacks from the backs of trucks was carried out in a manner which increased the need for lifting and required inordinate strength (often leading to injuries); an alternative method was readily available but was scorned as being unmanly. Refshauge holds that measures to protect health, whether related to weight lifting or otherwise, should apply to people irrespective of sex. (Refshauge, "Bearers of Burdens : Occupational Safety Without Discrimination" in All Her Labours, 1984, Sydney 170; see Refshauge, "Lifting Weight at Work" (1982) Women and Labour

Conference Proceedings; and see also report on study carried out for the New South Wales Antidiscrimination Board, 1981-1984, Sydney, report yet to be published.)

60.5 In Victoria, an officer of the Victorian Chamber of Manufactures ("the VCM") looked at the impact of government regulation on the foundry industry. The foundry industry was chosen because "a number of regulations affecting [it] had been introduced over the last decade or so". Comprehensive regulations were introduced to cover the industry in 1966 under the Labour and Industry Act 1958. The regulations covered foundry buildings in relation to cleanliness, lighting, ventilation and related features; health - particularly dust control; safety; and employee amenities including washing, eating and changing facilities. Additionally environmental legislation resulted in regulations being passed covering foundry activities. These included subordinate legislation under the Clean Air Act 1958 and the Environment Protection Act 1970. In Crow's view, the industry was a prime target for a regulatory impact study in that the regulations under the Labour and Industry Act were broad and the time lapse since their introduction would "provide a good basis to study the impact of regulations". As well, in relation to environment protection regulations, it was claimed that this "imposed a heavy cost burden on the industry, in some cases causing closure of firms". (Crow, Government Regulation of Industry, Paper II - Specific Case Study, "The Impact of Government Regulation on the Foundry Industry in Victoria", October 1981, Melbourne, at p. v.)

60.6 Desk research involved statistical data on the industry since the Second World War, and an industry questionnaire seeking information on "the nature and extent of the foundry industry's dealings with government, the impact of government regulations on the industry and changes in the industry's operations since 1960" was distributed to all units in the industry. As well, former management of defunct foundries were "traced and interviewed to identify reasons for closure".

60.7 The aim of the study was to identify and measure, where possible,

costs and benefits of government regulation. The report summed up :

> *There were many practical barriers to developing a methodology to assess the impact of regulation on the foundry industry.*
>
> *There were problems with quantifying benefits. Many [benefits] were only able to be assessed in qualitative terms. In addition, benefits of regulation often are evaluated on a community-wide basis and cannot be measured by the accounting and engineering records of business firms. This is particularly so in the case of environmental regulation when benefits such as 'improved air quality' and 'preservation of the species', are difficult if not impossible to quantify.*
>
> *There are problems also in identifying and measuring total costs. Some costs are easily identified - such as the purchase of pollution control equipment. Others, such as loss of productivity, resource misallocation, lost investment opportunities, impeding effects on innovation and technological advancement and so on, are often difficult to identify, let alone quantify.* (At p. viii.)

60.8 Despite the problems, possible benefits identified by the study in relation to the 1966 Labour and Industry (Foundries) Regulations were in the realm of improved working environment. According to the study, provisions in the regulations setting a standard for safety, employee health and amenities might be taken to have "improved the overall conditions of employment" including :

* the reduction of accident and injury rates

* the reduction of the incidence of silicosis

* increase in employee satisfaction through making the foundry a more attractive place in which to work

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In economic terms, these benefits should result in :

* a reduction in lost time due to injuries and accidents

* a reduction in workers compensation claims due both to industrial accidents and industrial disease (silicosis)

* a reduction in industrial disputes related to working conditions

* an improvement in productivity levels due to greater worker satisfaction

* a reduction in labour turnover due to greater worker satisfaction

* an improvement in apprenticeship levels and apprenticeship educational standards due to better working conditions

60.9 Commenting on the possible benefits the report went on to point out that :

> *Lack of controls and adequate statistical data on benefits (objectives) to be measured meant that no firm conclusions could be drawn on whether there were in fact benefits from the regulations.* (At p. ix.)

Nonetheless, incidence of silicosis decreased over the period, but "to what extent this was due to regulation could not be quantified". As well, the occurrence of accidents decreased :

> *This could have been related to companies' accident prevention programs rather than safety provisions of the regulations. It appears regulations create an awareness of safety and, as such, are more of a backdrop to company safety programs.* (At p. ix.)

(Yet without the regulations, it could be questioned whether companies would have introduced safety programmes at all.)

60.10 As for losses to the industry through industrial disputation, Crow concluded that there "appeared to be" a considerable degree of worker demand for better working conditions prior to the introduction of the regulations. This "seemed to taper off in the following years. This tapering off may have been due to improvements in conditions, but it could not be substantiated" as being directly related.

60.11 As for costs, hypotheses taken into account were the assumption that regulations :

* increased the total direct costs of a foundry, including identifiable cost items such as the cost of providing safety clothing (boots, gloves, overalls and the like), and worker amenities (washroom, lunchrooms, washing facilities and the like)

* had a negative effect on levels of investment - that is, compliance to the regulations directed capital away from "productive investment" increasing plant capacity and updating machinery

According to the survey, foundry regulations increased costs and other investments in accordance with the direct costs hypothesis, however "it was not possible to quantify the cost accurately" due to the lapse of time following the introduction of the regulations in 1966.

60.12 With the environmental regulations under the Clean Air Act 1958 and the Environment Protection Act 1970 "there were substantial problems in quantifying both costs and benefits". Hypotheses studied in relation to benefits

included :

* improvements in life, health and wellbeing of humans

* improvements in life, health and wellbeing of other forms of life

* improvements in visibility

* increase in useful life and improvements in appearance of building structures, property and materials

* increase in aesthetic enjoyment

Hypotheses put forward to test the "cost" of environmental regulations (which, according to the study were "more readily identifiable") included :

* that compliance with the regulations caused the closure of some foundries

* that compliance with the regulations reduced productivity levels through the introduction of environment control equipment

* that compliance with the regulations increased the level of non-productive investment by foundries

* that compliance with the regulations increased total costs

60.13 The study concluded :

... the net impact of environmental regulations cannot be assessed. Social benefits such as the protection of the environment are difficult to quantify. Private benefits which accrue to firms

associated with pollution abatement requirements are more easily quantified. Such benefits may include technical innovation, improved productivity and reduction of roof rust or improved neighbourhood relations.

During the height of the environmental pressures on foundries in the mid 1970s, while there was a reduction in the number of foundries, there was an increase in output and productivity. This increase may have been related to foundries either improving cupola furnace practices to reduce emissions, or changing to induction melting. Management decisions in either case may have been influenced by environmental regulation, or a variety of other 'business considerations'. It is therefore difficult to quantify the impact of regulations in that instance.

The costs of environmental regulations are also difficult to assess with accuracy. Although a number of firms have changed over to induction melting, it is unclear whether the whole of that cost can be ascribed to regulation or to other business considerations. By 'complying' with the regulation many firms improved their efficiency in many cases. Secondary costs are also difficult to quantify. There is also the cost factor of those foundries that closed due to the fact that they could not raise the capital necessary to comply to emission standards. (At pp. 137-138.)

60.14 In the final analysis, the report acknowledged that all that could be said was "that there have been costs and benefits associated with environmental regulation, but the net impact of the regulation cannot be assessed. In Crow's view the difficulties surrounding assessment of regulations resulted from a lack of identifying, at the outset of regulation-implementation, objects of regulations and other features which would facilitate regulation review. It was therefore imperative, according to the report, to incorporate into regulation development and review factors to assist in making a useful assessment.

60.15 In 1984 in a study of the retail industry, Hogbin looked at regulations dealing with shop trading hours. He concluded that these regulations operate to the detriment of the largest sector of the community affected - namely, the consumer. His research is quoted by Porter as confirming that "the gains to the community at large from liberalising retailing shopping hours are potentially enormous". (See Porter, "The Labour of Liberalization" in Australia - Poor White Nation of the Pacific?, Scutt, editor, 1985 forthcoming.)

60.16 In reviewing the issues, Hogbin restricts himself to weekend shopping, dealing systematically with the 'time cost' of shopping; retailers and weekend trading; employees and weekend trading; and weekend trading practices. In looking at shoppers' demands, he describes practices elsewhere in Australia than Victoria, as well as public opinion polls and surveys of public demands. On the difficulty of ensuring one has the "right" answer to "what is the public demand?" or the most accurate answer, Hogbin comments :

> *Regardless of how many official inquiries or surveys of public opinion are conducted, nobody can know in advance the extent to which people would shop on Saturday afternoons or Sundays if they were free to do so. Even if the regulatory authorities act in accordance with their perceptions of the public interest, it should be recognised that their judgements must inevitably be made substanially on the basis of guess work. Are they guessing correctly about where the public interest lies with respect to weekend trading? What is meant by that widely used but ill defined term the 'public interest'? Do the authorities give more weight to the interests of some groups than to others? ...*

(Free to Shop, Centre for Independent Studies, 1983, CIS Policy Monograph 4, at pp. 26-27.)

60.17 The "cost of time" to the potential consumer is discussed. Hogbin

acknowledges there is difficulty in calculating this cost "because it differs for the same individual at different times, and varies from individual to individual". "Time cost" may be the cost to a person of three or four hours' shopping on a Friday evening which might otherwise be spent at a theatre or a restaurant, or an hotel with fellow employees. On a Sunday it may be the value of going to play tennis, going to the beach, attending church, Sunday driving ...

60.18 With retailers, there are arguments for and against, and retailers are, acknowledges Hogbin, divided on the question. Employees are a group potentially greatly affected by any proposal to change shopping hours, for restructuring of the labour force in the whole retail trade would be necessary. On this :

> *The community faces a clear choice. Either consumers will have to bear the costs of restrictions on their freedom to shop for all time to come, or at some time a particular group of employees will have to bear the once-off costs of adjusting to weekend trading. The costs of adjustment are unlikely to diminish in the future, but ... the costs to consumers of maintaining the restrictions are likely to become increasingly severe.* (At p. 64, emphasis in text.)

Of prices, the conclusions are that :

> *It is by no means obvious that the average level of retail prices would rise if [weekend shopping] were to be introduced. While the need for retailers to pay premium wage rates for weekend work would exert upward pressure on prices, other factors would produce downward pressures, so that the outcome is uncertain.* (At p. 77, emphasis in text.)

60.19 Hogbin says :

> *We have seen that if consumers had a wider choice of times in which*

to shop, especially at weekends, their time-costs of shopping would be reduced and the benefits derived from their leisure time raised. This is so because they would be better able to avoid scheduling shopping excursions during time that could be used for activities which they value more highly, and because congestion would be reduced, especially on Saturday mornings. Consequently, they would be able to shop more carefully and gain more satisfaction from the limited quantities of goods and services their incomes allow them to purchase. Workers with nine-to-five jobs would be the ones most likely to gain because, at present, the time available for shopping is severely curtailed.

(Free to Shop, Centre for Independent Studies, 1983, CIS Policy Monograph 4, at p. 82.)

60.20 The Committee notes that varying views are taken of this proposition. Strong opinions have been voiced either way, as they have on other studies of regulatory necessity, efficiency and impact. The Committee observes that this bears out the view that just as debates continue generally within the academic community about the nature of research and its objectivity, so too research into the advantages or otherwise of deregulation (like research into any field) is not taken by observers to be value free.

Initial Moves In Victoria

61 Review Papers. In Victoria, the United States' and Canadian moves resulted in an increased interest in regulation reform on the part of various bodies, including the Confederation of Australian Industry and the Victorian Chamber of Manufactures. Papers written by the Executive Assistant to the Director of the VCM, Ms. Janine Crow were published in 1981 as part of the Victorian Government Deregulation Review Unit exercise. Reviewing the United States' and Canadian scene, she itemised six points relevant to Australia generally and Victoria in particular :

* the various approaches to regulatory reform in the United States and Canada provide an example of mechanisms currently in use, but in mooting their possible application to Australia, it is important to be aware of the different operating environments in those countries

* the regulatory system and associated problems in the United States are quite different in nature and magnitude from those existing in Australia : the complex regulatory system existing in the United States is lacking in Australia

* major programmes of regulatory reform have been initiated in the United States with reform being sought through deregulation of specific industries and increased cost-effectiveness of social regulation

* due to many similarities between the federal systems of government in Canada and Australia, the Canadian experience in regulatory reform may have greater relevance to the Australian situation

* unlike in the United States, the main objective of the Canadian reform movement appears to be directed towards improved cost-effectiveness rather than deregulation

* aspects of the Regulation Reference undertaken by the Economic Council in Canada could provide an example of mechanisms and approaches relevant to any regulatory activity which should be put in train in the Australian context

(See generally Crow, Government Regulation of Industry, Paper I "Framework Study", July 1981 (and particularly at pp. 51-52); and Crow Government Regulation of Industry, Paper II "Specific Case Study - The Impact of Government Regulation on the Foundry Industry in Victoria", October 1981.)

61.1 In her summary of recommendations Crow concluded that if regulatory decision-making is to be improved, "review mechanisms must be installed that will both facilitate and influence decisions". The over-riding recommendation was that proponents of major new policies should :

> ... *state the objectives of proposed government action clearly enough to permit future evaluation of whether the objective is being met; state the potential impact on overall economic objectives; and present evidence to justify government's involvement and choice of regulatory technique ... [T]he results [should] be independently evaluated relative to goals and projections.* (Paper I, at pp. vi-vii.)

61.2 Essential elements of any regulatory reform programme were outlined as including :

* consultation with interested parties and the opportunity for public comment during the development of major new regulatory proposals

* prior assessment of the potential benefits and cost of major new regulations

* assessment of feasibility and mode of implementation to minimise costs and dislocation of those to be regulated

* assessment, review and consolidation of existing regulations (to help to eliminate overlapping regulations - whether local, state or federal - and regulations which are no longer operative)

* increased accountability of government agencies in the conduct of regulatory activities

* development of a regulatory strategy to minimise the transition costs of the introduction or withdrawal of any regulation

* review of major legislation and regulations every few years to ensure that inappropriate/outdated legislation does not remain in operation

(Paper I - "Framework Study", at p. viii.)

62 Regulation Review Unit. In August 1981 a Regulation Review Unit was established in the Premier's Department as a special unit of the State Coordination Council. (The State Coordination Council was abolished by the repeal of the State Coordination Council Act in 1983.) A co-ordinator from the Premier's Department and seven members formed an advisory panel. These members included a representative from the Department of Labour and Industry, a representative from Treasury, one from the Department of Planning, another from the Ministry of Economic Development, and one from the Public Service Board, as well as a representative from the Victorian Chamber of Manufactures (VCM) and one from the Metal Trades Industry Association (MTIA). The latter two representatives became members of the advisory panel in February 1982. The Unit comprised a secretary and two support staff, all from the Premier's Department.

62.1 The responsibilities of the Unit included a general review of the area, the aims being to devise ways of removing regulations which had become obsolete or which were impeding the progress of business and to identify those which required revision to enable economic development to proceed without artificial constraints. The Unit began working toward planning a programme designed to tease out some of the principles which are now outlined in the Subordinate Legislation (Deregulation) Bill 1983, and to work toward framing procedures which would enable the principles to be implemented.

62.2 With the change of government the Unit continued its work until abolished as a result of the passage of the State Coordination Council Repeal Act in 1983. The work of the Unit and subsequently of the Department of the Premier and Cabinet (as the Premier's Department became after the change of government) resulted in the measures now outlined in the Victorian Government's statement released on 9 April 1984 - Victoria. The Next Step - Economic Initiatives and Opportunities for the 1980s. (See particularly chapter 6, "Regulation Review and Reform", at pp. 44ff.)

Summing Up

63 Bipartisan Concern. What becomes clear in the final analysis is that there is a general concern in Australia about the nature and effect of regulation. This concern has often sought to distinguish between "economic regulation" and "social regulation", sometimes seeing justification for the latter but not for the former; on the other hand, some critics have contended that social regulation does not achieve its aims. Whatever the position taken, however, the concern about regulation has spread across the political spectrum. Although differing ideological views may determine the type of regulations about which individuals, groups or political parties articulate disaffection, it is clear that on balance there is a general acceptance of a need to review the regulatory process. (See for example, Crow, Government Regulation of Industry, Papers I and II, 1981, Melbourne; CAI, Government Regulation in Australia, 1980, Melbourne; Hawke, "Perspective in Industrial Relations - The Labor Alternative" in Industrial Confrontation, Aldred editor, 1984, Sydney, 20; Hughes, "Australia and the World Environment - The Dynamics of International Competition and Wealth Creation" in Australia - Poor White Nation of the Pacific?, Scutt editor, 1985 forthcoming, Sydney; Porter, "The Labour of Liberalization" in Australia - Poor White Nation of the Pacific?; Button, "Australia's Industry Policy - Now and the Future" in Australia - Poor White Nation of the Pacific?; MacPhee, "The Labour Market" in Australia - Poor White Nation of the Pacific?; Jones, "Science and Technology - Managing Our Opportunities" in Australia - Poor White Nation of the Pacific?; Bailey, "Capital Markets and the Climate for Development" in Australia - Poor White Nation of the Pacific?; and see generally, Cranston, "Reform Through Regulation : The Dimension of Legislative Technique" (1978) 73 (5) Northwestern University Law Review 873; Cranston, "Regulation and Deregulation : General Issues" (1982) 5 University of New South Wales Law Journal 1.)

64 The Committee's Approach. Taking into account this concern, the wide range of views on the need for regulatory reform, and the evidence given before it, the Committee believes that the time is ripe for a review of the

regulatory process. To this end, the Committee is of the view that it is essential that delegated legislation procedures are made more amenable to the taking into account of factors that may or may not make delegated legislation effective. Additionally, possible alternatives to dealing with economic and social problems by way of delegated legislation, and the longevity of delegated legislation should be considered. In this regard, the question also arises as to whether it is preferable for administrative steps only to be taken to implement such a programme, or whether a legislative approach is required. In accordance with its belief that delegated legislation and the matters taken into account in its making should be as open to public view as possible, the Committee believes that it is necessary to provide a legislative base for the review and, where appropriate, revocation of delegated legislation. In this way, the public can be apprised of measures taken and principles followed.

65 RECOMMENDATION 1

The Committee considers that it is essential for the current debate on the effectiveness or otherwise of delegated legislation to be taken into account by government. To this end, the Committee recommends that a legislative base should be provided for the introduction of procedures to ensure that delegated legislation making is in accordance with community needs. The principles to be followed by departments and authorities in the making of delegated legislation should also be contained in that Act.

CONTEMPORARY ISSUES

Application of Policies by Principal or Delegated Legislation

66 The Issues. It has been suggested that a system of regulations assessment is necessary because currently there is little or no public involvement in the regulation making process. Publicity and the scrutiny which is devoted to principal legislation is not accorded to delegated legislation. Principal legislation is subject to debate in Parliament, which means that the public has an input through its elected representatives and also that consequent publicity alerts the general community to government proposals and government action. Some people contend that subordinate legislation is, however, made by bureaucrats who are not answerable to the public; it is made without publicity, without consultation, and without opportunities for interested parties to air their views.

66.1 Parallel with this, a debate is being conducted which takes as its premise the view that rather than containing detailed policy provisions, Acts should in fact contain only general statements of principle, leaving the "filling in" to be done by way of subordinate legislation. For example, Clark has said that the philosophy underlying the framing of legislation of a principal nature should conform with the idea that it is drafted to ensure :

* the inclusion of general, broad, declaratory statements as to the purpose of the legislation and the objects to be promoted

* precise lines of executive authority are spelt out in order to overcome problems of inter-departmental conflict

* the legislation is conceived as a basic fundamental document concerning the subject matter, which will stand the test of

time and not require frequent amendment; exact details of how power is to be exercised is left to regulations

* It is in simple, uncomplicated, non-technical language

(See Clark, "Legal Problems Associated with the Role of Planning in Water Resources Management" 2 Annales Juris Aquarum 598; also Public Bodies Review Committee, Seventh Report to Parliament, 1982, Government Printer, Melbourne, 56.)

66.2 The Committee accepts that it is untrue to say that public servants "make" delegated legislation. Subordinate legislation is generally made by Governor in Council, and the Minister is ultimately responsible for it. Nonetheless it is important to subject delegated legislation to public scrutiny. This is all the more important if principal legislation takes the broad-brush approach. If it is accepted that the principal legislation should take this form, then it is the more imperative that regulations should be subject to a public review process.

67 Policy, Consultation, and Delegated Legislation. No doubt in some instances it is incorrect to say that subordinate legislation is formulated without consultation with interested parties, or with those who will be affected. In submissions to the Legal and Constitutional Committee, some government departments and instrumentalities in fact spelt out their consultation processes. For example, the Department of Agriculture pointed out that it consults extensively with groups outside the Department. In giving evidence before the Committee, the Secretary of the Department of Agriculture said :

> *... all our major sets of regulations are developed after consultation with whatever the relevant industry might be. We have a long history of different types of regulations, about 58 sets in fact, and in nearly every case there seems to have been some sort of industry body on whom the major impact of those regulations will fall. When*

we are about to make a major set of regulations, we always consult with industry and when we are making a new and major set of regulations we always consult with Parliamentary Counsel.

(Wheatland, oral evidence, 26 June 1984, at p. 357.)

67.1 The aim of the Department in taking this approach is "that we would have a set of instructions where the legality, the constitutionality and all those aspects involving the impact on industry have been properly canvassed". (At p. 357.) The Secretary of the Department, added :

We do not go through that process with fee changes and minor amendments, but that procedure has been the Department's practice for some time. (At p. 357.)

67.2 The nature of the consultation conducted by the Department of Agriculture varies depending upon the regulations. In some cases, drafts of proposed regulations may be the subject of consultation with outside bodies. In some cases outside bodies submit their own draft words, but "in most cases it relates to principles".

67.3 The Deputy Director-General of the Department elaborated, saying :

The nature of the draft words that the Department develops depends on -

(a) the industry with which we are dealing; and

(b) whether we are dealing with another government department.

There will often be more technicality in communications concerning health matters : for example, if it is a regulation affecting the dairy industry there will be more technicality, although the general principles behind the proposed change would be discussed with the dairying industry.

(Hore, oral evidence, 26 June 1984, at p. 357.)

67.4 The Health Commission consults with relevant boards and other bodies when regulations are being formulated or reviewed. In evidence before the Committee a representative of the Commission said :

The call for subordinate legislation can come from various areas, either from the ministerial side where it follows on from a Bill, or it can come from the public health area. That normally comes by way of the Subordinate Legislation Review Committee, which is a permanent body meeting once a week.

Otherwise, calls come from various divisions, which may write to the Commission and suggest that an amendment be made or that some new form of legislation be introduced.

The Subordinate Legislation Review Committee is comprised mainly of public health personnel and, depending on whether the regulation being reviewed is a matter for health surveyors or any special interest group, they will be represented on the Committee. It is an internal committee. They then seek opinions from outside groups, manufacturers and consumers, whoever may be interested, and they deal with the submissions made on behalf of those people to the Commission. They, with their expertise and knowledge of the area, will contribute to the practical side of what the regulation should be without attempting to hone the language or create the regulation.

(Power, oral evidence, 4 July 1984, at p. 380.)

67.5 A second representative of the Commission explained that a different approach arises in relation to different subordinate legislation :

> *There are a number of boards under the administration of the Minister of Health. Taking one as an example, the Optometrists Registration Board, there are ways in which regulations tend to be amended with respect to that Board. First, the Board will ask the Commission to prepare regulations with respect to the matter. Secondly, with respect to fees payable to members of the Board, the Commission would obtain a direction from the Public Service Board which states the point to which the fees may be adjusted, and it would then write to the Board indicating that figure. It would ask for a recommendation from the Board so that the Commission may make the necessary amendment.*

(Race, oral evidence, 4 July 1984, at p. 381.)

67.6 In answer to the question of what an individual optometrist would do, should she or he have a proposed regulation or amendment to a regulation, the Subordinate Legislation Officer of the Commission replied that that had not occurred in her experience, as such a matter would be raised with the Optometrists' Board by the individual, and therefore would come through to the Commission from the Board in the usual way. The Commission's Legislation Officer added that in many cases regulations can be made only on the recommendation of the appropriate board, which comprises (in the example quoted) optometrists who are elected by the profession, "although the Registrar is a full time solicitor who acts as Registrar as a minor part of his duties". (Race, oral evidence, 4 July 1984, at p. 381.)

68 Summing Up. Despite the consultative nature of some departmental subordinate legislation proceedings, not all government departments and instrumentalities adopt such an approach. Furthermore, the consultative process is not necessarily undertaken in a systematic form. As well, some

parties claiming an interest, or claiming to be affected, may not be a part of the consultation mechanism. If consultation is to be undertaken, it would seem important that charges of "favouritism" or "partiality" to certain interest groups should not be allowed to arise, whether or not such charges have substance.

68.1 The Committee believes that, as far as possible, principal legislation should spell out the policies to be pursued by government in a particular area. No new policy should be able to be introduced by way of subordinate legislation. However, it is equally clear that not every item can be spelled out in principal legislation, and that in fact to do so would be a misuse of parliamentary time. Delegated legislation should be used as a means of putting into practice policy as spelled out in principal legislation. In this regard the Committee accepts that delegated legislation may expand upon policy contained in principal legislation. At the same time the Committee emphasises that this "expansion" should not go beyond the implementation of policy as laid down in the Principal Act. Broad guidelines laid down in principal legislation should be clear and exact, thus indicating precisely to the electorate and to the implementing department or other body the policy sought to be pursued.

69 RECOMMENDATION 2

The Committee accepts that principal legislation cannot deal with every conceivable issue which may arise in the pursuit of a particular policy outlined in that legislation. However, as far as possible principal legislation should spell out the policy guidelines to be followed by bodies vested with delegated powers to implement government policy as stated in a particular Act. Where delegated legislation deals with policy implementation, it should not go outside the boundaries laid down in the Principal Act, although its terms may further define the policy aims to be pursued under the principal legislation. The Committee therefore recommends that principal legislation should, as clearly and precisely as possible, indicate the boundaries of policy to be implemented by subordinate legislation passed in accordance with that principal legislation.

Enabling Provisions

70 The Issues. As previously outlined, enabling provisions may be couched in broad, all encompassing terms, or may be drafted in more specific terms, limiting the body with delegated power to passing delegated legislation in precise accordance with specific matters outlined in the principal legislation. (See "Enabling Clauses", at pp.44-55 of this Report.)

70.1 Parliament has a clear role to play in the oversight of delegated legislation, and that role should commence at the starting point : that is, at the point at which power is to be granted to a government department or other body to make delegated legislation. Parliamentary scrutiny should be directed at the formulation of enabling clauses. This should ensure that delegated powers are not so wide as to enable the delegated body to introduce regulations or other forms of subordinate legislation going beyond that which Parliament originally contemplated in the passing of the principal legislation.

70.2 It may be suggested that parliamentary time does not permit sufficient scrutiny of Bills as a whole, and that Members of Parliament are not necessarily possessed of the requisite expertise to enquire into the form of enabling clauses. The Committee believes that this argument has some merit, and that it would be helpful to Members if a specialist committee were established to provide Members with a report on Bills coming before the House, with a particular concentration upon enabling clauses. At federal level, the Government has acknowledged that the Scrutiny of Bills Committee "has improved the legislative process without inconveniencing or slowing down the legislative program." (Cumming-Thom, The Senate's Scrutiny of Bills Committee, Paper presented to the Fourteenth Presiding Officers and Clerks Conference, 19-24, June 1983, Nauru, 127 at p.131.) That Committee has expert assistance from a lawyer based at the Australian National University. Such resources are necessary to enable this work to be done effectively.

71 RECOMMENDATION 3

The Committee recommends that Parliament should establish a Scrutiny of Bills Sub-committee of the Legal and Constitutional Committee, that Committee to comment generally on Bills before the Parliament and, particularly, to comment to Parliament on the nature and scope of enabling clauses contained in Bills. The Scrutiny of Bills Sub-committee should have the responsibility of alerting the Parliament to any clause of a Bill which might be considered to :

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties and/or obligations unduly dependent upon non-reviewable administrative decisions;

(iv) inappropriately delegate legislative power;

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

That Sub-Committee should not have the authority to comment on policy.

Sunset Provisions

72 Background. Sunset provisions are designed to ensure that a specific life span is allotted to a law or body at the outset. By this principle, if a body established in 1985 is granted a lifetime of, say, five years, then in 1990 it automatically becomes defunct unless positive steps are taken to prolong its existence. In conjunction with a sunset provision it is usual to find outlined in the Act creating the relevant body, programme or law, review procedures to be followed if prolongation is to be authorised. If the review procedures are not complied with or reveal that the purpose of the body (or law, or programme) is spent, then no extension will be forthcoming : Parliament would be required to authorise such extension by way of a new Act, and presumably would not do so without justification.

72.1 The impetus for including "sunset" provisions in legislation generally, or particularly in laws establishing regulatory agencies or programmes in the United States came initially from the community lobby group Common Cause. In their Report on State Sunset Activity they outlined the origin and rationale of sunset laws :

> *Sunset is the brainchild of Colorado Common Cause which had grown frustrated with more traditional attempts to reform Colorado's regulatory structure. It is a tribute to the power of ideas in our political process that three years after the idea was first broached 29 states had enacted sunset laws. Common Cause defines 'sunset' as an action-forcing mechanism designed to increase executive branch accountability through imnproved executive and legislative evaluation of programs and agencies. While 'sunset' has many possible applications a typical sunset law establishes a timetable for review of a group of programmes, laws or agencies. These would terminate on certain established dates unless affirmatively recreated by law. This threat of termination is the mechanism designed to force evaluation.*

(Common Cause Report on State Sunset Activity, cited Phillips, "Sunset Legislation" (1979) The Australian Quarterly, December, 85, at p. 88; see also Congressional Record, January 1977.)

72.2 In describing the operation of sunset laws, and urging their introduction, Common Cause acknowledge that legislatures already have the power "to terminate existing programmes and agencies", but conclude that they seldom exercise that power. Why? Common Cause replies :

> *The reasons are not mysterious - programme evaluation and legislative oversight are difficult, time-consuming tasks. It is easy to put them aside. Most legislators look ahead rather than behind. They are extremely busy and can always justify doing something other than oversight. Proposing legislation is more glamorous that reviewing laws. In recent years many state legislatures have made improvements in their evaluation work. But before the recent wave of sunset legislation most legislatures still spent far too little time on oversight and made little use of the programme evaluation information that they did receive. Sunset is designed to force legislatures to carry out their oversight responsibilities in order to strengthen state government. In the absence of affirmative action by the legislature the status quo is changed rather than continued. A good sunset process will result in a partnership between the executive and legislative branches that will result in improved evaluation work by the executive branch as well. Common Cause views sunset as a way to make government work but the name and the termination mechanism are not enough ... Sunset legislation must contain the institutional arrangements necessary to guarantee meaningful and thoughtful programme evaluation. Evaluation is the key to the goal of increased accountability.*

(Common Cause Report on State Sunset Activity, cited Phillips, The Australian Quarterly, at p. 88; See also Washington Post, 27 April 1976, "Sunset for Bureaucracies".)

73 United States' Sunset Act. Federally, similar views were expressed during the hearings conducted by the Senate Committee on Government Affairs during the first session of the 95th Congress, held to gauge the response of various individuals, bodies and interest groups to the proposed Sunset Act of 1977. The Bill aimed to require authorisations of new budget authority for government programmes at least every five years, so as to "provide for review of government programmes every five years, and for other purposes" : cl. 2. Introducing the Bill, Senator Muskie pointed out that in its "simplest sense, sunset proposes nothing more than a process through which Congress can begin to exercise greater control over the results of its legislative work - the hundreds of individual programmes we have created over the years and which affect the daily lives of all Americans in so many ways ..." (Congressional Record, 10 January 1977, at p. 3.) In his view, the principle was a "relatively simple idea" :

> *It assumes that there is no Federal programme so important or so holy that it should escape regular and thorough review - to see if it is working, to see if it is still needed, to see if its funding level is justified by its contribution to society.* (At p.3.)

73.1 Principal provisions of the Sunset Act 1977 included :

* a 5 year schedule for the mandatory reauthorisation of all federal programmes; where no such reauthorisation is provided, no money can be spent to carry out the programme

* appropriate committees of the House and the Senate should propose a similar schedule for the review and re-enactment of tax expenditures

* authorisations for federal programmes should be grouped for reauthorisation by budget function and subfunction, so that Congress has to look at all programmes in a given area at one time, rather than the usual practice of "bits and pieces"

* no programme scheduled for reauthorisation could be reauthorised unless the authorising committee with jurisdiction over it completes a thorough review of the programme and provides a substantial justification for the programme's continuation

There was general agreement during the debates and hearings that "sunset" would add to the efficacy of government and benefit the community as a whole. (See Congressional Record, 95th Congress, First Session, 22, 23, 24, 28, 29 and 30 March 1977, U.S. Government Printing Office, Washington D.C.)

73.2 The Sunset Act 1977 lapsed in the 96th Congress. (See s.403-14 Program Evaluation Act 1977 and commentary Congressional Quarterly - Almanac, 95th Congress, First Session, 1977, volume xxxiii, pp. 815-816; also Congressional Quarterly - Almanac, 96th Congress, Second Session, 1980, volume xxxvi, pp.530-531.) Legislation on "paperwork" - designed to eliminate much form filling and "to do away with some needless government paper work" had more success, Bill HR 6686-PL96-470 passing the House and Senate, with Senate cuts agreed to on 2 October 1980. The measure eliminated or modified 95 of the 2,300 reports required to be made annually to Congresss by government agencies. This legislation was viewed as complementary to regulation reform.

74 Sunset in Australia. In Australia, various inquiries into the standing and activities of statutory bodies have borne out the view that once a law is passed, or an agency established, or a regulation introduced, it is highly likely that it will continue to operate, rather than its existence being reviewed or - even more unlikely - being abandoned and subject to repeal by parliamentary and governmental action.

74.1 In recognition of this problem, in 1980 the Parliamentary Committees (Public Bodies Review) Act 1980 provided the opportunity for

sunsetting of all public bodies through a review mechanism : that is, by Parliament or Governor in Council, if a particular body is referred to the Public Bodies Review Committee for review and the Committee recommends its abolition, abolition is automatic unless a debate in the Parliament resolves otherwise. Without such debate taking place, the named body "sunsets" 12 months after the tabling of the Public Bodies Review Committee negative report. In its third report to the Victorian Parliament, the Public Bodies Review Committee discovered, amongst other matters, that at the time there were in excess of 9,000 public bodies in the State, with "approximately 1,000 such bodies [being] ... significant"; they accounted for more than two-thirds of all public sector expenditure in Victoria, employing approximately two-thirds of the public sector work force; approximately 80 per cent did not report on their activities to Parliament - and many did "not even report to the responsible Minister"; where reports were required to be tabled in Parliament, most were "in a form that has little relevance, even comprehensibility" to Members. In addition :

> *Even a cursory examination of a small sample of Victoria's public bodies population exposes a large number of anomalies, overlapping responsibilities and unclear or unstated objectives.*

(Audit and Reporting of Public Bodies, 1981, Government Printer, Melbourne, at pp. vii-viii; and see comments Grant, The Australian Dilemma, 1984, Sydney, at pp.154-155.)

74.2 Following these revelations, efforts were taken to ensure that public bodies were accountable by way of the Annual Reporting Act 1983 (less than 20 per cent of Victoria's public bodies were audited by the Auditor-General at the time of the Report). However, it is clear that had sunset provisions been included in the legislation establishing the bodies (or in parent legislation or administrative directives - less than five per cent of Victoria's public bodies were established under an independent Act of Parliament at that time), arguably the number of such bodies would not have burgeoned as they did without such controls. At minimum, such provisions would have ensured a regular review of the activities of agencies and their relevance. There can be

little doubt that an agency, regulation or law established, made or passed in, say, 1911 or 1940 or 1955 may well have little application or relevance in 1984 or 1994.

74.3 Thus, sunset-type provisions are not unknown in Australia. A more specific example arises in Tasmania where the Law Reform Commission Act 1974 contains such a provision. The Tasmanian Parliament in the July/August session passed the Law Reform Commission Act 1984 which was drafted to replace the former Act, taking into account views expressed as a result of review of the activities of the Commission. Under the new legislation the Commission is constituted differently - without laymembers as Commissioners, for example - with a revamped secretariat; it has a five year lifetime, with review to take place in 1989. In some jurisdictions, emergency legislation has sometimes been passed which includes sunset provisions - for example, the legislation passed in New South Wales in 1979 to deal with issues arising in the transportation of goods by truck owner-drivers (which precipitated a blockade on Razorback Mountain) provided that the Act would have a limited lifetime only. (See Road Obstructions (Special Provisions) Act 1979; Road Obstructions (Special Provisions) Revival and Amendment Act 1983.)

75 Summing Up. The Committee believes that, in principle, sunset provisions are a valuable means of ensuring that oversight is maintained of bodies, laws and programmes established by Parliament, which may be apposite at the time of their creation, but which run the risk of becoming obsolete - yet continuing on without review. In the Committee's view, it is vital that Parliament should maintain a process of review as far as it is able to do so. This is particularly true in the case of delegated legislation. As a general matter the Committee endorses the principle of sunset provisions covering regulations.

76 **RECOMMENDATION 4**

The Committee endorses in principle the introduction of provisions "sunsetting" regulations after they have been in operation for a stated period. Departments and other bodies having oversight of regulations should be required to undertake periodic reviews of those regulations to justify their continuation.*

* The exact nature and terms of sunset provisions to be incorporated are outlined at pp. 253-279 in Part II of this Report, and Recommendations 21-30.

Impact Statements

77 Environmental Impact Assessment. The proposal that regulations should be subjected to an "impact analysis" or "impact statement" has its precursor in the environmental impact statement. For example, under the Environment Effects Act 1978 it is provided that the environmental effects of proposed new developments "which could be of environmental significance" are carefully described and considered before any decisions about the commencement of such developments are made. An Environmental Effects Statement is required to be prepared by the proponent of the development. The Act covers :

* public works which could have a significant effect on the environment

* municipal works

  - local government bodies may at their own discretion seek advice and assistance of the Minister for Conservation for the purpose of making decisions about new developments and evaluating any environmental effects statement

  - the Minister for Local Government or other relevant Minister may request such bodies to seek the advice of the Minister for Conservation in relation to a proposed development and any environmental effects statement

* any other decision making process where those making the decision refer matters related to the decision to the Minister for Conservation for advice under the Environment Effects Act; amongst matters which might be covered in this way are planning decisions (including private development) and mining approvals

77.1 Mr. Malcolm Knight, formerly Chief Assessment Officer, Ministry for Conservation and presently Director of Research, Victorian Parliamentary Natural Resources and Environment Committee, discussed the procedures adopted in relation to environmental impact statements when he gave evidence before the Legal and Constitutional Committee. He said :

> *The present Environment Effects Act 1978 allows the Minister for Conservation to intervene in any public works decision ... The Minister for Conservation could not intervene directly in a decision about a private development unless it had been referred to the Minister by the decision maker.* (Oral evidence, 9 March 1984, at p.53.)

The "decision maker" is the body or department responsible for making a decision as to whether a proposed project should or should not proceed. On most occasions involving major projects, the Minister for Planning would have to make a decision on proposed developments, and therefore could refer them to the Minister for Conservation for the purpose of invoking the provisions of the Environment Effects Act. (The Minister for Planning and Environment is now the responsible Minister for both the Town and Country Planning Act and the Environment Effects Act.)

77.2 Addressing the question of what mechanism provides for the relevant minister to "become alert" or to be notified of a particular developmental proposal, Knight said :

> *There is a section in the Ministry [of Conservation] which has the job, basically, of keeping in contact with all ... public works departments and the [local] councils. If [a] controversial development is proposed ... it is surprising the communication network that exists. There is always someone who [will] object, and there is always someone who says that [a particular proposal] has to have an environmental effects statement ...*

[V]ery often the procedure for an environment effects statement is much more elaborate than this. Often there is an advertisement in the newspapers saying there is an intention to produce an environment effects statement and asking for submissions on what it ought to cover. That was done with the Mount Stirling Alpine Resort Centre exercise. For major contentious works often there are periods of public consultation before one gets to the preparation of an environment effects statement. (At p. 54.)

77.3 Prior to the introduction of the environmental impact statement procedure, approaches by local councils and other bodies to proposed major developments was inconsistent. Some bodies recognised the need for assessing the benefits and disadvantages of development projects; others failed to do so:

For example if it was the Melbourne City Council or some similar body, they would normally ask for some documentation which was very similar to the environmental effects statement, and ... would require it to be publicly displayed. However, if ... a council was not used to having [a major developmental] proposal before it, it might well have become overawed and think it was a good development, whatever the case. Such bodies would omit to ask for the right sort of information. That did not apply only at council level; it applied right throughout the system. [Bodies] did not think they had the right to ask for [environmental impact] information.

...

Often projects would have gone through without people looking at factors to be examined ... It is worth stressing that the first aspect the environmental effects procedure seeks to establish is whether there is a need for what is proposed. It is surprising to note in the past how frequently that question was omitted. Second, the procedure requires one to look at alternative ways of meeting that need. Thirdly, one is required to do what is effectively a cost-benefit analysis for the alternatives, to show that one's alternative is the best way of meeting the situation. That fairly rigorous

approach is relatively new throughout the world. It started in 1969 in the United States of America and has gradually become commonplace throughout the world. (At p.55.)

77.4 Costs are incurred for undertaking environmental impact assessments. In Knight's view, they are justifiable and proportionately may be infinitesmal. As he said, being required to produce an environmental impact statement "does impose some additional costs. For example, with the Driffield power station, the statement would have cost overall about $1 million to produce." The total cost of the Driffield power station project "was $400 million and the $1 million was only a small proportion. When one thinks of the consequences, it (the overall procedure) probably saved the State from making the wrong decision." (At p.55.)

77.5 Knight added that with the introduction of environment impact assessment procedures companies should spend no more than on a public relations exercise to acquaint the community with proposed developments (which expenditure is undertaken by companies in the normal course - that is without environment assessment procedure requirements). However even if they did spend more in collecting the information necessary to the environmental impact assessment, such information will ultimately be beneficial to the company as well as the community.

78 Social Impact Analysis. A later development is the "social impact statement" or "social impact analysis". The Department of Community Welfare undertook social impact reviews in relation to the Loy Yang Power Station development and the La Trobe Valley development. (See Office of Research and Social Policy, Social Impact Assessment - Latrobe Valley, July 1982, Department of Community Welfare Services, Victoria; Regional Consultative Council (Central Gippsland), Living with Loy Yang - The Traralgon Community Survey, February 1983; Department of Community Welfare Services, Victoria; Regional Consultative Council (Central Gippsland), Views of

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the Valley - The "Social Impact Assessment - Latrobe Valley" Consultation, May 1983, Department of Community Welfare Services, Victoria.) (It should be noted, however, that this procedure in both cases differed from the environmental effects statement procedure, in that under the Environment Effects Act the inquiry into effects is to take place prior to any development being undertaken; the social impact statements done by the Department of Community Welfare for Loy Yang and the La Trobe Valley were compiled after decisions about the developments going ahead were made.)

78.1 Social impact assessment procedures in Victoria, like environmental impact assessment procedures, have their forerunners in the United States. Mr. Bernie Marshall, officer employed by the Department of Community Welfare in the Policy Advice and Development Branch and previously an officer with that Department's Social Planning Unit, outlined to the Committee in evidence the background to the introduction of the process :

> *In the United States when, in 1969, the National Environmental Policy Act was implemented, a great debate took place, centering around various aspects including what "protectional policy" meant. There was a recognition that within that system there was a need for a consistent methodology by which social impact assessments might be carried out. Following the introduction of the Act, it was found that practitioners did not really know how to go about doing such assessments and there was no consistent way in which social impact proposals were being addressed, if at all. In Victoria, the social impact assessment methodology has no specific legislation as it does in the United States of America.* It evolved basically from the Norgard Report in 1976 into child care. That Report advocated that the government should be aware of the family and*

* Although as in the United States, under environmental impact legislation social impacts should be incorporated within environmental effects statements where appropriate to the project proposed or under review.

community impacts of their policy proposals. That was one of the earliest signs that it was recognised that government decisions have an impact on families and communities. (Oral Evidence, 9 March 1984, at p. 63.)

Subsequent to the Norgard Report, the 1978 White Paper on Community Welfare Services reinforced the view that family and community impact assessments should be made in relation to government proposals which might conceivably have a real effect upon them.

78.2 Although the new Community Welfare Services Act 1978, passed in conjunction with the White Paper proposals, fails to make specific provision for such assessments to be required, the spirit of the Act was taken to include the making of social impact statements. Marshall commented to the Committee :

The Community Welfare Services Act gave the department a role in co-ordinating social planning and integrating it with economic and physical planning across government departments. It also facilitated community involvement in government planning.

Prior to the enactment of the legislation, the department approached cabinet with a proposal that one means by which that function could be performed was by a social impact statement or family or community impact statement being carried out in relation to various government proposals. Cabinet at that time agreed with an arrangement that a department could be approached by any minister to undertake a specific impact assessment on his behalf...

[I]n September 1980 we initially gained approval for the establishment of a social planning unit in the department ..." (At pp. 63-64.)

(At the time Marshall gave evidence to the Committee there was no Social

Planning Unit within the department "because of the restructuring of the department [due to] an effectiveness review ... carried out ... by the Public Service Board ..." and the fate of the unit was unclear.

78.3 Marshall referred to the La Trobe Valley and Portland projects, saying :

> *Following the establishment of the social planning unit, we have been engaged in a number of social impact assessments ranging from very popular topics such as the social effects of the Olympic Games ... to the effect of Sunday VFL football ... [I]n the La Trobe Valley and Portland areas ... we have been involved in providing a social effects input into the strategy plan development. Work has been carried out by physical planning agencies.*
>
> ...
>
> *The then Ministry for Economic Development [referred] the Latrobe Valley exercise to the unit and the Department of Planning [referred] the Portland study. Basically the studies were different from the environmental effects process in that we were looking, in the Portland Alcoa exercise, at a situation where the decision for development had already been made. We were looking at how the development in that region might take place in the fifteen or twenty years following. In the Latrobe Valley exercise, the Ministry for Economic Development was interested in developing a strategy plan on behalf of the ministerial council for a similar development, putting the State Electricity Commission project within the context of a long term development plan. Both ... exercises were not specifically tied to single projects, although Alcoa at Portland was perhaps a little more specific. The Latrobe Vallery exercise was designed around a range of projects that were likely to impact on that community within the next twenty years.*
>
> *The approach to social impact assessments we adopted in each of*

the cases was different ... [I]t is important to recognise the way in which one carries out an assessment will vary according to the case ... What is appropriate in the Latrobe Valley may not be appropriate in Portland because of the nature and types of impacts that are likely to occur ... (At pp. 64-65.)

78.4 In assessing social impacts, the aim is "... to identify the social consequences of any proposed development plans ... with a view to influencing the political process, leading up to decisions on projects that were to be implemented". According to Marshall, the major strategy of social impact assessors is to counterbalance the traditional emphasis on economic considerations and the commonly held view that social impacts are somewhat intangible and incapable of measurement along traditional economic cost benefit lines :

The basic agenda has been to address and perhaps redress the social equity issues, how the impact of projects has been distributed across various sub-groups within the community. The traditional model has been that the poor in our society bear the major burden of the impact of projects and quite often have the least ability to contribute to the decisions which will have an effect on them.

He concluded :

... social impact assessments ... are little more than common sense, because they concern matters that should be done by a responsible department. It seems nonsensical for any responsible department to make decisions on the basis of insufficient information.

Impact assessments aid decision making; they do not replace it. They should contribute to the decision rather than make the decision for the person or party wanting it made. The options for what the strategy should be need to be clearly addressed. (At p. 65.)

79 Regulatory Impact Statements. Although the proposal that regulations should be subjected to an impact statement prior to their introduction is new in the Australian context, it has a relatively long history in the United States. The Report of the Committee on the Judiciary - United States Senate on the Regulatory Reform Act, published in 1981, traced the history of regulatory impact procedures. Yandle testified at the Senate hearings that the regulatory analysis provided in the Regulatory Reform Bill should not be described as "a dramatically new development in that it is part of an evolutionary process which we have observed as regulatory analysis and cost-benefit analysis have entered into the regulatory process now for a number of years." The Committee continued :

> ... *in the late nineteenth and early twentieth centuries, cost-benefit analysis was introduced into government policy making at the local level as a device to evaluate proposals for municipal sewage systems ... Cost-benefit analysis was mandated at the federal level for the first time in the Food Control Act of 1935, which required that acceptable water resources projects demonstrate that 'the benefits to whomsoever they may accrue are in excess of the estimated costs' ... The Congressional Research Service has identified over 200 instances since that time where Congress has incorporated requirements for some form of cost-benefit analysis, economic analysis, or cost-effectiveness studies in regulatory decision making.*

(At pp. 69-71; see also Green, "Cost-Risk-Benefit Assessment and The Law : Introduction and Perspective" (1977) 45 George Washington Law Review 901; Baram, "Regulation of Health, Safety and Environmental Quality and the Use of Cost-Benefit Analysis" Final Report to the Administrative Conference of the United States (1979) 1, 11-12 (1 March); Jeweller and Carr, Survey of United States Code Provisions Concerning Requirements for Cost-Benefit, Economic Impact, or Cost-Effectiveness Analysis, 1981, Washington DC.)

79.1 The Committee pointed out that the procedure had been introduced on a generalised basis by way of executive order, citing the initiative of

Executive Order 11821, promulgated by the Ford Administration and focussing on the economic effects of regulation "by requiring agencies to consider the inflationary impact of major rules", defined by the numerical threshold of a $100 million impact on the economy each year. The Carter Administration superseded the Ford initiative by Executive Order 12044 which similarly required consideration of economic and other effects of major regulations. President Reagan's Executive Order 12291 required agencies to undertake a regulatory impact analysis of major rules; to support introduction of such rules, the regulatory impact analysis must ultimately support the proposition that expected benefits of the proposed rule exceed its costs.

79.2 Section 3 of the Reagan Executive Order states, in relation to regulatory impact procedures :

Regulatory Impact Analysis and Review

(a) *In order to implement ... this Order, each agency shall, in connection with every major rule, prepare, and to the extent permitted by law consider, A Regulatory Impact Analysis. Such Analyses may be combined with any Regulatory Flexibility Analyses performed under [the relevant law].*

(b) *Each agency shall initially determine whether a rule it intends to propose or to issue is a major rule, provided that that Director [of the Office of Management and Budget], subject to the direction of the [Presidential] Task Force [on Regulatory Relief], shall have authority, in accordance with ... this Order, to prescribe criteria for making such determinations, to order a rule to be treated as a major rule, and to require any set of related rules to be considered together as a major rule.*

(c) *Except as provided in ... this Order, agencies shall prepare Regulatory Impact Analyses of major rules and transmit them, along with all notices and proposed rulemaking and all final*

rules to the Director as follows :

(1) If no notice of proposed rulemaking is to be published for a proposed major rule that is not an emergency rule, the agency shall prepare only a final Regulatory Impact Analysis, which shall be transmitted, along with the proposed rule, to the Director at least 60 days prior to the publication of the major rule as a final rule;

(2) With respect to all other major rules, the agency shall prepare a preliminary Regulatory Impact Analysis, which shall be transmitted, along with a notice of proposed rule making to the Director at least 60 days prior to the publication of a notice of proposed rulemaking, and a final Regulatory Impact Analysis, which shall be transmitted along with the final rule at least 30 days before the publication of the major rule as a final rule;

(3) For all rules other than major rules, agencies shall submit to the Director, at least 10 days prior to publication, every notice of proposed rulemaking and final rule.

(d) To permit each proposed major rule to be analyzed in light of the requirements stated in ... this Order, each preliminary and final Regulatory Impact Analysis shall contain the following information :

(1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of these.

(2) a description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to

bear the costs;

(3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;

(4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of this potential benefit and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted; and

(5) Unless covered by the description required under paragraph (4) of this sub-section, an explanation of any legal reasons why the rule cannot be based on the requirements set forth in Section 2 of this Order. [See p.106-107 of this Report for an outline of the requirements of section 2.]

(e) (1) The Director, subject to the direction of the Task Force, which shall resolve any issues raised under this Order to ensure that they are presented to the President, is authorized to review any preliminary or final Regulatory Impact Analysis, notice of proposed rulemaking, or final rule based on the requirements of this Order.

(2) The Director shall be deemed to have concluded review unless the Director advises an agency to the contrary under subsection (f) of this Section :

A. Within 60 days of a submission under subsection (c)(1) or a submission of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under sub-section (c)(2);

B. Within 30 days of the submission of a final Regulatory Impact Analysis and a final rule under subsection (c)(2); and

C. Within 10 days of the submission of a notice of proposed rulemaking or final rule under sub-section (c)(3).

(f) (1) Upon the request of the Director, an agency shall consult with the Director concerning the review of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under this Order, refrain from publishing its preliminary Regulatory Impact Analysis or notice of proposed rulemaking until such review is concluded.

(2) Upon receiving notice that the Director intends to submit views with respect to any final Regulatory Impact Analysis or final rule, the agency shall, subject to ... this Order refrain from publishing its final Regulatory Impact Analysis or final rule until the agency has responded to the Director's views, and incorporated those views and the agency's response in the rulemaking file.

(3) Nothing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law.

(g) For every rule for which an agency publishes a notice of proposed rulemaking, the agency shall include in its notice :

(1) A brief statement setting forth the agency's initial determination whether the proposed rule is a major rule, together with the reasons underlying that determination; and

(2) For each proposed major rule, a brief summary of the agency's preliminary Regulatory Impact Analysis.

(h) Agencies shall make their preliminary and final Regulatory Impact Analysis available to the public.

(i) Agencies shall initiate reviews of currently effective rules in accordance with the purposes of this Order, and perform Regulatory Impact Analysis of currently effective major rules. The Director, subject to the direction of the Task Force, may designate currently effective rules for review in accordance with this Order, and establish schedules for reviews and Analyses under this Order.

79.3 The Order defines "major rule" as did the earlier orders, namely as :

Any regulation that is likely to result in

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprise in domestic or export markets.

79.4 The rationale underlying the introduction of regulatory impact procedures is that decision-making will be enhanced if all possible information is available to the decision-maker. In their introduction to Benefit - Cost Analyses of Social Regulation Miller and Yandle state that "every policy action

reveals that, in the mind of decision maker(s), benefits do exceed costs and that the distribution of benefits and costs is socially desirable". (1979, at p.4) However, there is no real assurance that it is true that benefits exceed costs in any policy decision : all information is not necessarily available, for information seeking and obtaining procedures are not necessarily fail-safe. The Sub-committee on Regulatory Reform of the Committee on the Judiciary of the 97th Congress stated that the "difficulty of governmental risk evaluation lies in the fact that it must construct a collective value judgment for purposes of national policy in areas where the facts are imprecise and the values inherently subjective, individualistic, and often conflicting." The same is true for State Governments and local government, and individual government agencies. This means that uncertainty "tends to dominate regulatory decisions", particularly having regard to "the causal relationships and the presumed benefits that underlie regulatory decisions". The Regulatory Reform Committee cited an example in relation to certain regulations designed to protect citizens' health :

> *In the area of chemical carcinogens, ... there is tremendous uncertainty regarding dose-response relationships. Even where the causal relationship is established, we do not know what the threshold of danger is, or if indeed there is a threshold. We do not know very much about what substitutes will be used for chemicals that we are either banning or regulating. There is some evidence that in many cases the substitute chemical has been more damaging.*

(Schuck, "A Tool for Assessing Social Legislation" in Reforming Regulation, Clark, Kosters and Miller, editors, 1980, New York, 117; Report on the Regulatory Reform Act, 1981, at p. 72.)

79.5 Decision makers are faced with competing interests, and tradeoffs are invariably necessary. More information and the existence of procedures whereby various interest groups and community representatives are enabled to put their views, based on expertise in a particular area, will mean that competing economic, social and moral claims are more adequately revealed. Without such a procedure, those whose claims are more obvious or who are able

to gain access to the decision making process will more often "win"; this means, in the context of regulation-making, that regulations will not necessarily be made which benefit the community to the optimum degree possible, but will very likely benefit sectional interests to the detriment of the whole. The making of tradeoffs in determining the desirability and form of regulations should, in the view of the Regulatory Reform Committee, "be addressed directly and rationally" :

> *Careful regulatory impact analysis can be a valuable aid to this process : Impacts must be identified and quantified and causal links established. As such, impact analysis can be important not only for the resulting information, but also for the overview of impacts and interrelationships which it can provide.*

79.6 The Regulatory Reform Committee acknowledged that the lack of any clear, public structure for resolving tradeoffs of regulatory decisions "does not mean ... that agencies do not at least implicitly address these matters". Intelligent decision-making has to be based on "some sort of implicit cost-benefit analysis. Often you cannot quantify the benefits or the costs, but you must think about what you are getting into in cost and benefit terms". However, the Regulatory Reform Committee continued :

> *Implicitly making such important public decisions [in this way] is unacceptable from many perspectives. Most critically, implicitly resolving the tradeoffs inherent in regulatory decisions tends to undermine the accuracy and value of those decisions. Simply put, since these choices must be made, 'it is preferable to make [them] explicitly, based on the best available assessment of social gains and losses, than implicitly based upon judgments which are only imperfectly understood.' Explicit, public resolution of regulatory tradeoffs tends to buttress the credibility of the value judgments involved. 'The role of the scientist in providing the technical basis for such value judgments must be properly delineated, as must the roles of the government administrator making regulatory decisions*

> *on behalf of society and the attorney implementing the resulting regulations.' The credibility of regulatory judgments will be enhanced not only by defining the roles of various individuals in making such decisions, but by exposing their assumptions and prejudices to public view.* (At p. 73.)

In sum, the Regulatory Reform Committee accepted the view of representatives of the Reagan Administration appearing before it to give evidence on the proposed law, that the point of good regulatory analysis is "to present in a systematic way the information that is available for comparison and to highlight areas where judgment and/or more data are needed." (Hearing on S. 1080, response of the administration representatives to written questions; Report on the Regulatory Reform Act, 1981, at p. 75.)

79.7 Not all views of regulatory impact statement procedures are, however, positive. In particular, the requirement that regulation-making should be overseen by the Office of Management and Budget has been subject to criticism. Tolchin and Tolchin state that the grant of power to the Office of Management and Budget under Executive Order 12291 to oversee all major regulations issued by regulatory agencies has "directly discouraged the agencies from developing new regulations". They continue :

> *... if a new regulation was to be advanced, the agencies were required to present extensive cost-benefit analyses to justify it.*
>
> *Despite its power, [the Office of Management and Budget] 'pretends it isn't there' ... But by demanding ever more information and raising one objection after another, the budget office exercises de facto control over the agencies' agenda and output. The mere fact that [the Office of Management and Budget] questions a proposed regulation can cause an agency to drop the proposal.*

("The Rush to Deregulate" (1983) New York Times Magazine (21 August) 38, at p. 69.)

79.8 In support of their proposition, Tolchin and Tolchin note examples of this limiting effect occurring throughout 1981. Documents obtained under subpoena by a subcommittee of the House Energy and Commerce Committee showed that from June to September of 1981 "at least seven proposed regulations were returned to the agencies. Six were never resubmitted". Regulations which were thus stifled by the process included those prohibiting hang gliders from using airspace in the vicinity of airports, and regulations covering the blood alcohol level of pilots.

79.9 The "chilling effect" of the Office of Management and Budget's involvement in regulatory impact procedures has also been commented upon. Counsel to the subcommittee of the House Energy and Commerce Committee has been noted as expressing concern about the chilling effect caused by budget office procedures. What is difficult to discover is the number of regulations that have never been submitted to the Office, because agencies are deterred from putting them through Office of Management and Budget oversight processes. According to counsel, this means that regulations which may have an important role to play in ensuring that necessary standards are adopted by particular industries and conformed to, never come into effect because agencies are afraid to put them through the rigors of an Office of Management and Budget review, or worse, are convinced that the Office of Management and Budget will take a position against the regulations, and therefore will adopt a view of the cost/benefit analysis which is negative to introduction of the regulations. In such circumstances, agencies are confronted with the question whether it is worthwhile or economically justified to propose regulations and undertake hearings, cost-benefit analysis, and draw up regulatory impact statements : these efforts will be negated by a pre-decision made by the Office of Management and Budget that the regulations should not be introduced.

79.10 Whether or not the view of agencies that the Office of Management and Budget has made up its mind prior to viewing the regulations and accompanying information is correct, is not the issue : what is in issue is the "chilling effect" that oversight by the Office has on the regulation making

activities of agencies. (See Tolchin and Tolchin, "The Rush to Deregulate" (1983) New York Times Magazine (21 August) 38, at p. 69, citing Patrick M. McLain, Counsel to the Subcommittee of the House Energy and Commerce Committee.)

79.11 Tolchin and Tolchin cite experience of the Environmental Protection Agency regulations developed to implement the Clean Water Act. The regulations were designed to prevent private industry from dumping toxic chemicals into municipal sewage treatment plants which were not designed to handle those wastes. The regulations were formulated to prevent dumping : in their absence, the chemicals could proceed untreated through the sewage plants to contaminate rivers and lakes. This in turn would impair drinking water quality; there was a risk of the chemicals "entering the food chain". (Contaminants about which concern was greatest were lead, which damages the nervous system and may cause major damage to children; and mercury, which is linked to brain damage and loss of vision.) The regulations required 60,000 industrial plants to treat chemicals before emitting them into the environment.

79.12 Tolchin and Tolchin continue :

> *... in the spring of 1981 the [Environmental Protection Agency] suspended key portions of the regulations just three days after they had taken effect ... A law suit initiated by the Natural Resources Defence Council, an environmental public-interest group, revealed that the suspension had in effect been ordered by the Budget Office, pending an economic analysis that the [Environmental Protection Agency] staff said would take 15 months. The agency had already issued one economic-impact statement during the four years of preparation before the regulations were allowed to go into effect.*
>
> *In the course of the lawsuit, the evidence showed that the three Government units involved in the decision to suspend the rules - [Office of Management and Budget], the Vice President's Office and*

[the Environmental Protection Agency] - had been contacted by representatives of affected industries and companies, including the Chemical Manufacturing Association and the Ford Motor Company. There was no record, however, of any conversations with environmental groups ... (At p. 69.)

79.13 Tolchin and Tolchin come down on the side of enabling consultation to take place between regulatory agencies and groups interested in the outcome of proposed regulations, and thus favour regulatory impact procedures. However they object to the power of the Office of Management and Budget in reviewing the procedures of regulation-making bodies. The Tolchins deplore interference with the initial consultation process undertaken by a particular agency. In particular they protest about the "superior" consultation process of the Office of Management and Budget. Their position has, in fact, been supported by the United States Court of Appeals for the Third Circuit, which ordered a reinstatement of the regulations proposed in relation to the Clean Water Act on the basis that the Office of Management and Budget consultations had not been subject to "notice and the opportunity for comment" by the public, as required under the Administrative Procedure Act 1946.

80 Cost-Benefit Analysis. The making of regulatory impact statements in the Unites States has been, as pointed out, very much attuned to cost-benefit analysis techniques. In reviewing the value of cost-benefit in relation to regulatory impact, the Committee had the assistance of a number of learned articles and submissions from academics and others working in the field, and discussions with witnesses appearing before it. (See for example Cranston, oral evidence, 30 March 1984, at pp.101,108; Philips, oral evidence, 30 March 1984, at p.92.)

80.1 The Committee recognises that as a measure against which to judge the value of regulations it cannot be seen in isolation from policy considerations : that is, the result of a cost-benefit analysis may point toward the

inappropriateness of a particular regulation, in that it may seem "too costly" in financial terms, but its value may lie in the policy contained in the regulation, which is not quantifiable in monetary terms. It is incorrect to suggest that all policy decisions can be made in accordance with a simple quantification of cost and benefit. Government involves political decisions which cannot be ignored, and which might if cost-benefit analysis is seen as the ultimate answer to which policies should or should not be followed, be seen as irrelevant. The other side of the coin is that cost-benefit analysis may serve to hide policy or political decision-making : that is, such decisions may continue to be made, but be concealed in a welter of "scientific" figuring which purports to rely upon objectivity, despite the truly subjective nature of underlying assumptions which in turn affect the cost-benefit analysis.

80.2 Mr. D. Brereton, Lecturer in Legal Studies at La Trobe University raised these issues in a written submission to the Committee. He said:

> *Clearly, a strong case can be made that there should be some expanded institutionalised mechanisms for reviewing proposed and existing regulations. It is also highly desirable that those who write regulations be required to give serious thought to why they might be needed, what their likely impact might be, and so on. ... [Cost-benefit analysis is a method that can be used but not uncritically.] Whatever the utility of [the cost-benefit approach] in particular instances, it is a moral cop-out and and a dangerous intellectual error to believe that 'scientific economics' can either assume responsibility for making difficult policy decisions or that it can in effect take such decisions in a neutral fashion.*

(Written submission, 5 June 1984, at p. 1.)

80.3 He noted a number of specific problems in relation to cost-benefit analysis. These include :

* a thorough analysis of the desirability of a particular scheme or approach to a problem would require a large-scale effort to collect and analyse all information that might bear upon the question

* making sense of all data, particularly given the dubious reliability of some of it, would be a task of daunting complexity

* in practice, "cutting corners" would be seen as a "solution" to the problem of complexity

* to eliminate complexity, often only one or two alternatives would be systematically considered, with attention being directed to information which is accessible, easy to interpret but not necessarily reliable

* because it is necessary to quantify particulars in monetary terms, this itself leads to distortion

* significant value judgements are necessary, particularly where what is measured is a cost-benefit that cannot easily be stated in monetary terms

80.4 Brereton adds :

For example, how do we determine how much a life is worth? (This question arises frequently in dealing with issues such as road safety, industrial health and regulation of pharmaceutical drugs.) There is no obvious 'right' methodology for resolving this issue and the analyst, in assigning an amount, is forced either to rely on his or her own values or to borrow a technique or estimate embodying somebody else's values.

Even where the effect is ostensibly quantifiable, the analyst will often still be confronted with a number of problematical choices ... like it or not, the analyst must make a choice which, intentionally or otherwise, will entail the incorporation of significant value judgements into the analysis ...

The use of cost-benefit analysis to deal with questions where public health and safety may be at stake raises serious methodological and moral questions. Do we really want those charged with reviewing regulations governing public amusement structures to tally up the supposed dollar value of lives saved and injuries prevented by these regulations and then subtract from this the cost to operators and consumers of amusement rides? Certainly we might want them to offer evidence and argument that what is being proposed will in fact contribute to the protection of the public and that there are not less onerous means of achieving the same objective, but this is not cost-benefit analysis in the proper sense of the term. (At p.10.)

Brereton concludes that "somewhere along the line" it cannot be denied that a decision may have to be taken against a further increase in standards, in that it would not be worth "the very marginal increase in the overall level of safety it will bring". However, "this is a matter of moral and political judgement, not something for the analyst to resolve by pseudo-scientific means". (At p.10.)

80.5 Brereton's misgivings are not insignificant. In the United States, for example, it has been alleged that the car manufacturer responsible for producing the Pinto car carried out a cost-benefit analysis taking into account the amount which would have to be paid out in damages to a calculated number of victims if a particular defect was allowed to continue, and balancing this against the cost of recalling the cars and rectifying the defect. (The cost for rectifying each car was reported as being in the vicinity of $11.00 per vehicle.) (See Fisse and Braithwaite, The Impact of Publicity on Corporate Crime, 1984, New York.)

80.6 On the other hand, it has been argued that far from being incapable of assessing or unaware of the existence of "intangibles" and their value, economists are particularly capable - and cost-benefit analysis is the tool they have developed to put this capability into practice. Parish expresses this view in forthright terms :

> *Economists are often accused of being preoccupied with measurable money costs and benefits to the neglect of intangibles - of 'knowing the price of everything and the value of nothing'. In my view this charge is almost totally misdirected : it is only economists who have developed a conceptual framework that, at least in principle, takes account of all the consequences, pecuniary and intangible, of policy actions. The charge is typically made by those members of the intelligentsia who wish to confine economics to the ghetto of monetary aggregates - the better to be able to complain of its inadequacy. The accusation would be directed far more appropriately against politicians who frequently deploy 'economic' arguments of extreme crassness ...*

("Foreword" to Hogbin, Free to Shop, 1983, Centre of Independent Studies Policy Monographs 4, Sydney, at p. vii.)

80.7 Appearing before the Committee, a member of the Centre of Policy Studies, Monash University, was more positive than Brereton about the efficacy of cost-benefit analysis in relation to regulations, and the capability of economists in conducting assessments. In giving evidence he determined that the question to be addressed is that of devising techniques "to bring forth the best sort of regulation and get rid of the worst sort of regulation". He saw this as the purpose of the Bill. In the context of devising a method, Pincus considered it necessary to define what is meant by "good regulation" or "bad regulation". He said :

> *... regulation benefits often quite a diverse group of people. It is not easy to say immediately who is benefitting from some*

regulation; some people benefit and some people lose within groups. For example, with safety regulations, some workers may benefit from regulations which make their work place a lot more safe; some workers may lose from that.

If we are to make a judgement that a particular regulation is good or bad, we need to sum up these benefits and costs. The easiest way of doing this is by treating people reasonably equally in the summing up procedure. That is, questioning whether it hurts this person or helps that person without knowing the details of those individuals the best thing to do in the first instance is to say that we will treat them as equal and add up all the benefits and costs. That is a rough procedure. In some regulation or legislation it can be extremely valuable and useful, even if the summing up procedure ... shows that the burdens on some groups are larger than the benefits on other groups ...

(Pincus, Oral evidence, 2 April 1984, at p. 124.)

80.8 Pincus agreed there was no shorthand method of conducting cost-benefit analysis with "important regulations". Some regulation might lend itself to a shorthand approach, however :

> *... in regulations relating to price, one can often cut through and look at some market information for answers.* (At p. 124.)

Pincus added, however, that this was not a method he readily adopted. He preferred "to start from the notion : can we identify the group of individuals, the types of people who are suffering or benefitting the most and work up this way to arrive at a total, rather than work from the top and go down". In studies of regulations he has conducted, the tendency has been "to look at regulations and their impact on the groups and individuals, and not ignore the distribution of benefits and costs". Once having discovered "in a rough way" what the relative costs and benefits are, they must then be added up in sum total.

"Sometimes", Pincus commented, "the adding up procedure is one which people may seriously object to".

80.9 In "Economics of Regulation", published in 1983, Pincus and Withers acknowledge that it is commonly "easier to estimate costs of regulation than benefits". They continue :

> *This biases public discussion which, moreover, often revolves about transaction and administrative costs, data on which are readily available, especially in the public sector. An important characteristic of regulation is that it can induce shifts in resource allocation out of all proportion to the administrative costs involved. The costs and benefits of these induced changes are what economists focus on, because these can swamp the administrative costs that annoy business [people].*
>
> *Included in administrative or transaction costs are direct costs of operating the relevant public agencies and the direct costs imposed upon private businesses in negotiating, reporting on and complying with regulations.*

(In Surveys of Australian Economics, Gruen, editor, volume 3, 1983, 8, at p. 56.)

80.10 Pincus and Withers point out that figures produced by the Confederation of Australian Industries in accordance with cost-benefit analysis of particular regulations "are total costs of meeting regulatory requirements, not incremental costs. Yet many firms would meet some requirements irrespective of regulation". In a Confederation of Australian Industries sub-sample looking at incremental costs, these were "less than 50 per cent of total costs". In the upshot, say Pincus and Withers :

> *Finally, the CAI figures include 'secondary costs' of compliance (that is, delays, loss of productivity, shortages, lost opportunities,*

disincentives to investment and the misallocation of resources). Clearly this category is impressionistic and may have considerable reporting bias. It also covers most of what economists would call efficiency rather than transaction costs. For these costs economists have less impressionistic methods of quantification. (At p. 56, emphasis added.)

80.11 In "Economics of Regulation" Pincus and Withers express the common concern amongst some writers on regulation that "pressure groups" or "particular interest groups" gain most from the regulation making process, and that their advocacy of regulation may not ultimately be to the benefit of the community at large. To guard against this, it is necessary to introduce procedures which give more guidance than is currently the case as to possible benefits and possible costs of proposed regulation. They acknowledge :

> *Quantification of costs and benefits (including intangibles) is still ill-developed. Recent research has helped clarify the resource cost implications of x-efficiency and rent-seeking theories and some of the Australian work (for example in banking, air-transport and the motor vehicle industry) goes further than most in attempting quantification in these areas on an industry basis. But much more work on this is needed. Further, there is an important need to go beyond simple comparative static allocative efficiency approaches and incorporate more quality effects, dynamic efficiency, transitional consequences and detailed distributional implications. These dimensions of the problems are often of the essence and are equally often ignored ...* (At p. 58.)

They come down on the side of arguing that more information is preferable to less, and that even if cost-benefit analysis is inadequate or can be faulted in certain respects, it is preferable to no analysis at all in relation to proposed regulation.

80.12 Brereton, however, argues that the "better more information than no information at all" argument should be subjected to rigorous analysis. He agrees that those who make decisions should be made aware of the consequences of different courses of action and of different ways in which they might achieve a given outcome, "but ultimately they are going to have to balance these considerations against their own sense of what is desirable and politically feasible. Any recommendations to improve the quality of policy-making must recognise this fact, not obscure it. We certainly should seek to facilitate the making of intelligent choices but we should not convey the impression, as the present proposal does, that the need for judgement can somehow be supplanted by the use of the 'proper techniques'". (At p.14.)

80.13 Apart from the difficulties he pinpoints in relation to the cost-benefit approach as a technique, Brereton refers to another problem. He says :

> ... *we cannot ignore the possibility that regulatory bodies, motivated by interests and perspectives of their own, will use [cost-benefit analysis] as a means of giving an unwarranted scientific legitimacy to their actions. This is particularly likely to occur when the relationship between the regulatory body and the dominant affected interests is close, for then there will be no effective mechanism to scrutinise and correct the inadequacies of the analysis.*

(Written submission, 5 June 1984, at p.13.)

80.14 The subjective nature of assessments of "good" and "bad" regulation; of unacceptable cost (financial and/or otherwise); and of "benefits" to accrue is evident in the writings. For example, Porter proposes that regulations governing pay rates of juveniles should be removed, particularly in bad economic times where unemployment (not the least of youth) is high, to lead "to a great deal more prosperity ..." ("The Labour of Liberalization" in Australia - Poor White Nation of the Pacific?, Scutt editor, 1985 forthcoming, Sydney, at p.7.) Clearly from some vantage points, the reduction of juvenile wages would

not increase prosperity, particularly for juveniles in paid work. Porter also uses the tourist industry as a paradigm for the creation of an economy where benefits accrue :

> *Within the tourism sector one finds that where restaurants and other tourist ventures have managed to free themselves of market constraints such as penalty rates, they have proven able to expand quite considerably. A common example is Chinese restaurants - employing family labour. Other examples include fast food chains which are able to expand so long as they are able to employ labour at competitive rates. Rather than employ almost no labour on weekends because of penalty rates, such restaurants and fast food outlets, to the extent they can internalise employment arrangements through family and equity arrangements or avoid penalty structures, can thereby continue to offer full service at the most profitable time - for example, weekends and nights. As a result of this differential capacity to avoid regulation we have seen the small restaurant prosper* ... (At p.7.)

The question to be asked is "Who prospers? Who benefits?" Within family organisation research shows without exception that the major income is controlled by the husband/father. Edwards' study of financial arrangements amongst families supports research carried out in the United States and the United Kingdom, showing that where a man's wages or salary increases, this is not passed on to the person organising the homeground - the wife/mother. Rather, her housekeeping remains set at the level arrived at prior to the raise. (Financial Arrangements In Families - A Research Study Carried out for the National Women's Advisory Council, 1981, AGPS, Canberra, ACT.) Thus it is not correct to assert that within family businesses "the whole family" prospers. As well, the right of employees to decline to work long hours for little pay would not, in the eyes of some commentators at least, be removed simply because a worker is employed in the family business. During marriage, women and men do not have equal rights to income, and therefore it is not correct to assume that within these businesses prosperity and benefits will be bestowed equally or equitably amongst members. To promote "prosperity" for one

member of a family against the better interests of other members would not stand the scrutiny of a large proportion of our society. "Benefit" would not be seen to outweigh the negative nature of "arrangements" which avoid legislative standards set on the basis of preventing exploitation. (On this issue, see Scutt and Graham, Money, Marriage and Property Rights, 1984, Ringwood, Victoria; Scutt, "Principle versus Practice : Defining 'Equality' in the Family Court" (1983) 57 Australian Law Journal 347.)

81 Regulatory Agendas. In both the United States and Canada the concept of a "regulatory agenda" has been proposed as important for orderly administration and budgetary projections. In Canada, it is the policy of the federal government to provide the earliest possible notice of proposed or contemplated regulatory initiatives, under the title "Regulatory Agendas". This is based on the belief of the government that providing such notices "fosters constructive consultation and increases the efficiency of the regulatory process itself, resulting in improved and less burdensome regulation". In the government's view, publication of regulatory agendas "will help achieve these objectives".

81.1 In an outline of regulatory agenda requirements, the Canadian government states :

> *Regulatory Agendas are not intended to provide detailed information on any particular initiative. Rather, they only provide enough information so that readers can decide whether or not they wish to learn more or to become involved in the consideration and development of the initiative through the consultative process. Each entry in the Agenda lists a 'contact person' who will be able to provide more specific information. In addition, by indicating the status of the initiative, each entry allows interested parties to know the time period available to them to provide their ideas and comments to the regulating department.*

(Supplement to the Gazette of Canada - Regulatory Agendas, 28 May 1983, at p.1; and see also comments generally on regulatory agenda Pincus, oral evidence, 2 April 1984, at pp.128-130.)

81.2 In Canada, regulatory agendas are published in May and November of each year as a Supplement to the Canada Gazette. An agenda is a listing of all proposed regulatory action to be taken by a particular department or authority, where that regulatory action will involve major expenditure. In effect, it is a projected programme of regulatory action - or a "regulatory budget". For the purpose of the agenda, "regulation" is defined as :

> ... *the imposition of rules on the private sector for the purpose of modifying behaviour. Such rules typically govern - prices, output, rates of return, conditions of market entry and/or exit, methods of production, attributes of a product or service, disclosure of information, or conditions of service.* (At p.1.)

Agendas are required to give notice of possible regulatory intervention through any means including both the creation and the revision of policies, programmes, statutes, subordinate legislation (regulations), policy directives, guidelines and orders.Those authorities participating in the regulatory agenda project include :

* Departments

Agriculture
Communications
Consumer and Corporate Affairs
Energy, Mines and Resources,
Environment
Fisheries and Oceans
Health and Welfare
Indian Affairs and Northern Development
Labour
Transport

* Agencies

Atomic Energy Control Board
Canadian Radio-Television & Telecommunications Commission
Canadian Transport Commission
National Energy Board

81.3 The idea of a regulatory agenda is to go beyond a regulatory impact statement, in that it is the entire programme of a department or agency which is to be published, rather than one proposed regulation in isolation. This enables the public, business, trades unions and other interested parties to gain an overview of regulatory activity proposed by a particular department or agency. Regulatory agendas include :

* possible action
* policy review and analyses
* regulatory program evaluation schedule
* completed matters

The "regulatory program evaluation schedule" excerpts information from the "Departmental Program Evaluation Plan", listing those programme components including regulatory activities, and providing target dates for commencement and completion of the two major steps in the evaluation process - the "planning stage" and the actual "evaluation study". As a minimum requirement, the "Regulatory Program Evaluation Schedule" includes programme components that the department will evaluate within the two years following publication.

82 Summing Up. The Committee believes that it is important for departments and authorities to have before them relevant information to assist them in making decisions about the content and form of regulations and the desirability of proceeding by way of regulation. It acknowledges the concerns expressed by Brereton, Cranston, Pincus, Withers and others as having a

legitimacy that cannot be ignored. At the same time the Committee believes that it is important for decision making processes to be as open to public awareness and accountability as possible. On the question of the subjectivity of regulation makers influencing cost-benefit analysis, and the regulation makers using cost-benefit analysis to bolster, on "pseudo-scientific" grounds, their subjective decisions, the Committee affirms that this may occur, albeit subconsciously. However, it is already open to suggest that regulation makers, without the benefit of cost-benefit analysis, indulge their subjectivity without having to account for the decision to introduce regulations in accordance with any procedure that is open to public comment and public testing.

82.1 Cost-benefit analyses or regulatory impact statements do ensure that the processes by which particular decisions about the form and introduction of delegated legislation are made, are more open to public view than is currently the case. The proposed regulatory impact procedure accords with the principles of openness as embodied, for example, in freedom of information legislation. Even with its faults, such a process is preferable to no process at all; to decisions being made in an ad hoc manner; to decisions being made with regard to subjective standards anyway, but with no mechanism available for accounting for or rebutting them.

82.2 Openness means that the way is clear to identify and counter subjectivity. Under the system as it exists, there is room for a regulation making authority to indulge its subjectivity without having to expose it to external view in the normal course. Certainly subjective decisions may be "wrapped up" in technical terminology with a regulatory impact procedure, even if it is open - but at least the department or authority has to choose the way in which it will frame its assessment of the efficacy of proposed regulations. At present, there is no requirement that any externally judged benefits and costs should be taken into account.

82.3 It has also to be acknowledged that particular interest groups may

influence the regulation-making process if cost-benefit analysis or regulatory impact statement procedures are adopted. At the same time it has equally to be acknowledged that particular interest groups may influence the regulation making process without such procedures being put into effect. (See, for example, Galbraith, The Anatomy of Power, 1984, New York; also note the salutary example of corporate interest interference in government processes recounted in Adams, Roche versus Adams, 1984, London; and of eugenicists influencing United States regulation making in Greer, Sex and Destiny, 1984, London.) At least, the introduction of regulatory impact procedures and cost-benefit analysis will reveal the competing interests involved in the regulation making process. This is preferable to those influences operating without any real opportunity for outsiders to point to flaws in the arguments; to criticise the totalling up of costs or benefits; to pinpoint defects in the application of cost-benefit procedures and the like.

82.4 The Committee does not consider that a cost-benefit analysis or regulatory impact statement approach to regulation making will without exception result in better regulation, or in the existence of delegated legislation which has maximum benefits to the community at all times, with minimum costs only. However, the Committee does believe that the introduction of such methodical procedures will go a long way toward ensuring that departments and authorities acknowledge the influences upon the decision-making process. The Committee also recognises that many departments and authorities already follow procedures akin to cost-benefit or regulatory impact analysis and the introduction of regulatory impact procedures will, in effect, simply bring these procedures out into the open and, in essence, formalise already existing informal procedures.

82.5 At the same time, the Committee emphasises that it does not believe that the endorsement of formalisation of procedures should be taken as inferring that the Committee supports stultification, nor the removal of flexibility from the process. The Committee believes that departments and authorities are sufficiently in possession of common sense to avoid this

occurring and will apply that common sense in the application of regulatory impact procedures.

82.6 The Committee generally endorses the notion of regulatory impact statements and sees them as a formal method of undertaking consultation and economic and social assessment of proposed subordinate legislation. Any cost-benefit analysis should take into account financial and non-financial costs; and benefits and other relevant intangibles should be taken into consideration equally. The Committee's view is that there is value in establishing a formal procedure with simple guidelines to be followed by departments and authorities drawing up subordinate legislation. Regulatory impact statement procedures in fact provide for this.

82.7 The Committee also believes that the concept of a "regulatory agenda" as an instrument for improving forward planning has appeal. It would be useful for departments and authorities to adopt a forward looking approach in the regulatory area, rather than react in an ad hoc manner to problems or issues that arise (but which might have been anticipated) in their area of administrative responsibility. No doubt some - or many - departments and authorities already do this. At the same time, the Committee is not unaware of the pitfalls of too readily accepting that the efficiency of government can be enhanced (or increased to some realistically indefinable and unachievable optimum) simply by the introduction of "more and better" procedures, or "more and better" planning. Every contingency arising out of government cannot be dealt with by forward planning; nor is it possible to accurately calculate forward costs on every occasion, at all times.

82.8 Nonetheless it would be useful, and in the Committee's view would enhance the regulatory process, for departments and authorities to adopt as an internal working guide the principle of the regulatory agenda. The Committee believes, however, that this should not be the subject of any legislative requirement, nor should departments or authorities consider that they are

irrevocably destined to pursue a path laid out in a regulatory agenda, without taking due consideration of changing social, economic and other factors. Indeed, one of the reasons for requiring regular regulatory review is that departments and authorities have, in the past, sometimes been caught in a situation which engenders continuation of a set of regulations which are inappropriate in view of the passage of years and changing times. It would be defeating the purpose of regulation review and reform to promote the idea that a regulatory agenda is to be seen as a definitive statement on regulatory activity of any department or authority over a set period.

83 RECOMMENDATION 5

The Committee considers that in proposing subordinate legislation, it is necessary for departments and authorities to take into account, as far as possible, relevant financial and non-financial costs and benefits, and other relevant intangibles where appropriate, in the drawing up of that subordinate legislation. It therefore recommends that a formal review process be introduced incorporating these aspects in the nature of a regulatory impact statement procedure, prior to the introduction of subordinate legislation .

84 RECOMMENDATION 6

The Committee endorses the concept of regulatory agendas and recommends that each department and authority should, at regular intervals, draw up a regulatory agenda covering projected regulatory initiatives and action to be taken over a two to three year period, the agenda to act as a guide. However the Committee does not consider that, at this stage, any legislative requirement should be placed on departments and authorities to introduce regulatory agendas; nor should departments or authorities be "locked in" to any proposed programme contained in such an agenda.

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Consultation

85 Consultation as a Democratic Ideal. Those adhering to a democratic philosophy do not, generally, believe democracy begins and ends at the ballot box. Voting for members of Parliament or local government is simply one aspect of the democratic process. Additionally, there is a realisation today that the public generally, and interest groups, have a right to involve themselves in debates about the policies and actions of government. There is an acceptance that, where policies or decisions of government affect the whole community or affect particular localities, groups and the like, individuals and groups have a right to speak up, and to be consulted. Their views may or may not be taken into account by the body making the decision or formulating the policy : ultimately, of course, control by the polity is taken to be exercised by voting governments in and out; however, today many people demand, and most governments recognise, that consultation and, sometimes, public participation, are concomitants of democratic government.

85.1 The Committee believes that not only should consultation be taken into account as ensuring that the people have a greater involvement in decision-making than has been the case in the past, but also that it has a potential for making government more effective. This is nowhere more evident than in the area of regulation making.

86 Mechanisms for Consultation. Having accepted that consultation is "a good thing", problems arise. First, not all involved in the process may in fact be committed to listening to public comment; some may believe that comment from the public is appropriate at certain stages and not at others, which may effectively nullify any public input; techniques of consultation vary, and some forms may prove more effective than others : how is a department, authority or other body to determine what mechanism should be adopted? Some mechanisms for public involvement may be more useful in some circumstances than in others; deciding which technique to use may take up time and effort which some may believe would be better directed to other matters. When can a

department or authority determine that "enough public consultation is enough", and draw the process to a close? How much validity should be given to protests that the public was not consulted, or that the consultation taking place was insufficient? How can departments or authorities deal with problems of representation : some bodies or interest groups or individuals will be possessed of greater resources than others; the question arises of whether this is "fair", whether it means that the consultation process is cued toward taking into account certain interests to the detriment of others. A further question is whether to even out the chances for less well endowed groups to be able to put their views (and be able to undertake any necessary research or consultation with their own membership or grass roots before formulating those views), government should be responsible for funding "public interest groups" which have an interest in a particular project or proposal of a department or authority.

86.1 In Canada, "notice and comment" procedures have been introduced, which are included in various statutes. Under the Canada Post Corporation Act 1981 it is proposed that all regulations will, in the normal course, be pre-published and put into the public domain for comment. (Under the old procedure it was required only that regulations should be published in the Canada Gazette after - not before - their completion.) Under the new procedure, a copy of each regulation proposed to be made by the corporation must be published in the Canada Gazette and a reasonable opportunity granted to interested parties to make representations to the Minister in respect to them. No proposed regulation need be published more than once (under section 17(1) of the Act), whether or not it is amended following publication. (In fact, the Corporation has republished redrafted provisions as a revised draft.) Where publication takes place, if the regulation has not been withdrawn within 60 days, then it goes automatically to the Governor in Council. Governor in Council then has a further period of up to 60 days to decide how to deal with the proposed regulation.

86.2 At the Second Delegated Legislation Conference held in Ottawa in 1983 the General Counsel of Canada Post Corporation described the process :

> *Essentially what the legislation contemplates is that if the regulation is satisfactory, it will be approved. If it is not, it will be rejected. There is no authority conferred by the legislation on the Governor in Council to make amendments during that period.*
>
> *So it becomes absolutely essential that if the consultation process is ... to work, it should begin during the 60 day period, if not before, and that whatever changes may result from the consultative processes must be introduced prior to the submission by the Minister responsible for Canada Post Corporation to the Governor in Council. This procedure is somewhat different from what appears in a number of other federal enactments, in that it is the only one which provides for time limits.*

(Second Commonwealth Conference on Delegated Legislation - Transcript of Proceedings, vol. 3, 1983, at p. 64.)

86.3 Commenting on time limits and the consultative process generally, he continued :

> *On the one hand [time limits] provide a framework for an orderly progression and treatment of each regulation; but, on the other, there is a question of whether 60 days in the public domain is sufficient - and this has given rise to a number of modifications by way of practice, one of which is simply to put it out informally into the public domain in advance of starting the clock, the object being to ensure that it does get fair dissemination and a full and ample opportunity for consideration.* (At p. 64.)

86.4 One particular public comment exercise involving regulations

proposed by Canada Post reveals some of the problems experienced in this area. 300 representations were received on publication of the first regulation coming under the procedure. Many people expressing their concern "felt that they were dealing with a fait accompli". Nonetheless, they responded. The Corporation followed up the representations by holding meetings with various groups. Discussions were continuing when the 60 day period expired and the regulation was required to be submitted to the Governor in Council. Not all points raised were covered in the redrafted regulation. However, the Governor in Council rejected the redraft and required that the changes agreed upon should be included as a result of the consultation process :

> *To date we have received something in the order of approximately 50 representations from individuals and interest groups [on the republished regulation]. The vast majority of those representations have been positive, supportive of the process, and pleased with the outcome. A number of representations have been directed purely at acquiring more information relative to the operation of the particular regulation, and a few of them - a very few of them, a handful, in fact - have been negative. So if one were to look at the reaction of the general public in terms of numbers, I would say that it has been successful.*

86.5 However, examples can be found where despite some commitment to public consultation, in operation consultation processes are inadequate. Again in Canada, an account of "public consultation" techniques reveals the difficulties that may arise where a body believes that public consultation may be appropriate - but only late in the process of formulating policy or rules. A Study Paper produced by the Canadian Law Reform Commission canvassed attitudes toward public involvement in decision-making and rule formulation, and actual involvement. The Atomic Energy Control Board is reported as never having held public hearings, "whether on rule-making or adjudicatory matters". However, the study paper continues, in November 1978 the Control Board initiated its first file hearing, establishing an Inter-Organizational Working Group (IOWG) comprising representatives from the Board, from several

provincial utilities and the Atomic Energy of Canada Limited. This Group made recommendations on safety requirements for the nuclear industry. The Commission continues :

> *As with the [Atomic Energy Control Board ("the AECB")] Advisory Committees, there was no representation from environmentalist or nuclear energy oriented public interest groups on the IOWG. This prompted Dr. Gordon Edwards of the Canadian Coalition for Nuclear Responsibility to query Dr. Prince (of the AECB) about this lack of balanced membership during the Royal Commission on Electric Power and Planning Debate Stage Hearings :*
>
> *Dr. Edwards : 'Is there any particular reason as to why there is no public input in the sense of invitations to public interest groups that have already expressed an interest?'*
>
> *Dr. Prince : 'I frankly don't think they are competent to deal with a matter of this kind.'*
>
> *Dr. Edwards : 'You don't think it would be good for them to be informed?'*
>
> *Dr. Prince : 'Once the document is ready, and it would be a public document, then I would appreciate any commentary the public might have but, at the present time, no ... If there are inputs from outside sources after it becomes public, we are quite prepared to listen to them.'*
>
> *Dr. Edwards : 'I am saying, why are the public interest groups excluded?'*
>
> *Dr. Prince : 'Because I don't think, at this particular juncture, it is any of their business.'*

(Law Reform Commission of Canada, Public Participation in the Administrative

Process. Administrative Law Series, Study Paper (prepared by David Fox), 1979, Minister of Supply and Services, Canada, at pp. 49-50.)

86.6 When the particular report was finally released by the AECB for public comment, some proposals of a far reaching nature appeared without any backup information and no effort was made in the report to ensure that its contents were understandable to the intelligent but non-scientific public. As well, there was no real attempt to ensure that there was ready access by the public to the report. The report was released on 28 November 1978 and submissions were required to be filed by 31 January 1979. (Although in the northern hemisphere holidays do not generally extend for as long a period over the Christmas break as is the case in Australia, it is predictable that the period granted for public comment was hardly conducive to ensuring that such comment would be significant.) Notice of the report was sent to individuals and groups on the AECB mailing lists "and also to nuclear critic groups which the AECB judged to be interested in the safety proposals". The paper continued :

> *Copies were not sent to public libraries; nor was press coverage encouraged by the AECB, since the Board considered the proposal to be too technical to arouse the interest of the general public ...*
>
> *Although [the] statement [released by the Board] gives a good outline of the report's aims, it ignores ... one major recommendation on safety feature design limiting allowable radiation exposure in case of malfunction or failure of the nuclear facility ... No pertinent background information that led to this and other proposals was available in the report. The [accompanying] Paper did not indicate AECB existing permissible limits except to note that their recommendation constituted a lowering of such standards ...* (At p. 50.)

86.7 Even in the Canada Post instance, which was seen as a positive outcome by the Corporation, a further look at the process indicates that all is

not well in the realm of public consultation. General Counsel of the Canada Post Corporation referred to the work of his "friend and colleague", Assistant Counsel for General Motors of Canada Limited, who was instrumental in effecting changes to the regulation though the consultation process. He worked to "pull together" groups which were concerned about the initial regulation, and became chairperson of a group "of about 16 major business associations plus some consumer groups". Commenting on the consultation process, GMH Canada Assistant Counsel said :

> *... notwithstanding that [our group of 16 associations] represented a broad cross section of the economy, [it] did not represent all associations involved in discussions with Canada Post ... Certainly we had a real input into [the regulation] and we started to realize that although the regulation sets aside the 60 day period and invites submissions, it does not structure a form within which discussion can be carried on. As a result, you have to devise this form on an informal basis, and that is what we set about doing ... We tried to limit the number of associations we would have to deal with. It was our hope that the group we put together would be representative and that it could reach some understanding on language that would likely be acceptable to most people in the country ...*

(Second Commonwealth Conference on Delegated Legislation - Transcript of Proceedings, vol. 3, 1983, Canada, at pp. 65-66.)

86.8 In the period following rejection of the regulation by the Governor in Council, the group "Began an exchange of letters and telephone calls which led to a number of meetings". Finally, we reached an understanding ... GMH Canada Assistant Counsel continued :

> *We tried to indicate our support of [the new] language to Canada Post so that it would recognize that many associations across the country supported it and hoped that it would become the regulation ... Though Canada Post would be entering into discussions with other*

groups, we felt that we had developed such a rapport with Canada Post that should new developments come along Canada Post would continue to consult with the associations that we were representing and with others so we could work out any potential problems ... and that, in fact, has happened. We had some further discussions, again on an informal basis ... We are very satisfied with the process that has gone on. To us as representatives of business this was a unique opportunity. There is much talk in the country about regulatory reform, but this was a real opportunity to try to make it work ... on this type of regulation, a very significant kind of regulation with broad socio-economic impact ... (At p. 66, emphasis added.)

86.9 These comments and the exchanges between counsel for Canada Post and GMH Canada reveal the degree to which consultation may be carried on - but it is also fair to say that other groups may not have been as happy. Notably, the GMH led group consisted of some "16 major businesses and some consumer groups"; consultation was conducted amongst these groups by letter, "ring-around" and several meetings. The group also developed a good rapport with Canada Post. Did these opportunities exist for other less well endowed or well organised groups?

86.10 In Australia, mechanisms for consultation are outlined by the Office of Research and Policy of the Department of Community Welfare Services of Victoria in a Handbook. The Handbook notes two key aspects which should be considered in planning a consultation :

* *Structures to assist community consultation, such as task groups, committees of inquiry and the like*

* *Techniques to facilitate involvement of people, such as public meetings, survey techniques, and so on*

Structures for consultation include :

* *consultative committees comprising a range of interests -*

    (a) *on-going, such as Regional Consultative Councils, the Victorian Consultative Committee on Social Development, or consultative committees for particular departmental programmes*

    (b) *established for the duration of a particular consultation exercise*

* *committees of inquiry - often smaller in membership than consultative committees and set up for a limited time only*

* *task groups - set up for a limited period and usually less formal in structure than committees of inquiry*

* *advisory councils/committees - while there are clear differences between the roles of consultative and advisory committees, an advisory committee could be the auspice for a community consultation*

* *other consultative bodies*

(Handbook of Techniques for Consultation, n.d., Office of Research and Social Policy, Department of Community Welfare Services Victoria, at pp. 2-3.)

86.11 In selecting techniques for consultation, various issues demand attention :

* the purpose of the consultation

* resources and skills required

* type of participants who are to be involved

* desired outcome(s) of the process

The handbook goes on to deal in detail with these matters. It discusses how to determine the purpose of the consultation; how to use to optimum degree the resources available, and how to tailor a consultative mechanism to the resources in accordance with time available, skills available, and cost; how to determine who should be selected as participants, and how many participants there should be; and outcome of consultation - and what to do with it.

87 Public Consultation. In discussions with witnesses appearing before the Committee it was evident that community groups have a role to play in the delegated legislation component of government, and believe that opportunity should be available. A number of witnesses pointed out the ways in which the views of the public may be utilised to ensure that this legislation is designed to measure up to community demands at the same time as fulfilling needs identified by departments or authorities.

87.1 In giving evidence before the Committee the Director of Social Impacts pointed out that departments and authorities would necessarily be required to tailor their calls for submissions and consultation to different groups, according to what type of regulation was under discussion. "Clearly," she said it is "a different situation in transport compared with community welfare or health" :

> *The groups of consumers are different. Everybody uses the transportation system and they use it simultaneously; whereas people who use the health system use it at different stages of their life cycle - they are more vulnerable because they are sick. Therefore, one is dealing with a different type of consumer of the service and one would need to recognise that.*

(Gorman, oral evidence, 13 April 1984, at p. 210.)

87.2 A consultant with the Department of Community Welfare also addressed the need to seek out various ways of consulting with interest groups and those with a potential for being affected by proposed delegated legislation. She posited the example of the jam industry deciding to increase the amount of sugar per kilo of jam. She said :

> *That may sound a trivial example, however one must consider how that decision would affect the community; which section of the community it would affect; and how one would undertake a social impact statement consisting of a statistical analysis and examples of where the proportion of sugar has been changed in making a kilo of jam. Although that reduces it to a simplistic level, that would have to be done as an initial step. In that example, one would have to identify the community that would be affected by the proposed change of the amount of sugar in jam. One would then have to undertake an impact statement and a consultation with the jam makers, the consumer groups, and so on.*

(Penrose, oral evidence, 9 May 1984, at p. 214.)

87.3 In Penrose's view, in such a case consultations of the type undertaken in social impact analysis by the Department of Community Welfare would not be appropriate. Rather, she suggested it would be necessary to have "some kind of committee of inquiry" similar to the public hearings held by the Legal and Constitutional Committee in the course of its references, for that type of regulation change. She added :

> *Those highly technical issues [arising in relation to some types of delegated legislation that is proposed] might be handled by a committee of inquiry process, but some of the regulations that have a clear impact on the community might be handled by a community consultative mechanism. A committee of inquiry may not be appropriate. Therefore, it would be important [in a proposal involving consultation] to identify which issues are highly technical*

and related to industry and do not have a direct impact on the community, and those regulations that do have a direct impact and should be, therefore the subject of a community level consultation. (At p. 217.)

87.4 Representatives from the Victorian Council of Social Service similarly gave their views to the Committee, putting the view that consultation is valuable not only for informing government about the views of the "grass roots" and those directly or indirectly affected by governmental policies and practices, but "as a community education exercise, consultation is enormously important in informing people about proposals, helping them to understand the proposals and finding out their response to these proposals". (Halliday, oral evidence, 22 May 1984, at p. 237.) On the form of consultation to be used, it was said :

> *The form of consultation is a difficult matter on which to set guidelines, because it varies so much from issue to issue. On some issues, an article or advertisement in the paper may be quite sufficient for a lot of responses to be received. That is seen all the time in the health area. One only has to mention that there is a critical shortage of humidicribs for babies and that creates an immediate response from the community. In other areas, consultation is more difficult ...*
>
> *It is partly a question of whether the media is likly to take up an issue. Some issues are always taken up by the press and no problem exists about obtaining attention. However, many issues do not attract the same degree of media attention and require a much more directed or focussed approach to consultation.*

(Halliday, oral evidence, 22 May 1984, at p. 238.)

87.5 A second Victorian Council of Social Service representative took up

the issue, casting responsibility upon the government for ensuring that consultative mechanisms are able to operate effectively and to involve "the public" or interest groups effectively :

> *A regular means of establishing cross-fertilisation of ideas to discover what issues are uppermost in the mind of the community should occur. The government should identify and support some of the 'watchdog' type advocacy groups. Within a democracy they play an important role, and if there are not sufficient consumer based organizations, steps should be taken towards establishing them.*
>
> *Victoria has a strong group in consumer affairs, the tenancy area and the legal area. Those types of networks and organizations are important and should be supported. Rather than treat them as an enemy, they should be treated as a central intelligence mechanism. Government must also anticipate the types of issues and legislative reforms that may come about in the future. Those networks are least prepared to deal with short-term, high-pressure urgent situations. It takes a long time for the communication to be filtered down and filtered back up again. Often, good planning is a way of ensuring that information can be fed out. Frequently it is nothing more than a time problem that excludes people from being able to participate.*

(Raysmith, oral evidence, 22 May 1984, at pp. 238-239.)

87.6 The Director of the Victorian Council for Social Service further added that for consultation and for dissemination of information generally, as well as for the understanding of law, whether principal legislation or subordinate legislation, language is important. Information should be made "more understandable to people. More attention can be paid to the level of literacy and the information that is available in non-English languages". (Raysmith, at p. 239.)

88 Interest Groups/Business/Trades Unions and Consultation. One of the problems arising in any discussion of public involvement in government policy making is that of how to identify "the public". Often it is special interest groups which take the role of "public advocate". The Committee believes that it is well nigh impossible to gain the views of "the person in the street" in any meaningful way, and that it is not fruitful for departments or authorities to spend time deliberating upon how the woman and man in the street can be consulted about the framing of delegated legislation. It is a truism that as soon as the ordinary citizen takes up a cause or expresses interest in a policy or decision of government, that she or he becomes "an interested party". As it is more likely that groups of persons will make their views felt, individuals who have an interest generally club together, thus becoming "an interest group". The Committee recognises the broad debate about the value of "single issue groups" and the dangers alleged by some to reside in groups taking up single issues. Nonetheless the Committee agrees that it is important that the public should be interested in the activities of government, and that the development of interest groups is vital to the better working of government.

88.1 In recent years governments have worked to institutionalise consultative processes for interest groups, business and trades unions. For example, at federal level under the Whitlam Government the "pre-budget discussion" process was introduced enabling various groups to put their views before government as part of the budget process. In 1983 as a result of the federal Economic Summit the Economic Planning and Advisory Council was established with representatives of trades unions, business, consumers and welfare, to take part in consultations with government about economic issues. In Victoria, the government proposes that trades unions and business should form a consultative council, together with Government representation, for the purpose of better planning economic regulation.

88.2 In Victoria. The Next Step. Economic Initiatives and Opportunities for the 1980s the Government stated that it had decided to implement "some

significant new measures to pursue the aims of its regulation policy". Amongst these was that of establishing a new tripartite government/business/trade union consultative committee "to advise the Minister for Industry, Commerce and Technology". The composition of the proposed committee would be :

* Government, represented by the nominees of the Premier; Treasurer; and Ministers for Industry, Commerce and Technology; Health; Planning and Environment; and those Ministers responsible for the regulation under assessment

* business, represented by both business organisations and independent senior businesspeople

* trades unions, represented by both individual unions and the Trades Hall Council

* the chairpersons of the consultative committee, appointed by the Minister for Industry, Commerce and Technology

This tripartite consultative committee is designed to "complement existing broadly based committees and other bodies which currently consult with relevant ministers in relation to social and environmental regulation". (The Economic Strategy for Victoria. Detailed papers., 9 April 1984, at p. 49.)

88.3 The Committee believes the action of the Government in this respect is to be applauded. Nonetheless, there is room for misgiving. Although the tripartite council is to "complement" existing committees, and therefore will presumably operate in conjunction with bodies concerned about the social impact of delegated legislation, the Committee questions the efficacy of this arrangement. Will social impacts be taken into acount to the same degree as "business impact" or "trades union impact"? Furthermore, is "the public" or "community" equally well placed to give an input into regulation making as business and trades unions? It might be argued that government should adequately represent community interests - however this is not generally

accepted as being the case in discussion of public interest group involvement in decision making.

88.4 The Committee notes the experience at federal level where consultation on economic matters is now institutionalised through EPAC. That body has direct consumer and community representation through membership of a representative from the Australian Council of Social Service ("ACOSS") and the Australian Federation of Consumer Organisations ("AFCO"). Nonetheless, some discontent has been expressed by the ACOSS representative about the value placed upon his contribution, and about the problem of ensuring that "community interests" or "welfare interests" are given equal attention as those of business and trades unions (and government) on such a body.

88.5 At the Australian Institute of Political Science National Conference in May 1984 Dr. A. Summers commented upon this problem and upon problems perceived to arise within the business community. Referring to the initiative taken by the Australian Government in building and nurturing a broad consensus in order to improve Australia's long term economic performance and the attempt to devise new procedures for consultation and decision making which by their nature "will secure widespread agreement, and in the process bring about the construction of national goals to which we can all agree", she said :

> *I think all will agree that this is an important, a massive and a radical objective. It is of surprise to me that there has been so little comment about it in the media, and when reported it tends to be depicted as something like 'business objects to being locked in at EPAC' or 'CAI criticises somebody speaking on behalf of business' when he is speaking on behalf of himself.*
>
> *There has been that level of criticism of the process, but there has not been any real assessment of what is going on. Last week's EPAC meeting produced an outburst from the representative from ACOSS, who complained very bitterly that the tax cuts proposed for this*

year's budget are, ACOSS alleges, being done 'behind closed doors' by the ACTU and the Treasury. ACOSS argued that there are other groups in society whose needs ought to be addressed but who do not have access to the Cabinet room or to Ministers in the same way as do the major economic partners. That question is one which is worthy of being addressed. If the process of arriving at change and defining national goals is one of consultation and concensus, are the procedures which are developed with that sufficiently encompassing to bring into the process all those groups affected.

("Poor White Nation - Or Not?" in Australia - Poor White Nation of the Pacific?, Scutt editor, 1985 forthcoming, Sydney.)

89 Resources and Interest Groups. In the Committee's view, it is important to ensure that public interest groups have access to the decision making process in the same degree as business and trade union groups. All interests which both require and deserve representation are not covered by "business", "trades unions" and "government". The Committee believes that it is important to build into the regulation making process mechanisms which ensure that community interests are given full recognition, so that the concerns of the public in general are not overlooked, nor downgraded. To this end, departments and authorities and other bodies formulating delegated legislation should where practicable consult with public interest groups and community groups in addition to trades unions and business.

89.1 However, it is clearly unsatisfactory simply to urge departments and authorities to consult with interest and community groups in addition to business and trades unions. If such groups do not have a high public profile, they may not be known to the relevant authorities. If they are known, and are asked to join in consultations, to make submissions and they wish to do so, they may well not have the necessary resources. Certainly, many such groups will not have the resources available to business and to trades unions.

89.2 This issue was raised by the Committee when the Director of Social Impacts appeared to give evidence. She referred to the Public Interest Advocacy Centre, established in New South Wales by the Law Foundation, funded by the interest monies paid on solicitors' trust fund accounts. The Public Interest Advocacy Centre operates in a manner akin to such organisations in the United States - taking up issues of public interest and devising ways of dealing with them effectively - sometimes by making representations to government, sometimes by taking offenders to court - as for example in the Depo Provera case. In the United States, tax incentives are granted to encourage private enterprise to endow foundations working for the public good like the Public Interest Advocacy Centre. Gorman commented :

> *In the United States ... many groups receive funding for new projects and for 'taking on' the big people from corporations. The Nader Foundation's funds come from industry, but individuals are given tax incentives to donate to public interest groups [operating along those lines]...*
>
> *Public interest groups need to be resourced, so ways must be found by which they can be resourced. Tax deductibility and conscience money from corporations to foundations are good methods. Those foundations need the money but corporations will not donate funds to the public interest directly, however they may go through an intermediary.*
>
> *The Ford Foundation has, over the years, given millions of dollars to promote social responsibility. That money is in different hands; once it is put into the hands of the foundation it is distributed by the foundation. By and large those types of foundations attract a fairly creative and innovative sort of person. Some of the foundations are very conservative and will fund only conservative groups, but we do not have any alternative source of funds in Australia and [it is necessary to solve the problem] of how to direct funds to disadvantaged groups ... to 'take on' the large groups - even to 'take on' a government, if they have no resources at their disposal. When*

I was working for the Government, we funded some groups like that and my Minister used to ask, 'Why should I fund those people who snipe at me?' I said, 'That is why you should give them money; it creates a balance'.

(Gorman, oral evidence, 13 April 1984, at pp. 207-208 and for already existing provisions see generally Hunter, The Tax Concessions Handbook, 1984, SA Council of Social Service, Adelaide.)

The Committee acknowledges the force of these views.

89.3 The Committee endorses the need for consultation with interested parties - including business and community groups (and other groups such as employee groups and particular interest groups where they have an interest) - by bodies formulating subordinate instruments of a legislative character. Its researches and enquiries have revealed that such consultation does take place, sometimes on an informal, sometimes on a more formal, basis - particularly in the case of departments dealing with specialised interests. However, the Committee does not believe that the United States approach is necessarily to be adopted as a blueprint for Victoria. Rather, it believes that there is good reason for improving consultative mechanisms generally.

90 RECOMMENDATION 7

The Committee considers that it is important to ensure that, where practicable, departments, authorities and other bodies formulating delegated legislation should consult with public interest groups, business, trades unions, community groups and other bodies having an interest in the content and form of delegated legislation. To that end, the Committee recommends that procedures which already exist should be continued, and where they do not, should be introduced to ensure that consultation is carried out in the appropriate case.

91 RECOMMENDATION 8

The Committee affirms that consultative processes by government departments and other bodies drawing up subordinate instruments of a legislative nature should be pursued with interested parties in relevant instances. Consequently, the Committee recommends that consultative mechanisms established or upgraded in accordance with Recommendation 7 should be made known to interested parties. The degree of consultation should be determined by the nature of the subordinate legislation, its importance to the economy and the community, and the potential effect upon governmental, community, and business operations.*

92 RECOMMENDATION 9

The Committee considers that it is important to ensure that public interest groups which have a role to play in consultation about government policies (including those pursued through delegated legislation) and which are under-resourced should be enabled to carry out that function, and that means should be found to ensure that such groups are able to perform a consultative role. To this end, the Committee recommends that government should explore possible means of providing funds for groups, whether by way of incentives to individuals or companies to fund them, by direct funding, or by other means, with suitable accountability provisions.

* The method of upgrading consultative mechanisms is spelled out in detail at pp. 332ff, 381, and 387ff,Recommendations 56 and 90 of this Report.

Parliamentary Committee Review

93 Policy and Committee Review. Parliamentary committees established to review subordinate legislation do not normally concern themselves with the policy or policies underlying that legislation. That is, the practice has been for policies to be debated in Parliament when a Bill is proposed and passed; Parliament is the forum for debates and disputes about legislative policy. When subordinate legislation is reviewed by committees established in parliaments, the matters to which attention is paid relate to the question of whether the legislation is ultra vires; whether the subordinate legislation unduly makes rights dependent upon administrative and not upon judicial decisions; whether the matter contained in the subordinate legislation should more properly be dealt with in an Act of Parliament; whether subordinate legislation trespasses unduly on rights established by law; and whether for any special reason the form or purport of the subordinate legislation calls for elucidation.

93.1 The question has, however, been raised in some forums as to whether subordinate legislation committees should be given a brief to consider the policy aspect of regulations. (See debate in Commonwealth Conference of Delegated Legislation Committees, 1981, Canberra, ACT.)

93.2 The powers of the Committee of Subordinate Legislation in the Queensland Parliament have been cited in this regard. These include :

* whether the regulations are in accord with the general objects of the Act pursuant to which they are made

* whether the regulations trespass unduly on rights previously established by law

* whether the regulations contain matter which in the opinion of

the Committee should properly be dealt with in an Act of Parliament

* whether for any special reason the form or purport of the regulations calls for elucidation

* whether the regulations unduly make rights dependent upon administrative and not upon judicial decisions

Although most of these powers are identical with those of similar bodies it has been suggested that under the power relating to "the general objects" of an Act the Committee takes into account "the public interest" or policy matters generally. (See Commonwealth Conference of Delegated Legislation Committees, vol. 1, "Transcript of Proceedings", 1981, AGPS, Canberra, ACT, at p.49.) Certainly under that power it may be possible to question, or at least to an extent debate, the policy of the primary legislation. The issue is whether such a power should be given, or such an interpretation should be placed upon the powers of a committee of the Parliament appointed to review subordinate legislation.

93.3 The Committee believes that the powers of the Subordinate Legislation Sub-committee of the Legal and Constitutional Committee should be sufficiently broad for it to competently carry out its task of ensuring that powers granted to authorities, departments and other bodies do not lead to the abuse of those powers by those agencies. To this end, there is value in clearly adumbrating in the Subordinate Legislation Act 1962 the matters to which the Committee should have regard in reviewing subordinate legislation coming before the Subordinate Legislation Sub-committee of the Legal and Constitutional Committee. However, it is the Committee's view that it would potentially destroy the value of oversight of subordinate legislation were policy matters allowed to be raised at review stage. The experience of the Subordinate Legislation Sub-committee and its forerunners has been one of bipartisanship in discussion and decision making. It would be lamentable were this spirit of cooperation, whichever party was in power, to be lost. The

Committee believes that, were policy matters to be debated by the Sub-committee in its review of subordinate legislation, there is a real danger of partisanship arising. This reflects upon no member of the Committee nor on any possible future, or past, members. It is simply a recognition of the reality of the political process, not least of the party system.

94 RECOMMENDATION 10

The Committee recommends that the powers of the Legal and Constitutional Committee in its Subordinate Legislation Sub-committee should not be increased to take into account policy matters, but should be spelt out to ensure that subordinate legislation is framed in accordance with the terms of the Principal Act, as proposed in Recommendations 71-76.

95 Regulation by Royal Prerogative. However, in its role of reviewing delegated legislation, a matter has come to the attention of the Committee which demands change. That is the question of subordinate legislation which does not depend, for its coming into being and its existence, upon any Act of Parliament. In some instances, subordinate legislation is made by the Governor in Council by royal prerogative. For example, regulations governing the appointment of Queen's Counsel are made under the royal prerogative. In 1978 statutory rule No. 34 replaced the Regulations Governing the Appointment of Her Majesty's Counsel made on the 20th October 1970. The new rule was identical with its precursor, except regulation 3 of the 1970 rule required a separate Order in Council for each recommendation for appointment of Queen's Counsel.

95.1 The Committee believes that it is inappropriate for any statutory rules to be made by way of royal prerogative. Rather, statutory rules should be made in accordance with principal legislation which has run the gauntlet of the parliamentary process. In the particular instance of Queen's Counsel, for example, the Committee questions why, if it is considered appropriate to

appoint certain members of the Victorian Bar (on the basis of their seniority and abilities) to this rank this should not be outlined in an Act of Parliament.

95.2 This would not derogate from the executive's power to appoint particular persons. Matters of a similar nature are dealt with in, for example, the Supreme Court Act 1958 as well as the County Court Act 1958 (appointment of various court personnel). The Committee believes a review of all subordinate legislation promulgated in accordance with the exercise of the royal prerogative, rather than in accordance with powers laid down in an Act, should be undertaken with a view to regularising this area, so that in the future subordinate legislation will be dependent upon the original exercise of parliamentary powers, rather than upon residual powers as in the case of the royal prerogative.

95.3 In proposing this review the Committee recognises that were the Parliament to decide that no regulations should be made by royal prerogative, certain consequences would flow. Acts passed by the Parliament covering matters formerly dealt with by prerogative would necessarily be submitted to the Crown in England for assent. It would not appear, however, that this should create a problem. It has arisen formerly without difficulty resulting - for example, in the case of the Historic Shipwrecks Act 1981.

96 RECOMMENDATION 11

The Committee recommends that a review should be carried out of all rules, regulations, orders and other subordinate instruments which come into being in exercise of prerogative power, with a view to ensuring that future subordinate legislation is dependent on the exercise of parliamentary powers, not upon residual powers as in the case of the royal prerogative.

Extra Parliamentary Review

97 The West Australian Example. In addition to the investigatory powers established under Ombudsman's Acts in various Australian jurisdictions and judicial and semi-judicial mechanisms for review existing within the traditional judicial and semi-judicial system or newly established by way of Administrative Appeals Tribunals, an extra-Parliamentary committee of review exists in one Australian State, Western Australia, to deal with delegated legislation much along the lines of the Parliamentary committees referred to earlier. (See Part I, "Regulations Generally" - Background Issues, "Parliamentary Responsibility", at p.42 and also Contemporary Issues, "Parliamentary Committee Review", at p.214.)

97.1 The Legislative Review and Advisory Committee was established in 1978 under the Legislative Review and Advisory Committee Act 1976 (Western Australia). Under Part III of that Act the Committee's function is to review subordinate legislation. In particular, its role is to consider whether the special attention of the Western Australian Parliament should be drawn to any regulations on a number of specified grounds. Section 7 of the Act provides :

> *whether the special attention of Parliament should be drawn to any regulations on the ground that -*
>
> *(a) the regulations appear not to be within the power to make regulations conferred by, or not to be in accord with, the general objects of the Act pursuant to which they purport to be made;*
>
> *(b) the form or purport of the regulations calls for elucidation;*
>
> *(c) the regulations unduly trespass on rights or liberties previously established by law or inherent in the traditional freedoms of Her Majesty's subjects in Western Australia;*

(d) *the regulations unduly make rights dependent upon administrative, and not upon judicial, decisions; or*

(e) *the regulations contain matter which, in the opinion of the Committee, should properly be dealt with by an Act of Parliament and not by regulations.*

Section 4 of the Act defines "regulation" as being "any regulation, rule or by-law made under any Act which is or was after the making thereof required to be laid before each House of Parliament".

97.2 Investigation and report by the Committee is also authorised by the Act to be carried out in relation to other legislation. Under section 9 of the Legislative Review and Advisory Committee Act it is provided, amongst other matters, that :

(1) Any Act, regulation or other statutory instrument may be referred by either House of Parliament or the Minister to the Committee for consideration and report on whether the Act, regulation or instrument -

(a) unduly trespasses on rights or liberties previously established by law or inherent in the traditional freedoms of Her Majesty's subjects in Western Australia; or

(b) unduly making rights dependent upon administrative, and not upon judicial, decisions or unduly restricting or inhibiting rights of appeal against administrative decisions.

97.3 The Committee comprises three members, none of whom is a sitting Member of Parliament. One of the original members (who served for some

three years) was Professor of Politics at the University of Western Australia. He was replaced, upon his retirement from the Committee, by an Emeritus Professor of Law from that University. Another member is a retired Member of Parliament, being a former Speaker of the Legislative Assembly of the Western Australian Parliament. The third member is, by section 5(2) of the Act, required to be a practitioner as defined by the Legal Practitioners Act 1893 The Annual Report 1981-1982 described the work of the Committee :

> *Holding regular meetings, usually weekly, the Committee examined 692 items of subordinate legislation. Six hundred and thirtyseven of the items reviewed were 'regulations' within the meaning of the Legislative Review and Advisory Committee Act and of these, 151 were new, 471 were amendments to existing regulations and 15 were revocations of existing regulations without replacement by new ones. Of the regulations considered by the Committee pursuant to section 7 of the Act, six were the subject of a report to Parliament in accordance with section 8 which prescribes the procedure therefore. Many more were the subject of correspondence with the authority by which they were formulated.* (At pp. 3-4.)

According to the Annual Report 1982-1983 the Committee held thirty-four meetings during that year, examining 494 items of subordinate legislation. Four were the subject of a report to Parliament in accordance with the procedure prescribed by section 8 of the Act.

97.4 Section 8 provides :

> *(1) Where the Committee is of the opinion that the special attention of Parliament should be drawn to any regulations considered by it pursuant to section 7, it shall forward its report, and any recommendation it wishes to make, on the matter to the presiding officer of each House of Parliament.*
>
> *(2) Each presiding officer shall cause any report and*

recommendation received by him from the Committee to be laid before the House of Parliament over which he presides not later than the next sitting day after he has received the report and recommendation.

(3) The Committee shall so conduct its affairs as to ensure, so far as possible, that any report or recommendation concerning a regulation is received by each presiding officer not later than the expiration of six sitting days after the regulation was laid before that House of Parliament pursuant to ... the Interpretation Act, 1918.

98 Regulations Reviewed by the Legislative Review and Advisory Council. Examples of regulations made the subject of report to Parliament by the Committee include the Local Government Superannuation Regulations 1981 where the Committee recommended that the power of the Local Government Superannuation Board to suspend payment of benefits to a person on the ground that she or he is incapable of managing her or his own affairs by reason of illness or any other cause should be made subject to the report of a duly qualified medical practitioner; with the Litter Regulations 1981 the Committee recommended that any prohibition of the practice of placing publicity material under windscreen wipers of vehicles "should be imposed by Act of Parliament rather than by subordinate legislation relating to litter"; in respect of the Education Act Amendment Regulations (No. 8) 1981, the regulations provided that a teacher "shall not fail to carry out his normal teaching duties in respect of his pupils", and that "a teacher shall not encourage counsel or incite a person to withhold his child from attending school", and the Committee recommended that express provision be made in the regulations for examption from penalty when failure to carry out normal duties was the result of ill health or inadvertance, and to enable a teacher to counsel or encourage parents to withhold a child from attending school when the health of that child (or others) would be adversely affected by the attendance of the child". In its 1981-1982 Annual Report the Committee commented in respect of each of these that it was "not aware of any action taken ..." (At pp. 4, 5.)

98.1 In one instance, a response was received from the Attorney-General, but the Committee was not thereby satisfied :

> ... *the Health (Notification of Cancer) Regulations were published in the Government Gazette of July 24th, 1981. The Committee considered that these regulations, in requiring the furnishing to the Commissioner of Public Health of detailed information regarding a cancer sufferer, unduly trespassed on traditional rights of privacy and confidentiality.*
>
> *This report was not acted upon by Parliament, but the Committee did receive a response from the Attorney-General. The Attorney-General advised the Committee that the matters raised in its report had been considered by the Cancer Registry Committee, the Minister for Health and the Cabinet, and that it was felt that the regulations would need to be retained in their present form. The Committee still considers that it is desirable that a coding system be implemented to obviate the need for a patient's name and address to be notified, and notes that the regulations and the system of operating the cancer register are to be re-examined in order to determine whether such a system can be implemented.*

(Legislative Review and Advisory Committee, Annual Report for the Year Ending June 30th, 1982, LRAC, Perth, Western Australia, at p. 5.)

99 Commentary on the Legislative Review and Advisory Council. At the First Commonwealth Conference of Delegated Legislation Committees Professor Gordon Reid, at that time a member of the Western Australian Legislative Review and Advisory Committee, recounted the history of the initiative :

> [I]n 1958, an amendment of the Interpretation Act 1918 included a provision that the Parliament - that is, both Houses acting together -might amend or vary a regulation before it, or substitute a

regulation or a part of a regulation for one which either House disallowed. This formally provided for the Parliament to enter positively into the making of delegated legislation and that was quite clearly making it a parliamentary function. Ironically, although the Parliament of Western Australia enjoys, and has used, this power, its new advisory committee on delegated legislation is appointed from outside its membership and is vested with powers of parliamentary privilege. As a result parliamentarians do not have the experience of examining and reporting upon the legislative instruments made by the Executive Government, its instrumentalities, and by local authorities in the State. Such experience of course could help them in the exercise of the power of amendment or substitution that the Act gives them.

(See Reid, in Commonwealth Conference of Delegated Legislation Committees, Senate Standing Committee on Regulations and Ordinances, Vol. 3, "Transcript of Proceedings", 1981, AGPS, Canberra, at p. 28.)

99.1 Reid outlined the activities of the Committee, stating that it undertakes the whole gamut of scrutiny that scrutiny committees undertake -all the regulations, rules, bylaws and orders". He continued :

Of course, [being established by] a State parliament [the Committee] is concerned with local government bylaws, too, which produce, in a local government setting, a multitude of regulatory rules for scrutiny. (At p. 32.)

99.2 At the same conference the Executive Officer to the Legislative Review and Advisory Committee commented on the work of the Committee in relation to by-laws of local authorities :

As we have many items which are drafted by [laypersons] particularly local authority by-laws, we have some problems of

communication. Local authorities probably provide half our work and two-thirds of our problems. We have a proliferation of country municipalities which cannot afford professional drafting assistance. Criticism by the Committee is often seen as a personal insult to the shire clerk or municipal officer who has done the drafting. But I am pleased to say that consultation has increased and there is a great willingness on the part of such people to accept the work of the Committee and to accept our ability to co-operate with them and provide some sort of informal assistance.

("Address from the Chair" in Commonwealth Conference of Delegated Legislation Committees, volume 3, "Transcript of Proceedings", 1981, Senate Standing Committee on Regulations and Ordinances, Canberra, ACT, 79, at pp. 79-80.)

99.3 In agreement, Reid concluded that the Committee was equally effective as the Senate Committee on Regulations and Ordinances (comprising Members of Parliament alone) in ensuring that the public service "becomes highly sensitive ... about adverse comment coming from [the Legislative Review and Advisory Committee]". He stated :

It is fascinating how quickly the Public Service will respond even to preliminary enquiries into what it is up to by virtue of offering change and modification in some way. Such a lot is changing simply by virtue of the Committee's existence.

99.4 On the fact of its being an extra-parliamentary mechanism for dealing with delegated legislation review, however, Reid was not persuaded that this was the most appropriate approach, saying :

The great omission that such a committee, being extra-parliamentary, creates is that parliamentarians are being deprived of that opportunity to engage in the scrutiny of and to develop

familiarity with the whole range of government administration in the State. A few would gain that opportunity were the Committee within the Parliament. I think that is a very serious loss in the political system. (At p. 33.)

He considered that this lack led to a further problem : that of having reports of the Committee taken up with vigour and followed through; in his view, the effectiveness of the Committee in having its views taken into account was curtailed by its not being an integral part of the parliamentary process, in that its members come from outside the Parliament :

> *Stemming from [the fact that the Committee is extra-parliamentary] is another problem in that the adverse reports from the Committee go into the Parliament and strike the parliamentarians fresh. No parliamentarian within the Parliament is somehow committed to what the Committee is producing because no parliamentarian is party to the report and to the recommendations of disallowance. So parliamentarians are not quite as involved personally as they might be although we must admit that some, mainly lawyers, demonstrate an interest in what the Committee is doing and endeavour to follow it through; but they are in a real minority.* (At p. 33.)

99.5 In Delegated Legislation in Australia and New Zealand Pearce commented that if the Legislative Review and Advisory Committee was to be at all successful it would necessarily require support of the kind awarded to parliamentary committees established to fulfill its purposes in other states. (At p. 65; at the time of his writing the Committee had not been established; the legislation had only recently been passed.) In response to this, the Executive Officer stated that the experience in Western Australia "is that we have received that degree of support from both the Parliament and from departments and authorities making subordinate legislation" as granted to the parliamentary committees of other states. However, he added that a problem noted by the Committee "is the lack of involvement of active parliamentarians

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on our Committee. He continued :

> *To an extent we rely on tame politicians to advance our cause in the House.* (At p. 80.)

99.6 Delegates to the First Commonwealth Delegated Legislation Conference appeared to accede to Reid's view that extra-parliamentary bodies were not the most appropriate answer to surveillance of delegated legislation. Indeed, the entire thrust of that Conference (and its follow-up two years later in Ottawa) was toward creating parliamentary responsibility for delegated legislation - by way of the introduction of parliamentary committees. Those with committees favoured an increase in powers to review regulations in accordance with powers of the kind currently held by the Senate Standing Committee on Regulations and Ordinances and the Victorian Parliamentary Subordinate Legislation Committee (now sub-committee of the Legal and Constitutional Committee).

100 Summing Up. Is there value in having an extra-parliamentary body to deal with subordinate legislation, or do problems arise in this form of review which outweigh its positive aspects? The Legal and Constitutional Committee notes that there is a role for the Legislative Review and Advisory Committee of Western Australia in the absence of any parliamentary committee to fulfil its role. However, during debate on the passage of the Legislative Review and Advisory Committee Act 1976 through the Western Australian Parliament, the extra-parliamentary nature of the committee was "vigorously attacked" by the Opposition. Pearce points out that this feature of the Committee was "a unique attempt to move away from the idea of having a parliamentary committee to review delegated legislation." As he further comments, however, this may be unnecessary :

> *There may be advantages in having subordinate legislation reviewed by a non-parliamentary committee in that any question of political involvement in the form of the legislation will be avoided.*

However, party politics has not intruded into the deliberations of the committees established in the other parliaments. (At p.65.)

100.1 The experience of the Victorian Legal and Constitutional Committee and its predecessor, the Subordinate Legislation Committee, is that party politics have not entered into deliberations. Rather, Committee members have been able to sit down together and discuss the content of delegated legislation without rancour. Indeed outcomes have been fruitful on each occasion. The bipartisan support gained within the Committee for recommendations which have been put forward has led to its effectiveness : knowing that the Committee operates on such a basis has ensured that departments whose legislation has been the subject of adverse comment properly take into account the Committee's views, which results in subordinate legislation being redrafted where necessary. In the final analysis, the very fact that the Legal and Constitutional Committee (and its Subcommittee which now works on subordinate legislation) comprises Members of all parties, from both Houses, has led to improved drafting of delegated legislation.

100.2 The Legal and Constitutional Committee is not persuaded that there is any value to be gained in Victoria from creating an extra-parliamentary body to deal with subordinate legislation. The Committee is minded to agree with the First Conference on Commonwealth Delegated Legislation assessment of mechanisms for reviewing delegated legislation. It endorses the view that it is Parliament - whether as a whole or by way of joint parliamentary committee - which should be responsible for regulation review, rather than that responsibility being placed upon an extra-parliamentary committee such as the Western Australian Legislative Review and Advisory Committee.

100.3 As previously stated, however, the value of extra-parliamentary specialist staff cannot be denied. It is here that the capacities of Members of Parliament can rightly be supplemented, so that the best of both approaches is obtained : the full involvement of Members of Parliament in the delegated

legislation process, and the availability of legal expertise to ensure that the existing or potential problems of draft subordinate legislation are taken up with the relevant department or other body or authority at the drafting stage and prior to that legislation coming into force. Adequate resources including staff, must be provided to make the committee's role effective.

101 RECOMMENDATION 12

The Committee recommends that no extra-parliamentary body should be established to review subordinate legislation, but rather that the Subordinate Legislation Sub-committee of the Legal and Constitutional Committee should continue to deal with that review.

Uniformity

102 Uniform Legislation. At various times efforts have been made, involving the co-operation of the federal government and state governments, to devise uniform legislation on a number of matters - for example, uniform companies legislation. In this regard, not only is it important to come to agreement about the content of principal legislation, but also about the formulation of subordinate legislation designed to accompany it. This matter was raised at the Commonwealth Conference of Delegated Legislation Committees in Canberra by a representative of the Queensland Parliament. He said :

> *We have an increasing incidence in this country of uniform legislation, and there is talk of more of it to come. What happens is that individual parliaments both in the State and Commonwealth spheres are often faced with Bills which are being introduced simultaneously right across the country. Achieving amendments to these Bills when they reach the individual parliaments is extremely difficult, if not impossible, because the argument comes back 'But we have all agreed to it'. Unfortunately some Bills ... contain provisions relating to subordinate legislation which our Committee [the Queensland Legislative Assembly Committee of Subordinate Legislation] considers to be objectionable.*

(Gyger, in "Transcript of Proceedings", vol. 3, at p.16.)

102.1 The question of uniformity was again raised at the Second Commonwealth Conference of Delegated Legislation. Problems raised by uniform legislation were commented upon by a Senator of the Australian Parliament, who said :

> *The Queensland Committee of Subordinate Legislation [has referred to uniformity under the companies legislation which] has to do with the fact that there is now in existence a system of company and*

security industry legislation which may be very difficult to change. When regulations are made under that scheme, after they are investigated by a ministerial council - that is, a Minister representing the Federal Government and each of the States - if the council agrees upon amendments, the amendments are then trundled into the various parliaments of the Commonwealth and we are told, 'Well, you had better not disturb that. You had better not recommend rejection, because the whole scheme might break down'.

(Missen, in Second Commonwealth Conference on Delegated Legislation, vol. 3, "Transcript of Proceedings", 1983, Canada, at p. 75.)

102.2 The Queensland Committee objected to the procedure used in ensuring uniformity of delegated legislation under the uniform principal legislation : that is, of officers of federal and state departments consulting together and "wrapping up" the form of that legislation, with the inference that once drafted it could not be changed, despite any misgivings that members of the parliamentary subordinate legislation committees of any of the parliaments might have. In response to this, the then federal Attorney-General set out the position :

This unusual method was adopted deliberately as being necessary to ensure the continuous application of uniform companies and securities legislation throughout Australia, once the application Bills had taken account of the pre-existing diversity in detail of ancillary State laws.

The continuance in this scheme would be a decision for the Government of the day but it remains technically possible for any State Parliament, by altering the schedule to the application Bill, to alter the text of the relevant code as it applies in that State. It would of course need to be realised that such a move could lead to a breach of the Formal Agreement which could bring the scheme to an end.

(Cited Missen, Second Commonwealth Conference on Delegated Legislation, vol. 3, "Transcript of Proceedings, 1983, Canada, at p. 75; and see also Missen, oral evidence 9 April 1984, at p. 186; Cranston, oral evidence, 30 March 1984, at pp.104,117; Philips, oral evidence, 30 March 1984, at p.104; Porter, oral evidence, 4 April 1984, at p.145.)

103 Summing Up. The Committee recognises the problems arising out of efforts to gain uniform legislation on matters relevant to the state and federal governments. It believes that where uniform principal legislation is agreed to, it is obviously vital to ensure, as far as possible, that uniform delegated legislation in respect of it can similarly be agreed to. Should new consultation and impact statement procedures be brought in, then it is clear that these procedures should be carried out prior to draft legislation being taken by the Victorian delegation to any round table meeting with federal and state representatives. Such matters should be dealt with in the early stages, so that the form and content of the delegated legislation is not settled to such a degree that information gleaned from the consultation and impact procedures is not able to be taken into account. It may well be that all governments can come to an agreement in relation to particular legislation, so that one government may take responsibility for carrying out impact analysis and consultation (review), and its results can be taken into account by all in drawing up the regulations.

103.1 The Committee also notes that it is important to take into account, in regard to uniform delegated legislation, the issue of revocation. Should the proposal be adopted in Victoria that subordinate legislation be reviewed every ten years, then that review becomes germane to the application of regulations under a Principal Uniform Act in other jurisdictions.

103.2 The Committee believes that it is vital that these matters should be taken up with federal and state governments where uniform legislation is under discussion, and where uniform legislation already exists.

104 RECOMMENDATION 13

The Committee considers that it is important to ensure that, where appropriate, laws are uniform throughout Australia. Where uniform legislation has been agreed to amongst the states, it is important that delegated legislation under a Principal Act should be, as far as possible, uniform. In this regard, the Committee recommends that where consultation processes are operative or are introduced, those processes should take place prior to the state and federal governments meeting to determine the content and structure of delegated legislation.

105 RECOMMENDATION 14

The Committee observes that the introduction of consultation and impact analysis procedures for delegated legislation has implications for the framing of delegated legislation passed in accordance with a Uniform Act. The Committee recommends that if other jurisdictions do not introduce review procedures, state consultative and regulatory impact methods should be utilised, where appropriate, prior to discussions with federal and state officers. Victorian officers participating in round table negotiation on the formulation of such delegated legislation should have the benefit of the information available from review prior to those discussions taking place.

106 RECOMMENDATION 15

The Committee recommends that the Victorian Government takes up with the federal and other state governments the question of revocation procedures in relation to subordinate legislation passed under uniform principal legislation, with a view to ensuring that regular review of such legislation becomes a policy where uniformity is agreed upon.

PART II

SUBORDINATE LEGISLATION (DEREGULATION) BILL 1983

HISTORY OF THE BILL AND GOVERNMENT MOVES FOR REFORM

Background Issues

107 Report on Regulation Review in Victoria. Both the Victorian Government and the Opposition have perceived the need for regulation review and revocation of obsolete or ineffective regulations. In 1982 the Regulation Review Unit of the Department of the Premier issued a Report on Regulation Review in Victoria. The report canvassed various problems and issues in regulation formulation and review in Victoria. It identified a number of deficiencies in the regulatory system developed over time by Victorian governments. That regulatory system, stated the report :

* varied considerably according to the policies and resources of the regulating agency

* had no systematic and standardised guidelines for preparation of regulations in the various agencies

* did not require consultation with interested parties

* was subject to limited parliamentary scrutiny

* had no systematic method of review, consolidation, reprinting or of public accessibility

* allowed for significant overlap of regulations and regulatory responsibility

* did not require any explicit consideration of the costs and benefits of regulatory activity or of alternative approaches

108 Introduction of the Subordinate Legislation (Deregulation) Bill. In November 1983 the Leader of the Opposition in the Upper House, the Honourable A.J. Hunt, MLC introduced the Subordinate Legislation (Deregulation) Bill 1983, designed to provide a legislative base for regulation review and revocation procedures. That Bill was described by the Attorney-General, the Honourable J.H. Kennan, MLC, as a measure to be treated "seriously and on a non-partisan, or bi-partisan, basis". By agreement, the Bill was referred to the Legal and Constitutional Committee for examination and report.

108.1 In introducing the Bill, Hunt noted the volume of regulations made in Victoria and in other States. He produced to the Parliament a table illustrating this :

TABLE I

Period	Number of Regulations Made								
	Federal	N.S.W.	Vic.	Qld.	S.A.	W.A	Tas.	N.T.	Total
10 years to 1969	1963	1557	2190	3179	924	184	2423		12420
10 years to 1979	3017	3511	4072	4494	1697	274	3030	36	20131
Increase, 2nd period on 1st	+54%	+125%	+86%	+41%	+84%	49%	+25%	..	+62%

Source : Government Regulation in Australia, Confederation of Australian Industry, July 1980, p. 51.

108.2 Hunt pointed out that it is impossible to determine how many

regulations currently affect Victoria; those passed prior to 1962 rarely appear in bound form and are out of print, and therefore are unobtainable. As for those whose existence can be ascertained through the cumulative index to Victorian Statutory Rules, the 1980 volume has 217 pages, with "an average of well over 40 entries per page". He said :

> *Many of the regulations doubtless have a worthwhile social purpose and some real or perceived social value. One must seriously doubt however that the value of regulation to Victorians approaches [what can be estimated as] 2 billion dollars per annum. The problem is that no assessment of the burdens imposed by regulations on the one hand as against their value to the community on the other occurs in any rational and coherent way - or in most cases, at all - before regulations are promulgated. No systematic examination of alternative courses of action is undertaken. Regulation tends to be regarded as the automatic response to any problem, real or imagined. New laws beget new regulations and each regulation gives rise to amendments as loopholes are perceived to emerge.*
>
> ...
>
> *The cost of regulations to business both large and small is staggering. The Confederation of Australian Industry three years ago estimated that cost as $4000 million annually. As a rule of thumb for many practical purposes, national figures can be divided by four to give an approximate idea of their application to Victoria. I am advised however that in the case of the cost impact of regulations, the proportion applicable to Victoria is in fact appreciably in excess of one-quarter of the Australian total ... Victoria's use of regulations is substantially in excess of the average and is exceeded only by Queensland ..."*

(Victorian Parliamentary Hansard 1983, at p.1132, emphasis added.)

108.3 Hunt cited an instance where the Fisheries Bill was drafted, and consultations with interested parties resulted in many of the provisions of the

draft Bill being removed on the basis that they "went far beyond need and imposed undue cost burdens on the fishing industry". When the regulations made under the Fisheries Act came before him as Minister, he discovered that the offending provisions had been drafted into regulations under the Act, despite the clear intention of Parliament that the provisions should not become part of the law of Victoria in the fishing industry.

109 Victoria : The Next Step. Economic Initiatives and Opportunities for the 1980s. In April 1984 the Government released its economic programme for the next decade, in which it signified an intention to establish procedures for ensuring that regulations are formulated with costs and benefits in mind, and that consultative processes should be introduced to govern the introduction of regulations; sunset legislation providing for set lifetimes in relation to existing and proposed regulations was proposed. (See Victoria. The Next Step. Economic Initiatives and Opportunities for the 1980s. Detailed Papers. Government Printer, 9 April 1984, Melbourne.) In support of the bi-partisan view taken of the issue in Victoria, in its economic policy statement the government said :

> *From their frequent critical comment during the last decade it is evident that Victoria's business community is concerned about the impact of government regulation on the economic development of the State. The Government shares this concern ... [T]he Government believes there is a need to ensure that regulation is the most effective and efficient way of achieving community objectives and that regulation in Victoria does not unnecessarily inhibit the economic and social development of the State.* (At p.44.)

At the same time it was emphasised that "simplistic calls for sweeping 'deregulation' (that is the wholesale dismantling of the regulatory framework) are based on a misunderstanding of the operation and complexities of contemporary mixed economies". Regulation has its advantages and its disadvantages, and it is important for any government to direct its attention at what regulation hopes to achieve, whether in fact it will (or is likely to) achieve

its objectives or whether some other mechanism or means may be used to gain the objectives with greater surety, or less cost, or with greater advantage; or indeed whether the objectives sought to be achieved by way of regulation are in fact misplaced.

109.1 The Next Step states that principles to be followed in future with regard to regulation should be consistent with the specific aims of the government in ensuring economic recovery and improvement; consultation with interested parties; accessibility of regulation; the need for a review mechanism; and the question of associated policy actions. Specific aims of the policy as outlined include -

(a) *ensuring that, whenever new regulation is proposed or existing regulation reviewed, the particular objective to be achieved by the regulation is identified; that regulation is the most appropriate policy instrument to achieve that objective; and that the form and content of regulation are appropriate to the subject matter being regulated and the environment in which the regulation will operate;*

(b) *establishing clear and consistent procedures for the development and implementation of effective and efficient regulations including a statement of the goals of the particular regulation; wherever possible, more positive forms of regulation based on performance standards; consistent form and content of regulation to facilitate interpretation; improved co-ordination between government departments and agencies on regulatory matters; the use of consultative (and educative) mechanisms for those affected by regulation; and an ongoing review mechanism;*

(c) *reforming the existing framework of regulation to eliminate areas of inconsistency, redundancy and overlap and to enhance the accessibility of the regulatory system; and*

(d) *allowing the discretionary powers in Victoria's regulatory system ultimately to rest with the government where they properly belong, such as the Minister for Planning's power to "call in" certain planning appeals to make a determination.*

109.2 Accordingly formal machinery should, in the Government's view, be introduced to oversee and coordinate the process of regulation development review and reform where regulations "affect business and economic activity in Victoria". A consultative body is to be established consisting of government, business, and trades union representatives to advise the Minister for Industry, Commerce and Technology on business development and the role of regulations in that development. A special unit in the Department of Industry, Commerce and Technology is to be staffed by experienced officials to service a Cabinet Review Committee and the consultative body with regard to managing and monitoring the process of regulation development, review and reform in Victoria. (At pp.44-46.)

110 Subordinate Legislation (Revocation) Act. The government has not yet introduced any legislation to provide a statutory base for the development, review and reform of the regulatory process. However, in the 1984 autumn session of the Parliament the government introduced and passed the Subordinate Legislation (Revocation) Act 1984 which takes up one of the primary proposals of the Subordinate Legislation (Deregulation) Bill, namely that all regulations in force prior to the consolidation of regulations in Victoria in 1962 should be revoked. The Act provides the date of revocation as 31 July 1984 for all 1962 regulations (apart from some regulations that are to be revoked on 31 July 1985), unless an exemption has been sought by the relevant Department and confirmed by the Act. (See Schedule I Subordinate Legislation (Revocation) Act 1984 and further comments at Clause 5 - Sunset Provisions for Statutory Rules, p.253ff.)

THE PROVISIONS OF THE BILL

Clause 1 : Title of the Act

111 Clause 1 : Inapplicability of Title. Clause 1 proposes that the title of the proposed Act should be the Subordinate Legislation (Deregulation) Act 1983. The Committee believes that the title does not adequately describe the contents nor the thrust of the Bill. Rather than taking a simplistic "deregulation approach", the Bill presumes that in some circumstances there is a need for regulation, but that that need should not be automatically assumed by parties having the power to regulate; rather, departments and other bodies vested with the power to make subordinate legislation should, in accordance with the proposed Act, consider whether alternative means of achieving the same end are available; and whether the costs and benefits of regulation are positively favourable to that mode of approach. It also introduces review mechanisms additional to those currently existing and provides for automatic revocation of regulations when they have been in operation for ten years. If certain decision-making and review mechanisms are complied with, the regulations could be remade.

112 Clause 1 : Alternative Titles. Accordingly, the Committee debated the more apt titles of "Subordinate Legislation (Scrutiny and Review) Act"; "Subordinate Legislation (Regulatory Impact) Act"; "Subordinate Legislation (Scrutiny, Review and Revocation) Act"; "Subordinate Legislation (Impact, Scrutiny, Review and Revocation) Act"; and "Subordinate Legislation (Review and Revocation) Act".

112.1 The Committee determined that "Subordinate Legislation (Scrutiny and Review) Act" does not adequately describe the content of the Bill, which deals not only with scrutiny or review of subordinate legislation, but also with "sunsetting" such legislation.

112.2 "Subordinate Legislation (Regulatory Impact) Act" describes well one of the purposes of the proposed legislation - that where it deals with matters of a legislative nature rather than simple administrative or mechanistic matters, it should, unless the Premier decides otherwise and places delegated legislation into the "fast track", be subjected to a regulatory impact statement. However, this is not the whole story; the Bill contains other review mechanisms as well as revocation procedures.

112.3 "Subordinate Legislation (Scrutiny, Review and Revocation) Act" covers the relevant aspects of the Bill in a way which clearly describes its contents. However, the Committee believes that it is unnecessary to include both "scrutiny" and "review", on the ground of their identical meanings. Furthermore the Committee is wedded to the belief that, where it adequately conveys the content and does not distort the meaning of legislation, the title of an Act should be as succinct as possible.

112.4 "Subordinate Legislation (Impact, Scrutiny, Review and Revocation) Act" again describes fully the content of the Bill, however again errs on the side of being unnecessarily lengthy.

112.5 The Committee believes that the fifth possible title, the "Subordinate Legislation (Review and Revocation) Act" conveys clearly and succintly the content of the Bill, and therefore is the most appropriate choice for the title.

112.6 Additionally, the Committee notes that the title should contain the correct date - 1984 - assuming that the proposed legislation (as amended by the Committee's recommendations) will be debated and passed in the Spring 1984 session of Parliament.

113 **RECOMMENDATION 16**

The Committee recommends that clause 1 of the Bill should be amended to provide :

> *This Act may be cited as the Subordinate Legislation (Review and Revocation Act) 1984.*

Clause 3 : Commencement

114 Clause 3 : Statement of Date of Coming into Operation. Clause 3 provides that the proposed Act "shall come into operation on the day on which it receives the Royal Assent." In its Report on the Interpretation Bill 1982 the Committee stated that it would be of assistance to those affected by the passage of laws if each statute contained a clear statement of when it was to come into operation. (At p.5, Recommendation 2.) The Committee reiterates the view that it is important for all citizens of the State of Victoria and others who may be affected by the operation of any laws of this State that they should know, by looking at the face of a particular Act, the date upon which it will come (or did come) into operation. Accordingly, the proposed Act should stipulate a date of commencement.

114.1 The Committee believes that 1 July 1985 would give all departments and other bodies having powers to introduce subordinate legislation ample time to reorder their methods and resources to enable them to fully comply with the terms of the Bill. That date should, therefore, appear in clause 3 of the Bill.

115 **RECOMMENDATION 17**

The Committee recommends that clause 3 of the Bill should be amended to read:

This Act shall come into operation on 1 July 1985.

Clause 4 : Declaration of Instrument which is not of a Legislative Character

116 Clause 4 : Definition of Statutory Rule. The section 2 definition of "statutory rule" contained in the Subordinate Legislation Act 1962 provides that unless inconsistent with the context or subject-matter of the Subordinate Legislation Act, "statutory rule" means

* any regulation or rule made by the Governor in Council

* any regulation made by a body corporate or unincorporate the making of which is subject to the consent or approval of, or subject to being disallowed by, the Governor in Council

* any rule, order, form, scale or regulation which relates to any court or to the procedure, practice or costs of any court

* any instrument of a legislative character made pursuant to the provisions of any Act which is an instrument of a class which has been declared by notice in writing under the hand of the Attorney-General published in the Government Gazette to be statutory rules

Under that section, "statutory rule" does not include "any regulation or rule that is made by a local authority or by a person or body of persons having jurisdiction limited to a district or locality unless it is a statutory rule by virtue of the operation of" the fourth category noted above.

116.1 Sub-section (2) of that section further provides that any declaration by the Attorney-General for the purposes of section 2 "may be revoked by notice in writing under the hand of the Attorney-General published in the Government Gazette".

117 Clause 4 : Subordinate Legislation (Deregulation) Bill Provisions. Clause 4(1) of the Subordinate Legislation (Deregulation) Bill 1983 provides that the following sub-sections should be inserted after section 2(2) of the Subordinate Legislation Act :

> *(a) The Attorney-General may on the advice of the Legal and Constitutional Committee declare by notice in writing published in the Government Gazette that an instrument or class of instrument which is a statutory rule within the meaning of [the first three categories noted in section 2(1) of the Subordinate Legislation Act 1962]... is not of a legislative character but relates only to matters which are of a fundamentally declaratory or machinery nature.*
>
> *(4) Where the Attorney-General makes a declaration under sub-section (3) -*
>
> > *(a) the provisions of this Act shall not apply to or in respect of that instrument or class of instrument;*
> >
> > *(b) it shall be sufficient compliance with the requirements of the Act under which the instrument or class of instrument is made if the instrument is published in the Government Gazette; and*
> >
> > *(c) unless provision is made to the contrary in the Act under which the instrument or class of instrument is made, the instrument shall come into operation on the day on which it is published in the Government Gazette or such later day or days as may be specified in the instrument.*
> >
> > ...

117.1 Clause 4 goes on to provide :

(2) In section 10 of the Principal Act after paragraph (c) (ii) there shall be inserted the following sub-paragraph:

"(iia) the declaration of instruments under section 2(3);".

118 Clause 4 : Inclusion of All Relevant Subordinate Legislation in Bill's Provisions. The Committee believes that it is important to ensure that review and revocation mechanisms contained in the Subordinate Legislation (Deregulation) Bill 1983 are introduced to cover all subordinate legislation which by its nature, should be subject to those mechanisms. That is, as the proposed sub-section (3) states, only those instruments dealing with matters "not of a legislative character but relat[ing] only to matters which are of a fundamentally declaratory or machinery nature" should be outside the purview of the Subordinate Legislation (Deregulation) Bill. Yet clause 4 is not designed to ensure that this is so.

118.1 As Butera has pointed out, not all subordinate legislation comes within the definition of "statutory rule" contained in the Subordinate Legislation Act 1962. This means that subordinate legislation may avoid the provisions of the Subordinate Legislation (Deregulation) Bill, as not being "an instrument or class of instrument which is a statutory rule within the meaning of [the categories outlined in the Subordinate Legislation Act 1962]".

118.2 A further difficulty arises in relation to the expression "of a fundamentally declaratory or machinery nature". The Committee considered whether the setting of fees consequent upon the passage of subordinate legislation establishing a body's fee setting structure would classify as "of a fundamentally declaratory or machinery nature". In evidence before the Committee this issue was addressed by the Chief Legal Officer of the Melbourne and Metropolitan Board of Works, who considered that every piece of subordinate legislation setting fees or costs would be susceptible to the procedures outlined in the Bill, where the Act of that body classified the

subordinate legislation as requiring the approval of Governor in Council. In his view each change in the level of fees would require an amendment to by-laws, and could not be classed as "of a fundamentally declaratory or machinery nature". (Jerrams, oral evidence, 30 May 1984, at p.250-252.) The Committee is minded to agree with this interpretation.

118.3 The Committee received a number of submissions, both oral and in writing, finding difficulty with the clause as "there are no criteria given by which an instrument can be distinguished as legislative in character." (State Electricity Commission, written submission, 23 February 1984, at p.1; also Du Gueschin, oral evidence, 4 April 1984, at pp.151-152; and see Ad Hoc Committee, Law Institute of Victoria, written submission, 28 March 1984, at p. 2.)

118.4 This lack of clarity has a potential for creating confusion with departments and authorities, the public, legal advisors, and the courts. The possibility was raised in written submissions and by witnesses that departments or other bodies making subordinate instruments may, to facilitate the implementation of regulations and to avoid what they consider to be unduly onerous requirements, or simply by way of oversight, use forms of subordinate legislation which are not controlled by the proposed Act.

118.5 In its 1980-1981 Final Report Upon a General Inquiry into Subordinate Legislation (Consolidation and Review) the Subordinate Legislation Committee (now a sub-committee of the Legal and Constitutional Committee) stated :

> *There are classes of subordinate legislation which in the opinion of the Committee ought not to be published as statutory rules. Limited interest regulations, a typical example being the Secondhand Dealers' Exemptions, would be more appropriately published in the Victorian Government Gazette. Such matters as*

staffing levels in the Police Department, and salary levels set by the Public Service Board Determinations ought to be recognised as being beyond the confines of true statutory rules, with their need for wide circulation and their content of some interest beyond the internal workings of a department. (At p. 6.)

It is these types of legislation which the Committee believes are intended to be included, and are rightly to be included, within the expression "of a fundamentally declaratory or machinery nature".

119 Clause 4 : Rationalisation of Categories of Subordinate Instrument. The Committee further believes that it is essential that order be brought to the entire field of subordinate legislation, and that this will be facilitated only by the formulation of a "subordinate legislation code" - that is, an amendment to the Subordinate Legislation Act 1962 setting out what is a statutory rule and what form of statutory rule should be used for what types of delegated legislation. In this regard, the Committee notes and endorses the comments of the former Chief Parliamentary Counsel of Victoria, Mr. J.C. Finemore, reported by the Subordinate Legislation Committee in its previously cited 1980-1981 report. He recommended in evidence to that Committee that legislative supplements to Acts should be called regulations, but by-laws should be restricted generally to subordinate bodies, especially council by-laws. The Subordinate Legislation Committee commented :

There is a need to look at the practice of other bodies such as the State Rivers and Water Supply Commission to decide whether their by-laws should in fact be by-laws, regulations or rules. With reference to proclamations, [Chief Parliamentary Counsel] Finemore can see nothing but confusion coming from the use of proclamations to make regulations. The Committee agrees. (At pp. 5-6.)

The Committee went on to recommend that as there "has never been any clear-cut view as to what should properly be done by regulations rather than by by-

laws or proclamations"; thus a clear guide should be laid down. (At p. 6.)

119.1 Some ten years earlier, in 1970, a recommendation along similar lines was contained in the Report of the Subordinate Legislation Committee, and in its 1980-81 Report that Committee reiterated it. The Legal and Constitutional Committee reiterates it once more. Furthermore, the guide should be laid down in a subordinate legislation code setting out the types of subordinate legislation available for use by departments, authorities and other bodies, and the use to which each type should be put. That is, the code should make clear what matters are to be included in what form of subordinate legislation.

119.2 The code should apply to all future subordinate legislation. However, it would obviously be vital for all departments and authorities to act with urgency in ensuring that all existing subordinate legislation is reviewed and remade to conform with the new code. If this is not done, greater confusion of a different kind would exist for the public and general readers of subordinate legislation. That is, with the introduction of the subordinate legislation code, they would expect that a particular type of subordinate legislation was being used in the sense required under the subordinate legislation code. This would not be correct for all existing subordinate legislation (that is, subordinate legislation made before the introduction and application of the code). In conjunction with the introduction of the code, two steps would have to be taken simultaneously :

(a) all departments and authorities as a matter of urgency to update enabling clauses in their Acts and subordinate legislation in accordance with the code;

(b) a saving clause to be inserted in the Subordinate Legislation Act 1962 to ensure that all subordinate legislation made prior to the introduction of the code stands as it is, until it is reviewed and remade, if necessary, in accordance with the

new subordinate legislation code.

120 **RECOMMENDATION 18**

The Committee recommends that an amendment to the Subordinate Legislation Act 1962, to be included in the Subordinate Legislation (Deregulation) Bill 1983, should provide an orderly system for the use of types of subordinate legislation for particular executive exercises of power. That amendment should provide:

(a) Regulations : all subordinate instruments of a legislative nature should be promulgated as regulations.

(b) All other subordinate instruments - should be used for machinery provisions only, except as indicated below in relation to court rules and by-laws.

(c) Proclamations should be used only in relation to the date of coming into effect of an Act or dates of coming into effect of particular parts of an Act; or for the declaration of particular dates - such as a fire-hazard day, the emergency date of coming into operation of particular provisions or requirements, and the like.

(d) Orders in Council should be used only for machinery provisions, such as across-the-board rises in fees in accordance with a general government directive to departments and authorities as a result of CPI rises or any similar cost-estimate mechanism.

(e) By-laws should be used by local authorities (councils) only and not by any other bodies, departments, or authorities for the making of subordinate instruments. (That is, by-laws should be used only by authorities that are elected bodies.)

(f) Court rules should continue to be used as the means of making rules of court by way of subordinate instrument.

All subordinate instruments made by statutory authorities, government departments and bodies should be made in accordance with the above provision. That is, regulations for instruments of a legislative character; proclamations for the coming into operation of provisions or emergency or special dates; orders in council for mechanical or administrative matters only. University rules and regulations should be promulgated in the same way as subordinate instruments emitting from other statutory bodies - namely, they should be regulations where dealing with legislative matters; proclamations where dealing with particular dates; orders in council for mechanical matters or matters of an administrative nature only. All statutory rules - including regulations (which includes university rules and regulations and court rules, are, under the provision, to be published in the Government Gazette and to come in the usual way to the Legal and Constitutional Committee for oversight by its Subordinate Legislation Sub-committee. In accordance with this Recommendation, as a matter of urgency all existing Acts and subordinate legislation should be reviewed to ensure that enabling clauses are amended to conform with the proposed code and, in consequence thereof, subordinate legislation should be remade to conform with the code.

121 Clause 4 : Rationalisation of Categories of Subordinate Instrument - Interim Measure. The Committee does not anticipate any difficulty arising in relation to the introduction and implementation of the proposed rationalisation of subordinate instruments. The "code" set out in Recommendation 18 should become a part of the Subordinate Legislation Act amendments proposed in the current Bill.

121.1 However, if the specifics of the outlined rationalisation are not accepted, then until such time as a rationalised format is devised to become a part of the Subordinate Legislation Act 1962, the Committee believes that, to ensure that all subordinate legislation which should come within the purview of

the Subordinate Legislation (Deregulation) Bill 1983 does so, clause 4 of the Bill should be redrafted. A new sub-section (3A) should make statutory rules and all other forms of subordinate legislation subject to the Bill, with the onus upon the Attorney-General to determine what subordinate legislation should be excluded from the regulation review and revocation procedures.

122 RECOMMENDATION 19

The Committee recommends that if Recommendation 18 is not accepted, a provision rationalising subordinate legislation along similar lines should be drawn up as an amendment to the Subordinate Legislation Act 1962, to clarify what form of subordinate instrument is to be used to what purpose by departments and other bodies vested with the power of delegated legislation. That code should, amongst other matters, establish clearly that legislative supplements to Acts should be called regulations, and that by-laws should be restricted to local councils. A form of subordinate instrument covering mechanical and administrative matters should be fixed upon. The code should also stipulate the forms of subordinate legislation which are to come within the purview of the Subordinate Legislation (Deregulation) Bill 1983.

123 RECOMMENDATION 20

The Committee recommends further that, if Recommendation 18 is not accepted, then as an interim measure whilst the subordinate legislation code is being drafted, a new sub-section (3A) should be added to clause 4 of the Subordinate Legislation (Deregulation) Bill 1983. This provision should ensure that (in addition to statutory rules as defined in section 2 of the Subordinate Legislation Act 1962) all other forms of subordinate legislation come within the terms of the Bill, with the onus lying upon the Attorney-General to determine what subordinate legislation should be excluded from the regulation review and revocation procedures of the Bill. Thus, the proposed sub-section (3) in clause 8 should stand, and a new sub-section (3A) should provide :

Subject to section 3, all forms of subordinate instrument must comply with the terms of this Act unless the Attorney-General, on the advice of the Legal and Constitutional Committee, declares by notice in writing published in the Government Gazette that an instrument or class of instrument not being a statutory rule within the meaning of paragraph (a), (b) or (c) of the interpretation of "statutory rule" is not of a legislative character but relates only to matters which are of a fundamentally declaratory or machinery nature. Those exempted matters should include limited interest regulations such as second-hand dealers' exemptions, staffing levels in the Police Department, and salary levels set by Public Service Board Determinations, as well as across the board fee rises.

Clause 5 : Sunset Provisions for Statutory Rules.

124 Clause 5 : Outline - Sunset Provisions. Clause 5 of the Bill provides that a new section 3A should be inserted in the Subordinate Legislation Act 1962 to provide for the periodic revocation of statutory rules. The proposed provision states :

After section 3 of the Principal Act there shall be inserted the following section:

3A. (1) Unless sooner revoked, a statutory rule -

(a) made prior to January 1962 shall by virtue of this Act be revoked on 30 June 1984;

(b) made on or after 1 January 1962 and prior to 1 January 1972 shall by virtue of this Act be revoked on 30 June 1988;

(c) made on or after 1 January 1972 and prior to 1 July 1982 shall by virtue of this Act be revoked on 30 June 1992; and

(d) made on or after 1 July 1982 shall by virtue of this Act be revoked on the day which is 10 years after the day which is the earliest day on which any provison of the statutory rule came into operation.

(2) For the purposes of this section a reference to a statutory rule -

(a) to which sub-section (1)(a) applies, is a reference to an instrument of a legislative character which would have been a statutory rule within the meaning of section 2(1)

(other than paragraph (d) of the interpretation) had this Act been in operation when that instrument was made; and

(b) where a statutory rule has been amended by any other statutory rule, is a reference to the statutory rule as amended from time to time and not to any of the amending statutory rules.

(3) For the purposes of determining when a statutory rule was made -

(a) where the statutory rule is a statutory rule to which sub-section (1)(a) applies and it is not apparent from the face of the instrument as to when it was made -

(i) if the statutory rule was published in the Government Gazette, the statutory rule shall be deemed to have been made on the day on which that Government Gazette was published;

(ii) if only a notice of making of the statutory rule was published in the Government Gazette, the statutory rule shall be deemed to have been made on the day on which that Government Gazette was published; and

(4) Where a statutory rule is revoked by virtue of this Act, the revocation shall not -

(a) revive anything not in force or existing at the time at which the revocation takes effect;

(b) affect the previous operation of that statutory rule or anything duly done or suffered under the

statutory rule;

(c) *affect any right, privilege, obligation or liability acquired, accrued, or incurred under the statutory rule;*

(d) *affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the statutory rule; or*

(e) *affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as is mentioned in paragraphs (c) and (d) -*

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the statutory rule had not been revoked.".

125 Clause 5 : Sunset - Revocation of Pre-1962 Statutory Rules. By way of the Subordinate Legislation (Revocation) Act 1984 the government and the Parliament have already endorsed the proposal that all pre-1962 regulations should be revoked, except that certain regulations have been exempted from revocation until 1 July 1985 and others have been exempted unconditionally.

125.1 The Subordinate Legislation (Revocation) Act 1984 provided for the repeal of statutory rules made prior to 1 August 1962, whereas the Subordinate Legislation (Deregulation) Bill 1983 provides for the repeal of statutory rules made prior to 1 January 1962. The former date was selected on the basis that it was on that date that the Subordinate Legislation Act 1962 came into operation. As the explanatory notes to the Subordinate Legislation

(Revocation) Act 1984 stated, repeal of statutory rules made prior to 1 August 1962 will ensure "that most rules will be available in bound volume and, accordingly, will improve the accessibility of subordinate legislation".

125.2 The Committee recognises the need for the passage of the Subordinate Legislation (Revocation) Act 1984 and notes that its coming into effect does, to a large degree, alleviate a problem which the Subordinate Legislation Committee recognised in a number of its reports. For example, in the Final Report upon a General Inquiry into Subordinate Legislation (Consolidation and Review) published in 1980-1981 the Subordinate Legislation Committee in commenting upon the need for constant consolidation of subordinate legislation by departments, added :

> *A review of the index of regulations contained in the annual volumes of statutory rules reveals the presence of regulations, by-laws and other instruments of subordinate legislation which are no longer operative, mainly through effluxion of time. In many cases the consolidation of the principal regulations would have brought about the revocation of such laws but nevertheless, there appears to be a need for the various departments and authorities to undertake a comprehensive study to evaluate this type of subordinate legislation.* (At p.4.)

125.3 Now that the Act has come into force, however, it supersedes the proposed section 3A(1)(a) included in the Subordinate Legislation (Deregulation) Bill 1983. That proposed section should therefore be deleted from the Bill.

126 RECOMMENDATION 21

The Committee recommends that, due to the passage of the Subordinate Legislation (Revocation) Act 1984 which in effect incorporates the proposed section 3A(1)(a) of the Subordinate Legislation Act 1962 that proposed section

should be deleted from clause 5 of the Bill.

127 Clause 5 : Sunset - Subordinate Legislation (Revocation) Act 1984 - Exemptions. However, the Committee notes that in passing the Subordinate Legislation (Revocation) Act 1984 the Parliament approved the exemption of certain regulations from the revocation process. Section 2 of the Act states :

> *(1) Unless sooner revoked a statutory rule (other than a statutory rule referred to in the Schedule or a statutory rule made under or continued in force by the Grain Elevators Act 1958, the Marine Act 1958, the Motor Car Act 1958, the Port of Melbourne Authority Act 1958 or the Port of Portland Authority Act 1958) made prior to 1 August 1962 shall by virtue of this Act be revoked on 31 July 1984.*
>
> *(2) Unless sooner revoked, a statutory rule made under or continued in force by the Grain Elevators Act 1958, the Marine Act 1958, the Motor Car Act 1958, the Port of Melbourne Authority Act 1958, made prior to 1 August 1962 shall by virtue of this Act be revoked on 1 July 1985.*

127.1 The Schedule to the Act provides :

Title or Description	*Date of Publication in the Government Gazette*
Regulations relating to the issue of debentures by the Country Fire Authority	
Loan No.	
17	*26.1.55*
19	*9.11.55*
22	*11.9.57*
25	*28.1.59*

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27	*16.9.59*
30	*14.9.60*
35	*30.5.62*

Regulations relating to the issue of debentures by the Metropolitan Fire Brigades Board

Loan No.	
13	*19.12.56*
14	*19.3.58*
15	*13.5.59*
16	*17.2.60*
17	*3.5.61*
18	*28.3.62*

Metropolitan Fire Brigades Board Superannuation	*20.12.44*
Metropolitan Fire Brigades Board Superannuation (Amendment)	*10.1.45*
Metropolitan Fire Brigades Board Superannuation (Amendment)	*25.9.46*
Metropolitan Fire Brigades Board Superannuation (Amendment)	*11.11.59*
Metropolitan Fire Brigades Board Superannuation (Amendment)	*22.6.60*
Firearms (Goldfields Historical Museum - Dunolly)	*23.8.61*
Apartment House Regulations 1955	*29.6.55*
Community Welfare Services Regulations 1962	*3.8.62*
Co-operative Societies (Model Rules) Regulations 1954	*29.7.54*
Co-operative Societies (Model Rules) Regulations No.2 1954	*15.9.54*
Council of Public Education Regulations 1952	*5.9.52*
Friendly Societies Regulations	*31.3.31*
General Sanitary Regulations 1950	*21.6.50*
Hairdressers' Shops, Beauty Parlours, and Chiropodists' Establishments Regulations 1955	*25.1.56*

Industrial and Provident Societies Regulations 1931	*18.2.31*
Marine Stores and Old Metals Regulations 1931	*4.2.31*
Milk Board Regulations 1952	*1.4.52*
Milk Pasteurization Regulations 1952	*16.1.52*
Milk Pasteurization (Sterilized Milk) Regulations 1957	*26.4.57*
Registration (Health Act 1919) Regulations 1921	*15.6.21*
Supreme Court Library Rules 1947	*25.6.47*
Supreme Court Rules 1957, Chapters I and III	*7.11.56*
Teaching Service (Governor in Council) Regulations 1951	*20.12.51*

127.2 Concerned that the principle of eliminating regulations which are outmoded and/or which remain unconsolidated should be carried through in all cases, the Committee enquired of the Department of the Premier and Cabinet the grounds upon which exemptions of regulations from the Subordinate Legislation (Revocation) Act 1984 had been sought. The Department responded :

> *Your letter ... seeks information as to the rationale for exempting those statutory rules set out in the Schedule to the Subordinate Legislation (Revocation) Act 1984 from that Act's revocation provisions. The statutory rules set out in the Schedule are those pre-1962 rules that departments advised that they would be unable to review and (if necessary) repromulgate prior to 31 July 1984, the date specified in the Act as the date of revocation. A number of those rules are currently being reviewed by the departments responsible for their administration, with a view to their revocation or consolidation. It is intended that those statutory rules will be treated no differently from existing post-1962 rules.*

(Letter from the Secretary, Department of the Premier and Cabinet, 3 July 1984.)

127.3 In following up this matter, the Committee was fortunate in having officers of the Health Commission of Victoria appear before it to give evidence in relation to the Bill generally; the Health Commission had sought (and received) exemption from the operation of the Subordinate Legislation (Revocation) Act 1984 in relation to a number of subordinate instruments promulgated under legislation administered by the Commission. Regulations exempted in the Schedule include Apartment House Regulations 1955; Hairdressers' Shops, Beauty Parlours and Chiropodists' Establishments Regulations 1955; General Sanitary Regulations 1950; Registration (Health Act) 1919 Regulations 1921. Responding to the question of why exemptions were sought, particularly in relation to the Apartment House Regulations 1955, the Subordinate Legislation Officer of the Commission replied :

> *The reason was that we are still in the preparatory stages of a new set of regulations that will make quite a few changes in the area. The Commission thought it might be possible to have the regulations ready a month after the [Subordinate Legislation (Revocation) Act 1984] was passed but that has not been possible. We are preparing a set of regulations to consolidate the old regulations and set them out more clearly, without changing the whole area at this time.*

(Powell, oral evidence, 4 July 1984, at p. 388.)

The Committee understands that the Commission has gone through a process of reviewing the regulations with a view to formulating a new set, however the exact details have not yet been settled. The review process has taken into account the effect apartment house regulations have on people outside the Health Commission and the local councils. This has meant that it was not possible to promulgate new regulations so that the 1955 Apartment House Regulations could be sunsetted by the Subordinate Legislation (Revocation) Act 1984.

127.4 The Committee considers that in such a case it is appropriate for an exemption to have been sought and obtained. However, the Committee is also

aware that if the principle of sunsetting pre-1962 regulations is to be adhered to across the board, it will be necessary to pass legislation stating that those regulations obtaining exemptions under the Subordinate Legislation (Revocation) Act 1984 will be sunsetted by a particular date. That is, the Department of the Premier and Cabinet makes it clear that exempted statutory rules "are to be treated no differently from existing post-1962 rules". At present there is no legislated review process for post-1962 rules. This means that the exempted regulations may continue in force with the problems of pre-1962 rules continuing : that is, the fact that they may be outdated, are not consolidated, and are not readily accessible. The Committee believes that there must be an obligation placed on departments or bodies responsible for the exempted pre-1962 regulations to ensure that action is taken to update and review them. This obligation should be legislated in the form of a sunset provision making it clear that the regulations will be revoked at a certain date. This in effect gives the responsible department or body a "breathing space" to ensure that the regulations are up to date, or that where they should be amended or completely revised, this will be done. The date upon which revocation of the exempted regulations should take place should be set at 1 July 1985, the date upon which the Subordinate Legislation (Deregulation) Bill 1983 is, in accordance with the recommendations of the Committee, scheduled to come into operation. This effectively grants the responsible departments or bodies leeway to carry out the necessary review process.

127.5 With those regulations granted an extension to 1 July 1985, the Committee understands that they are being reviewed and that new regulations are in the offing. For example, a new set of Motor Car Regulations was scheduled to come into force in mid-August 1984, and therefore do not require the entire leeway period to run.

128 RECOMMENDATION 22

The Committee recommends that the proposed section 3A(1)(a) in Clause 5 of the Bill should be replaced by a new section 3A(1)(a) in the following terms :

Unless sooner revoked, a statutory rule -

(a) made prior to 1 January 1962 and exempted from revocation by the Subordinate Legislation (Revocation) Act 1984 shall by virtue of this Act be revoked on 1 July 1985.

129 Clause 5 : Subordinate Legislation (Deregulation) Bill's Sunset Provisions Generally. Of those departments and bodies which responded to the Committee's request for comments on the Subordinate Legislation (Deregulation) Bill's provisions, some approved of the sunset provisions; others disapproved; some suggested alternative means of, in their view, achieving the same end.

129.1 The State Electricity Commission foresaw some practical difficulties in the operation of the clause. It commented :

> *New rules, especially if amendments are being considered, might take longer to prepare than expected and if other statutory bodies needed to be consulted the delay might be beyond the control of the department making the new rule.*

(Written submission, 23 February 1984, at p.2; see also Du Gueschin, oral evidence, 4 April 1984, at pp.152-154.) The Ad Hoc Committee of the Law Institute of Victoria in its submission pointed out that the strict application of the sunset provisions would mean that "an essential piece of subordinate legislation might be statutorily revoked by oversight or otherwise, without arrangements being made for its replacement. Administrative chaos would result and this might well outweigh the merits of placing of responsibility on the relevant department". (Written submission, 28 March 1984, at p.2.) Several witnesses appearing before the Committee stated that the sunset provisions had the flavour of "using a sledge hammer to crack a nut" and should not be introduced. (See for example Pincus, oral evidence, 2 April 1984, at pp.126-127; Cranston, oral evidence, 30 March 1984, at pp.98-99.)

129.2 The Department of the Premier and Cabinet argued in favour of the provisions, stating that proposals for phased repeal of existing and future statutory rules "ensure that rules that are no longer required or are out of date will be eliminated regularly and on a continuing basis"; as well, "constraints imposed by competing policies and priorities and which currently hinder the effective view of regulations will be overcome by the provision of mandatory regular repeal". (Written submission, 29 March 1984, at p.2.) The Rural Finance Commission "applauds" the sunset concept, with the qualification that "care would be needed to ensure that contracts based on regulations subject to the sunset clause which extend for a period of more than ten years remain valid after the provision of the sunset clause takes effect". (Written submission, 15 February 1984, at p.1.) The Melbourne and Metropolitan Board of Works stated that the sunset provision "reflects current Board practice which is to periodically review and replace existing by-laws". (Written submission, 30 March 1984, at p.2.)

129.3 Those suggesting alternatives included the Department of Education, which expressed concern at the proposal "to introduce mandatory revocation of regulations", suggesting instead "a compulsory review of regulations after a 10 year period with provision for the responsible Minister to authorize the continued operation of the legislation for a further specified period if required". The Department also suggested that "regulations made under an Act of Parliament should not be revoked by a separate enactment while the original Act remains in force". (Written submission, 27 February 1984, at p.1.) The Dandenong Valley Authority stated that sunset periods longer than the proposed ten years "will be appropriate in many instances". The Authority recommended a maximum of "perhaps 20 years with a provision for the appropriate period to be fixed for each set of regulations following consideration of information submitted to the Minister responsible 12 months prior to the conclusion of the sunset period". The information considered by the Authority to be relevant to this process includes :

* a copy of the current regulations together with documentation regarding any suggested amendments.

* an annual report prepared during the currency of the regulations

* audited accounts

(Written submission, 29 February 1984, at pp.1-2.)

129.4 On balance, the Committee believes that the sunset provisions are necessary to ensure that departments and other bodies responsible for subordinate legislation do keep legislation up to date, consolidated, and readily accessible to the public and interested parties. A swift perusal of the reports of the former Subordinate Legislation Committee reveals all too clearly that this was the case in the recent past, despite the considerable efforts of that Committee to ensure that this did not occur.

130 RECOMMENDATION 23

The Committee considers that it is necessary to apply sunset provisions automatically to delegated legislation. Accordingly, the Committee recommends that the proposed section 3A of clause 5 of the Subordinate Legislation Act 1962, as amended by Recommendation 21, should remain part of the Bill.

131 Clause 5 : Sunset Provisions - Extension of Time/Exemptions. A number of departments and witnesses appearing before the Committee considered that the introduction of sunset provisions requiring subordinate legislation to be revoked after ten years of life would necessarily require the inclusion of a possibility of extension. In its submission intended to convey the responses of a number of departments and bodies, the Department of the Premier and Cabinet proposed :

(a) to counter problems that might flow from repeal of important

statutory rules when resource constraints or other factors have prevented the making of new updated rules, the responsible Minister should be empowered to extend the date of repeal for a specified period not exceeding 12 months;

(b) *the responsible Minister should also be empowered to exempt specific statutory rules from repeal where she or he is satisfied that the reasons for which the rules were made and the circumstances in which they were made continue to apply and that revocation would serve no useful purpose;*

(c) *for both the extension of the period before repeal and the complete exemption from repeal the Minister should be required to report to the Legal and Constitutional Committee and to have published in the Government Gazette a notice to the effect of the proposed action.*

(Written submission, 29 March 1984, at p.2.)

131.1 The Department of Conservation, Forests and Lands, Division of Lands, suggested the inclusion of a provision in the Bill for a 12 month extension of time to enable a review of statutory rules to be finalised. (Written submission, 23 February 1984, at p.1.) The Gas and Fuel Corporation stated that, given the public safety nature of the Gas Fitting Regulations 1979, it was questionable whether automatic revocation upon the 10 year expiration period would be appropriate. The Corporation questioned whether the Bill could be amended to empower the Attorney-General or the Legal and Constitutional Committee to otherwise exempt particular regulations from the operation of the legislation. (Written submission, incorporated into Department of the Premier and Cabinet precis of departmental and authority submissions, 3 July 1984, at p.10.)

131.2 The Law Institute of Victoria Ad Hoc Committee suggested that the

Premier could be authorised to extend the life of a statutory rule for a limited period beyond the scheduled revocation date; application would have to be made to the Premier for such extension within a particular time-span prior to revocation date. The Institute proposed that the Bill should be amended to include a provision akin to the proposed section 13(1) of the Bill (Clause 8) to provide for this. That is, extension should be allowed only where certification in writing by the Premier could be obtained by the relevant department or body stating that, in the opinion of the Premier, in the special circumstances of the particular case the public interest requires an extension be granted. (Written submission, 28 March 1984, at p.3.)

131.3 Senator Alan Missen similarly suggested provision for extension should be made, however proposed a different mechanism. The Missen proposal involved the granting of a limited extension beyond the sunset date, by way of Parliamentary debate. He opposed the granting of an extension by the Minister having charge of the relevant delegated legislation. In his view, if extension by debate in Parliament was not acceptable, the alternative should be extension by resolution of the Legal and Constitutional Committee. (Oral evidence, 9 April 1984, at p.88.)

131.4 For the other side, the Melbourne and Metropolitan Board of Works stated that the sunset provision "reflects current Board practice, which is to periodically review and replace existing by-laws". (Written submission, 30 March 1984, at p.2.) The Health Commission questioned the utility of the sunset clause, stating that its regulations are "in constant review both internally and externally". It suggested that consideration should be given to requiring the consolidation of regulations at the expiration of periods of 10 years, or reporting at the end of the ten year period in relation to particular regulations, by the Minister or permanent head to the Legal and Constitutional Committee on the value of a particular regulation and the need to preserve it. (Written submission, Department of the Premier and Cabinet, 3 July 1984, at p.9.) The Department of Industry, Commerce and Technology expressed support in principle for the proposed sunset provisions, indicating that the Bill would

have only "minimal effect upon the Department's own administration". (Written submission, Department of the Premier and Cabinet, 3 July 1984, at p.4.)

132 Clause 5 : Sunset - (a) Extension of Time. The Committee questions the suggestion that provision should be made for a period of extension (albeit limited extension) beyond the sunsetted date. Ten years is a not inconsiderable time during which departments can review and, if necessary, revise their subordinate legislation. Indeed, as is evident from the submissions received by the Committee, some departments and other bodies are already doing this in their normal course of operation. A department which left review of its subordinate legislation until, say, six months or six weeks before the expiration date would be administratively inept. The current rate of economic and social change in fact requires departments to keep abreast of developments which may affect the operation of or need for subordinate legislation of various kinds.

132.1 The Committee believes that it is vital that those responsible for subordinate legislation should ensure that it is relevant to contemporary conditions and requirements. This would be effected by way of regular, ongoing review. The Committee suggests that all departments and other bodies should keep all subordinate legislation on computer, feeding comments, criticisms and general information on the operation of that legislation into the computer, and regularly reviewing the computer contents.

132.2 There is no reason for any department to wait until the ten year period is up before it commences a review of its subordinate legislation. It may well be that some subordinate legislation has a limited lifetime which does not run to 10 years : it would be common sense for departments to institute a system whereby this becomes clear sooner rather than later. Introducing regular review mechanisms could be calculated to lessen rather than increase the burden of subordinate legislation control, implementation and review, thus lessening unnecessary use of resouces. Accordingly, no extensions should be

granted, and provision should not be made for extension.*

133 RECOMMENDATION 24

The Committee recommends that no provision for extension of time should be drawn into the proposed section 3A.*

134 Clause 5 : Sunset - (a) Extension of Time - Alternative. However, if it is considered that despite the Committee's recommendation it is necessary to introduce a provision whereby an extension of time beyond the sunset date may be sought, the Committee believes that such an extension should be of limited duration. If a department or other body cannot, for some reason such as lack of resources, difficulties in consultation processes or the like, complete its review of subordinate legislation within the ten year period, it could be given a limited period of six months to complete the review. There may be occasions where a reviewed regulation is almost ready for promulgation and requires a short extension of time for completion. Again the Committee emphasises there is no truly legitimate ground for this.

134.1 However, it is not the Committee's view that such an extension should lie in the hands of the Minister responsible for the subordinate legislation in question. Rather, the Minister should be required to make representation to the Legal and Constitutional Committee outlining the special circumstances of the particular case and supporting the proposition that the public interest requires that the scheduled date of revocation should be extended by a period of up to a maximum of six months.

* Subject to the extraordinary case arising in the instance of refusal of request for exemption. (See further Clause 5 : Sunset (b) 10 Year Exemption, at p.271ff.)

134.2 If the Committee grants such an extension, then a written certificate of the Committee should be tabled in Parliament as soon as practically possible after the granting of the extension. The extension will remain in force for the stipulated period, unless the Parliament, by a majority vote in both Houses, rules otherwise. If the Committee refuses such an extension, then the certification of such refusal must be tabled in Parliament as soon as practicably possible after the refusal of the extension. The refusal of extension will result in the revocation of the subordinate instrument in question on the scheduled date, unless the Parliament, by a majority vote in both Houses, overrules the Committee's refusal and grants an extension of not more than six months to the relevant department for the particular subordinate instrument.

134.3 The Committee believes that the sunset provisions should come into force automatically, and that if any extension is to be sought, then the onus should be on the department concerned to justify that extension. All subordinate legislation should require justification at some stage, and it is necessary that a positive system of scrutiny should be brought into existence. This scrutiny should not be limited to the time of drafting of subordinate legislation, but should exist throughout the process of delegated legislation operation.

134.4 Accordingly, the Committee believes that the extension process outlined in paragraph 134.2 above should be resorted to, and applied, sparingly (if at all). It should not be brought into effect, nor should any department or other body administering delegated legislation seek it, as a matter of course.

135 RECOMMENDATION 25

The Committee recommends that, in the event of Recommendation 24 not being adopted in full by the Parliament and the Parliament considering that the sunset provisions should exist but with a possibility of a short extension being granted, on specified grounds, for the completion of review of a particular

subordinate instrument, a new section 3A(1A)(a) should be inserted in clause 5 of the Subordinate (Deregulation) Bill 1983, to provide :

3A

(1A)(a) Where an extension of time is sought beyond the scheduled date of revocation of a subordinate instrument, the Minister having responsibility for administration of that particular instrument shall be required to make representation to the Legal and Constitutional Committee, setting out the grounds upon which such extension is sought.

(b) Where the Legal and Constitutional Committee certifies in writing that in its opinion, on representations by the relevant Minister, in the special circumstances of the particular case the public interest requires it, the date of revocation of a particular subordinate instrument should be extended by a period of not more than six months, then revocation shall take place on the expiration of that extended date.

(c) Where the Legal and Constitutional Committee certifies in writing that in its opinion, on representations by the relevant Minister, there are no special circumstances affecting the public interest and requiring extension, the date of revocation of a particular subordinate instrument shall take place as if no extension had been sought.

(d) Where the Legal and Constitutional Committee has made out a certificate in accordance with sub-sections (b) or (c) above, that certificate must be laid before both Houses of the Parliament as soon as is practicable after the making of that certificate.

(e) The certificate of the Legal and Constitutional

Committee as made out in accordance with subsections (b) or (c) above will be final, unless both Houses of the Parliament, by a majority in each House, overrule the decision of the Legal and Constitutional Committee as notified in the certificate.

(f) If both Houses of Parliament overrule the certificate of the Legal and Constitutional Committee, then in the case of sub-section (b) above, the date of revocation of the particular subordinate instrument will come into effect six months after the date laid down in section 3(1) of this Act; in the case of subsection (c) above, the date of revocation of the particular subordinate instrument will come into effect as laid down in section 3(1) of this Act.

136 Clause 5 : Sunset - (b) 10 Year Exemption. In giving evidence before the Committee, representatives of the Health Commission raised the possibility that automatic revocation of subordinate instruments may prove, in some cases, to be unnecessarily costly. That is, some subordinate instruments may not be outdated after the expiration of the ten year period. Automatic revocation would, in such cases, necessarily be followed by the remaking of the particular subordinate instrument or instruments in precisely identical terms, apart from the date, as the revoked instrument or instruments. Stocks of the revoked instrument may be readily available - however the change in date would possibly lead to confusion. Old stocks would have to be pulped, despite their content being identical with the newly made instrument. (Powell, oral evidence, 4 July 1984, at pp.394-395.)

136.1 The Committee accepts that there may be instances where the revocation of a particular subordinate instrument may be inappropriate, despite its having been in operation for ten years. It believes that it is necessary to make provision for this. In such circumstances, the onus should lie on the

Minister responsible for administration of the subordinate legislation to provide a report to the Legal and Constitutional Committee justifying non-revocation. Such report should set out -

* the contents of the subordinate instrument

* its sphere of operation

* the aim of the instrument

* the consultative procedures which were undergone when the subordinate instrument was originally formulated

* assessment of the operation of the instrument over the period of its existence

* the consultative procedures which have been undergone in a review process justifying its retention in the same form as it took ten years previously

Upon reviewing the report of the Minister, the Legal and Constitutional Committee may certify the continuation of the subordinate instrument beyond the sunset date. In such a case, the next scheduled sunset date for that subordinate instrument will be ten years after the date upon which the Legal and Constitutional Committee issues its certificate of continuance.

136.2 Certification for continuance, by the Legal and Constitutional Committee, should only be made if the Committee is satisfied that, in the special circumstances of the case, the public interest requires a certificate of continuance to be granted. Where the Committee is not satisfied that, in the special circumstances of the case, the public interest requires continuance of the subordinate instrument, then the Committee should issue a certificate denying continuance and the revocation date as scheduled under section 3(1) of the Subordinate Legislation (Deregulation) Bill 1983 will come into effect. (In

such a case, it would be open to the Minister to apply to the Committee for a six month's extension of the revocation date in order to review the subordinate instrument.) In either case, the certificate of the Committee should be tabled in Parliament as soon as is practicable after granting of that certificate.

136.3 Where a report is made to the Committee by the relevant Minister, the report should be made accessible to the public by way of publication in the Government Gazette, a major daily newspaper, a relevant local newspaper (if any) and a trade, professional, or community interest journal (where applicable). Objections received by the Minister in consequence of making the report known must be taken into account and notified to the Legal and Constitutional Committee, with a response from the Minister. The time between publication of the report and receipt of objections and any consultation consequent on those objections should be not greater than 30 days. Where in the Committee's view the submissions or objections so received have not been adequately taken into account by the Minister, the Committee may grant an extension of another 30 days in order that that might be done.

136.4 The Committee notes, however, that the granting of a ten year exemption has a potential for confusion, particularly in the public arena. That is, the introduction of sunset provisions will lead members of the public (and of the government and other bodies) to assume that if a statutory rule came into operation on 1 January 1984, on 31 December 1994 that statutory rule is no longer in effect. However, this will not be the case if an exemption is granted. The Committee therefore believes that any remaining copies of a statutory rule which has been granted a 10 year exemption from sunset should be clearly stamped by the Government Printer, and where they are in possession of a department or other authority responsible for administering them, by that body, to indicate that a ten year exemption has been granted and that the rule has another 10 years to run. When the rule is reprinted, it should be marked with the date upon which the exemption was granted and clearly beside this date it should indicate that the rule remains as it was passed on the original date, with amendments incorporated since the original date.

137 RECOMMENDATION 26

The Committee recommends that a further provision be inserted into clause 5 of the Subordinate Legislation (Deregulation) Bill 1983 to provide :

s.3A

(1B)(a) Where a Minister responsible for the administration of a particular subordinate instrument believes that, despite that instrument having been in operation for ten years and the revocation date being imminent, it is inappropriate in the particular circumstances of the case, and in the public interest, that the particular subordinate instrument should be revoked, the Minister may make a report to the Legal and Constitutional Committee requesting continuance of the subordinate instrument.

(b) A report made under section 3A(1B)(a) to the Legal and Constitutional Committee should contain :

(i) the contents of the subordinate instrument;

(ii) an outline of its sphere of operation:

(iii) the aim of the instrument;

(iv) an outline of the consultative procedure which were undergone when the subordinate instrument was originally formulated;

(v) an assessment of the operation of the instrument over the period of its existence; and

(vi) an outline of the consultative procedures which have been undergone in the review process.

(c) The report made by the Minister in accordance with the foregoing subsection shall be published in the Government Gazette, a metropolitan daily newspaper and, where appropriate, a local newspaper, trade, business or professional journal and a community interest newspaper or circular.

(d) Where in consequence of publication of the report objections to the continuance of the subordinate instrument in unrevised form are received by the Minister within 30 days of that publication, the Minister shall forward those objections, together with any responses by the Minister, to the Legal and Constitutional Committee for consideration in its deliberations on the report.

(e) If, in the opinion of the Legal and Constitutional Committee, objections received under subsection (1B)(d) have not been properly taken into account by the Minister, the Committee may grant a further period of up to 30 days for those objections to be given adequate consideration by the Minister.

(f) Where the Legal and Constitutional Committee certifies in writing that in its opinion, on the report of the Minister, in the special circumstances of the particular case the public interest requires it, the subordinate instrument shall be granted a revocation date 10 years beyond the date upon which the Legal and Constitutional Committee issues its certificate under this section.

(g) Where the Legal and Constitutional Committee certifies in writing that in its opinion, on the report by the Minister, there are no special circumstances affecting the public interest and requiring the non-application of

the scheduled revocation date, the date of revocation of the particular subordinate instrument shall take place as if no report under this section had been made to the Committee.

(h) The certificate of the Legal and Constitutional Committee as made out in accordance with sub-sections (e) or (f) above will be final, unless both Houses of the Parliament, by a majority in each House, overrule the decision of the Legal and Constitutional Committee as notified in the certificate.

(i) If both Houses of Parliament overrule the certificate of the Legal and Constitutional Committee, then in the case of sub-section (e) above, the revocation date of the subordinate instrument being the subject of the certificate will come into effect ten years after the date upon which the Legal and Constitutional Committee issued its certificate under this section.

(j) If both Houses of Parliament overrule the certificate of the Legal and Constitutional Committee, then in the case of sub-section (f) above, the revocation date of the subordinate instrument being the subject of the certificate will come into effect as laid down in section 3(1) of this Act, except that the Committee may grant an extension of six months by certificate tabled in Parliament.

138 RECOMMENDATION 27

Where a 10 year exemption has been granted, the Committee recommends that an obligation should lie on the Government Printer, and upon the authority administering the delegated legislation, to mark clearly on the front of the

statutory rule that it has been granted a 10 year exemption and remains in the same form as at the original date on which it was passed. Further, when reprints of such a statutory rule are required, the reprint should carry the date upon which the 10 year exemption was granted and also indicate clearly beside this date that the exemption was granted and that the rule remains as it was passed on the original date, with amendments incorporated since that original date.

139 Clause 5 : Sunset - Departmental Oversight. The State Electricity Commission in its written submission to the Committee stated that the introduction of sunsetting of regulations having a lifetime of ten years would require vigilance to ensure that departments did not overlook the drawing close of the cut-off date. The Commission suggested that "some kind of central registry system" should be established to provide a mechanism for reminding each department of the imminent expiry of statutory rules or other subordinate legislation subject to the sunset provisions, for which it is responsible. (Oral evidence, 4 April 1984, at p.158.) The Committee appreciates this concern, however believes that it would be unnecessarily costly to establish a unit solely responsible for alerting departments to the need to review delegated legislation. Rather, the Committee believes that each department or other relevant body should establish (if it has not already established) a central point, staffed by a subordinate legislation officer, to undertake this role in relation to its own subordinate instruments. For example, the Health Commission of Victoria has a legal section staffed by a Legislation Officer and a Subordinate Legislation Officer. The latter officer is, as her title makes clear, responsible for the drafting of subordinate legislation for the Commission. Although an argument may be made for necessary backup staff of such an office, the primary requirement is that each department or body should have an officer responsible for ensuring that action is taken where necessary in relation to the updating or phasing out of existing subordinate legislation.

139.1 However, in addition a direct responsibility should be placed on each department or authority responsible for delegated legislation to ensure that

that legislation is reviewed before the expiration of the ten year sunset period. This should be done by imposing a statutory duty on the particular department or authority.

140 RECOMMENDATION 28

The Committee recommends that every department or other body responsible for formulating and administering delegated legislation require at least one officer to take on the duties of delegated legislation officer those duties to include responsibility for oversight of existing legislation to ensure that it is reviewed in accordance with sunset provisions contained in the Subordinate Legislation (Deregulation) Bill 1983. Where an officer has already been designated as responsible for delegated legislation, that officer should also be made responsible for ensuring that delegated legislation is reviewed in accordance with sunset provisions contained in the Subordinate Legislation (Deregulation) Bill 1983.

141 RECOMMENDATION 29

The Subordinate Legislation (Deregulation) Bill should be amended to include a new provision 3A(1C) of clause 5 stating :

> *It shall be the responsibility of each department, authority or other body responsible for the administration of subordinate instruments to ensure that a review of all subordinate legislation is made under Acts it administers and for which it has responsibility before the 10 year life time of that legislation expires.*

142 Clause 5 : Sunset Provisions- Overlap with Subordinate Legislation (Revocation) Act 1984. Proposed sub-sections (2) and (3) of section 3A are contained in the Subordinate Legislation (Revocation) Act 1984. Consequently, their inclusion in the Subordinate Legislation (Deregulation) Bill 1983 is no

longer necessary. They should therefore be omitted from the Bill. Additionally, proposed section 3A(4) is covered by the passage of the Interpretation of Legislation Act 1984 and therefore should be omitted from the Bill.

143 RECOMMENDATION 30

The Committee recommends that, due to their inclusion in the Subordinate Legislation (Revocation) Act 1984, proposed sections 3A(2) and (3) of clause 5 of the Subordinate Legislation (Deregulation) Bill 1983 (contained in the Bill) should be omitted from the Bill and proposed section 3A(4) should be omitted from clause 5 of the Bill as being covered by the passage of the Interpretation of Legislation Act 1984.

Clause 6 : Disallowance of Statutory Rules

144 Clause 6 : Outline of Disallowance Provisions. Clause 6 of the Bill deals with the disallowance of statutory rules. It provides :

> 6. *After section 6(2A) of the [Subordinate Legislation] Act there shall be inserted the following sub-sections :*
>
> *"(2B) Where the Legal and Constitutional Committee proposes to adversely report on a statutory rule and it is of the opinion that considerations of natural justice require that the operation of the statutory rule should be suspended pending the consideration by Parliament of the statutory rule, the Legal and Constitutional Committee may propose in the report, that the operation of the statutory rule be suspended.*
>
> *(2C) Subject to sub-section (2D), where the Legal and Constitutional Committee proposes that the operation of a statutory rule shall be suspended, the Committee shall forthwith send a copy of the report to the relevant Minister and the Governor in Council and the operation of the statutory rule shall be suspended at the expiry of the under-mentioned period until each House of Parliament has considered the statutory rule unless within the period of 7 days after the sending of the report to the Governor in Council, the Governor in Council has otherwise declared under sub-section (2D).*
>
> *(2D) The Governor in Council may on the recommendation of relevant Minister within the period of 7 days referred to in sub-section (2C) by Order in Council published in the Government Gazette declare that the operation of a statutory rule shall not be suspended and the provision in a report of the Legal and Constitutional Committee for*

the suspension shall be of no force or effect.

(2E) Whilst the operation of a statutory rule is suspended under this section the statutory rule shall be deemed not to have been made."

145 Clause 6: Disallowance - The Issues. Some comments were made on this clause of the Bill by government departments or bodies and witnesses appearing before the Committee. The State Electricity Commission commented that under the clause, the powers of the Legal and Constitutional Committee "would appear to be greatly extended ... and this appears to be a policy matter". (Written submission, 23 February 1984, at p.2.) Other witnesses commented on the operation of the clause. (See, for example, Missen, oral evidence, 9 April 1984, at pp.167-168; Phillips, oral evidence, 30 March, 1984, at p.99.)

145.1 The Committee identified three issues which should be taken into account in considering this provision. First, the clause sets out a procedure for the implementation of a power of suspension of statutory rules. Secondly, the clause outlines the criteria upon which such a suspension power should be put into effect. Thirdly, the clause nominates the party having the power to nullify or suspend the suspension of a statutory rule which has been effected by way of implementation of the procedure outlined in the clause.

146 Clause 6 : Before Disallowance - Power to Suspend. The aim of the proposed section is to cover the contingency which would arise if the Legal and Constitutional Committee believes that a particular statutory rule should not be allowed to stand, but Parliament is not sitting at the time the rule comes before the Committee and the Committee's adverse assessment is made. In such a case, the provision supplies a mechanism for suspending the rule until the Committee's adverse report can be considered by Parliament. However, the drafting of the proposed section is likely to lead to confusion. The Committee

found that some misunderstanding could arise from the drafting of the provision (2B) by the use of the word "proposes" and the word "propose" where it is stated :

> *Where the Legal and Constitutional Committee proposes to adversely report on a statutory rule ..., the Legal and Constitutional Committee may propose in the report, that the operation of the statutory rule shall be suspended.*

146.1 If the Legal and Constitutional Committee makes a decision that a the statutory rule is so offensive it should be suspended, then the power to so suspend should lie with the Committee. In the opinion of the Committee, to leave the provision as it is currently drafted, in conjunction with proposed sections (2C) and (2D), would imply that suspension is to be at the determination of the Governor in Council, or of the Parliament when Parliament sits and deals with the matter. However, the purpose of suspension is to prevent a rule having any force and effect for the period starting from when the determination is made by the Committee that an adverse report to Parliament is warranted (taking into account the seven day period stipulated in proposed section (2C)), pending the determination of Parliament on the report. When the matter comes before Parliament - if it is dealt with* - it would not be a case of Parliament simply suspending the rule; rather, Parliament would determine that the rule should be revoked and would revoke it in accordance with the adverse report. Alternatively, Parliament might decide that the rule should not be revoked and so should have full force and effect. (In this case any suspension by the Committee would be lifted, if not already lifted by Governor in Council : s.(2C).)

* See further on this issue discussion on proposed section 6(2C) in clause 6 of the Bill at p.290.)

146.2 Thus, proposed section 6(2B) (in clause 6) should make it clear that the Committee has the power to determine that a rule should be suspended and to declare that suspension should come into effect, not simply to "propose" the suspension. This would be effected by substituting the word "declare" for "propose" where it appears in that proposed section. Further, rather than "the ... Committee proposes" to adversely report, the word "intends" should be substituted. These substitutions will make the provision effective and its intention clear.

147 RECOMMENDATION 31

The Committee recommends that the proposed section 6(2B) in clause 6 of the Subordinate Legislation (Deregulation) Bill 1983 should be amended so that the word "proposes" is replaced with the word "intends"; and the word "propose" is replaced with the word "declare".

148 Clause 6 : Power to Suspend - "Considerations of Natural Justice". The Committee also identified some difficulties in the use of the term "considerations of natural justice" as providing the criteria upon which the Committee is empowered to adversely report on a statutory rule. In giving evidence before the Committee, Dr. Ross Cranston, Senior Lecturer in Law at the Australian National University, commented that the phrase is "probably drafted to mean 'equity' or 'justice' in the general sense". (Oral evidence, 30 March 1984, at p.99.) However he considered its inclusion could raise problems in that "considerations of natural justice" has a specific meaning in other contexts and in general areas of the law. Thus it would be preferable to spell out the meaning by using "equity", "justice", or "fairness and equity". The Committee also found some difficulty with the expression "considerations of natural justice", in that using broad terms may draw the Committee into a consideration of questions pertaining to policy. It is the Committee's firm belief that it would be inappropriate for the Legal and Constitutional Committee, in its role as Subordinate Legislation Sub-Committee, to enter into debate on policy matters.

148.1 The Committee considered several alternatives to "considerations of natural justice". These included the substitution of "considerations of natural justice" with "considerations of fairness and equity", "considerations of equity", "considerations of justice", "in the special circumstances of the case". The Committee also considered using the phrase "is of the opinion that the statutory rule would have such an adverse effect that [its] operation ... should be suspended ..." Ultimately, however, the Committee considered that it would be preferable to omit the phrase "considerations of natural justice" altogether, thus having the provision operate in accordance with the criteria used by the Committee in its deliberations on the content and effect of statutory rules coming before it in the usual way.

149 RECOMMENDATION 32

The Committee recommends that in the proposed section 6(2B) of clause 6 of the Subordinate Legislation (Deregulation) Bill 1983 the words "considerations of natural justice" should be omitted.

150 RECOMMENDATION 33

In consequence of Recommendations 31 and 32, the Committee recommends that the proposed section 6(2B) of clause 6 of the Subordinate Regulation (Deregulation) Bill 1983 should be amended to provide :

> *(2B) Where the Legal and Constitutional Committee intends to adversely report on a statutory rule and it is of the opinion that the operation of the statutory rule should be suspended pending the consideration by Parliament of the statutory rule, the Legal and Constitutional Committee may declare in the report, that the operation of the statutory rule shall be suspended by notification to the Governor in Council.*

151 RECOMMENDATION 34

As a further consequence of Recommendations 31 and 33, the Committee recommends that the word "proposes", where it appears in proposed section 6(2C) of clause 6 of the Bill, should be amended to be replaced with the word "declares".

152 Clause 6 : Overriding Suspension - Time Limit. On the proposed sub-sections (2C) and (2D), section 6 in clause 6 of the Bill, the Department of Labour and Industry commented that the period of seven days granted to enable the Governor in Council to override the suspension of a statutory rule by way of the Legal and Constitutional Committee's declaration provided "insufficient time" and that 14 days would be "a more reasonable period". (Written submission, Department of the Premier and Cabinet, 3 July 1984, at p.4.)

152.1 However, the Committee is not persuaded that a longer time limit should be set. If it is considered that a statutory rule must be suspended, it is imperative that a determination as to whether such suspension should or should not operate ought to be made as soon as practicable. A state of uncertainty could be engendered by the knowledge that the Committee has declared that a statutory rule should be suspended, whilst those affected by the rule and those charged with the duty of administering it await a decision by the relevant Minister to challenge the suspension of the rule by taking it to Governor in Council or to accept the suspension. The Committee believes that in such circumstances the relevant Minister should be under an obligation to act without delay, and that in the circumstances a seven day limit is not ungenerous.

153 RECOMMENDATION 35

The Committee recommends that the time limit of seven days provided in the proposed sections 6(2C) and (2D) of clause 6 of the Subordinate Legislation

(Deregulation) Bill 1983, during which a Minister should make a recommendation to the Governor in Council to declare that a statutory rule should not, despite the report of the Legal and Constitutional Committee, be suspended, and the Governor in Council to make that declaration by publication in the Government Gazette, should remain in the Bill.

154 Clause 6 : Party with Power to Override Suspension. In deliberating on the question of which party should be possessed of the power to override the proposed suspension of a statutory rule by the Legal and Consitutional Committee, the Committee took into account the comments of witnesses appearing before it. (See, for example, Missen, oral evidence, 9 April 1984, at p.167-168.)

154.1 The problem with empowering the Governor in Council to override the determination by the Legal and Constitutional Committee that a statutory rule should be suspended is that this places the executive above a committee of the Parliament. Should the Parliament be granted the power under the proposed sub-sections (2C) and (2D) in clause 6 this would overcome the problem of the executive continuing on a course of implementing a statutory rule despite the misgivings of the Parliamentary Committee - but would create problems if Parliament were not sitting at the time of proposed suspension by the Legal and Constitutional Committee. Indeed, this is the very contingency at which the provision is aimed : suspension is relevant only when Parliament is not sitting, or in the period leading up to the Parliament considering the Committee's adverse report. On consideration, Parliament would revoke or leave in effect, rather than be concerned with "suspension".

154.2 However, if power to override the suspension is left with Governor in Council, it is possible that this might lead to government departments promulgating subordinate legislation during times when Parliament is not sitting - so that if the Legal and Constitutional Committee recommends suspension, it is always possible for the Minister to make a recommendation to Governor in

Council that the suspension should be ineffective.

154.3 The Committee considered whether it would be workable to introduce a convention whereby subordinate instruments should not be promulgated whilst Parliament is prorogued : this would parallel the convention that no appointments to particular offices should be made by the executive during the time Parliament is prorogued. (The problem of Parliament simply not sitting and therefore being unavailable to consider whether or not a statutory rule should be suspended as recommended by the Legal and Constitutional Committee could be overcome, theoretically at least, by recalling Parliament. Presumably, if it were considered by the executive to be vital that a particular statutory instrument should not be suspended, it would be possible to recall Parliament for this purpose.) On balance, the Committee considered that it would impede unnecesssarily the good operation of government to introduce such a convention.

154.4 In the final analysis, the Committee accepts that it is necessary to have an "overriding" or "overruling" clause. This will ensure that if the executive is sufficiently confident a particular statutory rule -

* is within power;

* does not offend the criteria to which the Legal and Constitutional Committee is to have general regard in relation to the promulgation of delegated legislation; and

* should, despite the opinion of the Legal and Constitutional Committee, operate pending the judgement of Parliament on the matter when it again sits, such a statutory rule can come into operation.

Therefore the Committee endorses the inclusion of proposed sub-sections (2C) and (2D) in clause 6 of the Subordinate Legislation (Deregulation) Bill. The

Committee notes that in doing this, it is clear that the provision should not be greatly used. Even though the Governor in Council may override the proposal that the statutory rule be suspended, when Parliament resumes and/or deliberates on the report of the Legal and Constitutional Committee, Parliament has power to revoke the order in council and revoke the statutory rule in accordance with the Committee's adverse report.

154.5 The Committee is aware that, if the Governor in Council does overrule the Committee's recommendation by way of order in council, it is likely, due to the party system, that when the matter arises in the Parliament voting will be on party lines. (If, indeed, the matter is raised in the Parliament at all.) The order in council making the suspension of no force or effect will generally be upheld. However, by too readily overturning a recommendation of the Legal and Constitutional Committee for suspension of a statutory rule, the executive would be opening itself to political embarassment. On balance, the Committee believes that this consideration should offset the possibility that Governor in Council might too readily overrule a declaration by the Legal and Constitutional Committee that a particular statutory rule, or statutory rules, should be suspended.

155 RECOMMENDATION 36

The Committee recommends that the Governor in Council should have the power to override a declaration that a statutory rule be suspended, pending consideration by the Parliament of the Legal and Constitutional Committee's report under the proposed sub-sections 6(2C) and 6(2D) of clause 6 of the Subordinate Legislation (Deregulation) Bill 1983.

156 Clause 6 : Notification of Suspension. Further on the proposed sub-sections (2C) and (2D), the Law Institute of Victoria in its written submission foresaw "several difficulties ... in practice with this clause". The Ad Hoc Committee continued :

There is no mechanism in the Bill for notifying the public of the suspensions of a statutory instrument although there is provision in proposed section 6(2D) for notification of non-suspension ...

There is also uncertainty as to when suspension ends, as the words 'until each House of Parliament has considered the statutory rule' do not relate well to the procedure set out in section 6 of the [Subordinate Legislation Act 1962].

(Written submission, 28 March 1984, at 6.)

156.1 On the question of public notification of the suspension of a statutory rule under proposed section 6(2C) the Committee recognises the force of the Ad Hoc Committee's submission. A new provision should be included in the Bill to provide for this. The onus should lie on the Governor in Council, having received the report of the Legal and Constitutional Committee and not receiving a recommendation of the relevant Minister within the period of seven days referred to in section 6(2C); or receiving a recommendation of the relevant Minister that the operation of a statutory rule shall be suspended, but not exercising discretion to overrule the declaration of the Legal and Constitutional Committee that the statutory instrument should be suspended, to notify the public by order in council published in the Government Gazette.

157 RECOMMENDATION 37

The Committee recommends that a new section 6(2DA) should be inserted immediately following the proposed section 6(2D) in clause 6 the Subordinate Legislation (Deregulation) Bill 1983 to provide :

(2DA) If the Governor in Council does not under sub-section (2D) by Order in Council published in the Government Gazette declare that the operation of a statutory rule shall not be suspended and that the declaration of suspension by the

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Legal and Constitutional Committee shall be of no force or effect, the Governor in Council shall publish in the Government Gazette a notice to the effect that the statutory rule is suspended in accordance with the declaration of the Legal and Constitutional Committee pending consideration of the Committee's report by each House of Parliament.

158 Clause 6 : Resolution of Suspension and Adverse Report. The Committee notes the comment of the Ad Hoc Committee that it is unsatisfactory to provide that suspension continues "until each House of Parliament has considered the statutory rule unless within the period of seven days after the sending of the report to the Governor in Council, the Governor in Council has otherwise declared under subsection (2D)".

158.1 In this context section 6 of the Principal Act would operate. That is, section 6(1) of the Subordinate Legislation Act 1962 provides :

(1) Where -

(a) the power to make a statutory rule is expressed to be subject to the statutory rule being disallowed by Parliament; or

(b) a statutory rule has been adversely reported on by the Legal and Constitutional Committee or by any Subordinate Legislation Committee which held office as such before the commencement of the Parliamentary Committees (Joint Investigatory Committees) Act 1982 -

the statutory rule shall be disallowed if each House of the Parliament passes a resolution in accordance with the

requirements of sub-section (2) of this section.

Section 6(2) then goes on to state :

> *(2) Notice of a resolution to disallow a statutory rule must be given in the House in question on or before the eighteenth day upon which that House sits after the rule is laid before that House and the resolution must be passed on or before the twelfth day upon which that House sits after notice of the resolution has been given in that House but the power of either House to pass a resolution disallowing the statutory rule shall not be affected by the prorogation or dissolution of the Parliament or of either House of the Parliament and for the purpose of this section the calculation of days upon which a House has sat shall be made as if there had been no such prorogation or dissolution.*

158.2 Two issues are raised. First, the proposed section 6(2C) in clause 6 implies that if the Governor in Council reverses the declaration of suspension of the statutory rule by the Legal and Constitutional Committee, that is the end of the matter and the rule continues in force unless section 6 of the Subordinate Legislation Act 1962 is made directly applicable. (See further comments in paragraph 158.3.) Secondly, the provisions contained in section 6 of the Principal Act are not necessarily in line with the comments of the Committee made at paragraph 154.5 (where a Minister might be adamant in recommending to Governor in Council that a declaration of suspension by the Committee be disregarded) persuading Governor in Council to be rigorous in determining whether or not to accept that Minister's recommendation for overturning the Committee's determination.

158.3 To overcome the first problem, and not taking into account the second issue raised above, it would be necessary to introduce a new provision into the Subordinate Legislation (Deregulation) Bill stipulating that where the

Governor in Council makes an order in council under (the proposed) section 6(2D) that the suspension advocated by the Legal and Constitutional Committee should be of no force or effect, that order in council should continue in effect unless or until the Parliament passes a resolution in accordance with sections 6(1)(b) and 6(2) of the Subordinate Legislation Act 1962. Alternatively, proposed section 6(2C) could be redrafted to provide for consideration by each House of Parliament in accordance with sections 6(1)(b) and 6(2) of the Principal Act. (The Committee accepts that consideration of the adverse report by Parliament in accordance with section 6 of the Principal Act is implied by proposed section 6(2C), but evidence from witnesses supports the view that this implication is not immediately clear to all.) Here proposed section 6(2C) would be redrafted to read :

> *Subject to sub-section (2D), where the Legal and Constitutional Committee declares that the operation of a statutory rule shall be suspended, the Committee shall forthwith send a copy of the report to the relevant Minister and the Governor in Council and the operation of the statutory rule shall be suspended at the expiry of the undermentioned period until each House of Parliament has considered the statutory rule in accordance with sections 6(1)(b) and 6(2) of this Act, unless within the period of seven days after the sending of the report to the Governor in Council, the Governor in Council has otherwise declared under sub-section (2D).*

158.4 The question then arises, however, whether it is preferable to stipulate -

(a) that the Parliament should within a certain period affirm the adverse report of the Legal and Constitutional Committee, thereby disallowing the statutory rule; or

(b) that if the Parliament does not consider the report of the Legal and Constitutional Committee within a certain period, then the adverse report is automatically affirmed, and the

statutory rule disallowed; or

(c) that if the Parliament does not consider the report of the Legal and Constitutional Committee within a certain period, then the adverse report is automatically caused to lapse, and thus the statutory rule is no longer suspended, but has full force and effect.

158.5 That is, it is possible to establish a system whereby an adverse report by the Legal and Constitutional Committee has to be debated in Parliament if a rule is to be revoked. (This is the present case under section 6, Subordinate Legislation Act 1962.) Or a system can be created where a debate has to take place if declaration of suspension is to be overruled and the rule not be revoked or amended as in the adverse report. In the latter case, this would mean that where the Governor in Council had overridden the Committee's declaration of suspension, there would necessarily have to be a parliamentary debate on the question, which would bring into the open the grounds upon which the advice of the Committee was rejected by Governor in Council and suspension overruled. In the former case, there would not have to be a debate in Parliament about the rejection by Governor in Council of the Committee's declaration of suspension. (On affirmation and disallowance, see Butera, Subordinate Legislation in Australia 1983, at pp.106-117, 131ff.)

158.6 Some jurisdictions provide for disallowance of statutory rules to take effect where it is so recommended by a committee akin to the Legal and Constitutional Committee, and where no debate on the matter takes place in the Parliament within a certain period after the tabling of that recommendation. Other jurisdictions have a rule that disallowance does not take effect unless the Parliament debates the matter and affirms that the recommendation for disallowance should be endorsed. (See generally Senate Standing Committee on Regulations and Ordinances, Commonwealth Conference of Delegated Legislation Committees, vols.1-3, AGPS, Canberra, ACT; Second Commonwealth Conference on Delegated Legislation, vols.1-3,

Canada.) In Victoria at the present time, under the Subordinate Legislation Act 1962 the latter procedure operates, so that affirmative action of the Parliament in accepting a disallowance recommendation of the Committee is necessary for a rule to be revoked.

158.7 The problem is that if section 6 of the Subordinate Legislation Act 1962 is redrafted, as suggested in paragraph 158.3, to cover the situation foreshadowed in the proposed section 6(2C) where the Legal and Constitutional Committee's Subordinate Legislation Sub-committee declares in its report that a statutory rule should be suspended, it may be that those safeguards against too ready use of the Governor in Council power to override the declaration of suspension by the Committee (as proposed in draft section 6(2D) of the Bill), noted by the Committee in paragraphs 154.5 and 158.2 above, are weakened. It would be far less demanding for a government to be required to risk a debate on a declaration of suspension (that has been overruled) if the section 6 procedure applied, than if a procedure was introduced whereby it was necessary to have an affirmative resolution that the adverse report (and thus the declaration of suspension) by the Legal and Constitutional Committee not be upheld by the Parliament.

158.8 The Committee therefore believes that it is necessary to introduce a new provision into the Subordinate Legislation (Deregulation) Bill to provide a mechanism for dealing with a report of the Legal and Constitutional Committee declaring suspension of a statutory rule, which would act to ensure that no Minister lightly recommended to Governor in Council that the suspension of a statutory rule by the Legal and Constitutional Committee should be overridden, and that the Governor in Council did not lightly accept such a recommendation by a Minister. That provision should state that, unless the adverse report of the Committee (because of which a rule has been declared suspended by the Committee) is voted against by resolution of the Parliament within a particular period after the report has been received by the Parliament, the suspension will be affirmed; that is the statutory rule will be revoked, despite the fact that the Governor in Council may have issued an order in council declaring that the

operation of the statutory rule shall not be suspended notwithstanding the declaration by the Legal and Constitutional Committee.

158.9 Following the pattern laid down in section 6(2) of the Subordinate Legislation Act 1962, the period of time in which Parliament can by debate lift the suspension or affirm the Governor's order in council against the Committee's declaration should be set at 12 days after the report of the Legal and Constitutional Committee's adverse report on the statutory rule has been presented to the Parliament.

158.10 The question here arises of whether a new provision to deal with this contingency should simply replace the provision in the Principal Act - that is, sections 6(1) and 6(2). The Committee does not believe that any distinction in Parliamentary process should be drawn between the case where the Legal and Constitutional Committee intends to adversely report upon a statutory rule and declares that rule should be suspended, and the case where the Legal and Constitutional Committee intends to adversely report upon a statutory rule, and no suspension is declared. Indeed, it would seem unlikely that, in the event of Parliament not sitting at the time of the Committee's report, the Committee would not declare for suspension. (Even where Parliament is sitting it would seem sensible for the Committee to declare a suspension pending debate in Parliament on the adverse report.) Therefore, in each such case the procedure outlined in paragraphs 158.8 and 158.9 would operate.

158.11 The Committee sees no reason for drawing a distinction in procedure between instances where the Committee -

(a) adversely reports on a statutory rule; or

(b) intends to adversely report and declares suspension of a statutory rule; and

(c) where the power to make a statutory rule is expressed to be subject to the statutory rule being disallowed by Parliament.

In the last case, it is clear that Parliament must have a good reason for stipulating such a circumstance, and it is appropriate that the same procedure should be adopted as in the first two cases. Indeed, if there is no good reason for this stipulation, statutory rules should not be made in this way. In accordance with this, it is urgent that a review be undertaken of such rules and the reason for making them subject to Parliamentary disallowance.

158.12 The Committee therefore believes that the proposed new section should in fact replace the original sections 6(1) and 6(2) in the Subordinate Legislation Act 1962.

159 RECOMMENDATION 38

The Committee recommends that section 6 of the Subordinate Legislation Act 1962 should be repealed and replaced by the following proposed section, to be incorporated into the Subordinate Legislation (Deregulation) Bill 1983 :

Clause 6

Section 6 of the Subordinate Legislation Act 1962 shall be repealed and replaced with the following section :

6 ...

(2F) (1) Where -

(a) the power to make a statutory rule is expressed to be subject to the statutory rule being disallowed by Parliament; or

(b) a statutory rule has been reported on adversely by

the statutory rule shall be disallowed unless each House of the Parliament passes a resolution of affirmation of the rule in accordance with the requirements of sub-section (2) of this section.

(2) Notice of a resolution to affirm a statutory rule must be given in the House in question on or before the eighteenth day upon which that House sits after the rule is laid before that House and the resolution must be passed on or before the twelfth day upon which that House sits after notice of the resolution has been given in that House but the power of either House to pass a resolution affirming the statutory rule shall not be affected by the prorogation or dissolution of Parliament or of either House of the Parliament and for the purpose of this section the calculation of days upon which a House has sat shall be made as if there had been no such prorogation or dissolution.

(2A) Notice of resolution to affirm a statutory rule may be expressed to apply to the whole or to any part of the statutory rule and a resolution to affirm the whole or any part of a statutory rule shall have effect according to its tenor.

(3) Where a statutory rule is not affirmed by Parliament the failure of affirmation shall have the like effect to the repeal of an enactment.

In accordance with this Recommendation, an urgent review should be undertaken of the nature and extent of statutory rules which are subject to disallowance by Parliament (as covered by section 6(1)(a) of the Subordinate Legislation Act 1962) to determine whether they should be made in that way, or whether the power to make those rules should not be expressed to be subject to the statutory rule being disallowed by Parliament. If, following this review, it is considered that certain rules should be subject to such a procedure, it would

be preferable to make them subject to affirmation by Parliament (to bring the provision into line with the remainder of the proposed new section 6) and therefore to replace the word "disallowed" where it appears in proposed section 6(1)(a) with the word "affirmed".

160 RECOMMENDATION 39

If Recommendation 38 is not accepted, then the Committee recommends that a new provision should be inserted into the Subordinate Legislation (Deregulation) Bill 1983 to provide for affirmative resolution by the Parliament if the declaration by the Legal and Constitutional Committee under proposed sections (2B) and (2C) of the Bill that a statutory rule be suspended, is not to be confirmed by the Parliament. That provision should state :

(2AA) Where a statutory rule has been adversely reported on by the Legal and Constitutional Committee and in accordance with sub-sections (2B) and (2C) of section 6 of this Act that Committee has declared suspension of the statutory rule, the suspension shall be upheld and the statutory rule disallowed unless each House of the Parliament passes a resolution to affirm the statutory rule in accordance with sub-section (2AB) of this section.

(2AB) Notice of a resolution to affirm a statutory rule adversely reported on by the Legal and Constitutional Committee in accordance with sub-sections (2B) and (2C) of section 6 of this Act must be given in the House in question on or before the eighteenth day upon which that House sits after the report of the Committee on the statutory rule is laid before that House and the resolution must be passed on or before the twelfth day upon which that House sits after notice of the resolution has been given in that House but the power of either House to pass a resolution affirming the statutory rule shall not be affected by the prorogation

or dissolution of the Parliament or of either House of the Parliament and for the purpose of this section the calculation of days upon which a House has sat shall be made as if there had been no such prorogation or dissolution.

160.1 In order that this proposed section can operate in conformity with the provisions of section 6 of the Principal Act, section 6(1) will require amendment.

161 RECOMMENDATION 40

If Recommendation 39 is endorsed rather than Recommendation 38, the Committee further recommends that section 6 of the Subordinate Legislation Act 1962 should be amended to provide :

6(1) Subject to sub-section (2AA) of this section, where -

(a) the power to make a statutory rule is expressed to be subject to the statutory rule being disallowed by Parliament; or

(b) a statutory rule has adversely been reported on by the Legal and Constitutional Committee - ...

162 If the Parliament does not accede to the view that it is necessary to have a procedure of affirmation of a statutory rule adversely reported upon by the Legal and Constitutional Committee and subject to its determination that that rule should be suspended then a new provision should be contained in the Subordinate Legislation (Deregulation) Bill 1983. That provision should state that where the Governor in Council makes a declaration under (the proposed) section 6(2D) that the declared suspension of the Legal and Constitutional

Committee should be of no force or effect, that statutory rule should continue in effect unless or until the Parliament passes a resolution in accordance with section 6(1)(b) and 6(2) of the Subordinate Legislation Act 1962.

163 RECOMMENDATION 41

If the Parliament does not accept Recommendation 38 or Recommendation 39 of the Committee, the Committee recommends that a new provision should be inserted into clause 6 of the Subordinate Legislation (Deregulation) Bill 1983 to provide :

> *(2DA) Where the Governor in Council makes an Order in Council under sub-section (2D) that the suspension of a statutory rule as provided for by the Legal and Constitutional Committee in its report under section (2B) of this Act should be of no force or effect, that Order in Council should continue in effect unless or until the Parliament passes a resolution in accordance with section 6(1)(b) and (2) of this Act.*

164 Clause 6 : Suspension of Statutory Rule - Effect on Acts Done or Not Done in Accordance with the Rule. The Ad Hoc Committee also commented that the effect of the proposed section 6(2E) on the possibility of adverse action being taken which was in respect of an act to which a suspended statutory rule relates, committed prior to suspension must also be considered. (Written submission, 28 March 1984, at p.3.)

164.1 The Committee believes that on the one hand it would be unconscionable for any person to suffer in relation to the application of a regulation, the existence of which the Committee believed was in contravention of the criteria against which the promulgation of statutory rules is judged. On the other hand, administrative chaos could result where a rule had been in

operation but was suspended in accordance with the powers of the Legal and Constitutional Committee as proposed in the Subordinate Legislation (Deregulation) Bill, and then later revived when Parliament overruled the suspension. It would be more drastic if the Committee declared suspension, Governor in Council overruled, then Parliament reaffirmed the Committee's suspension by revoking the rule or part of it, or amending it.

164.2 The Committee notes that it would be rare indeed for any such occasion to arise. In its previous dealings with statutory rules, where a rule has appeared not to be in accord with the criteria employed by the Committee in judging statutory rules, the usual course has been for consultation with the department or body proposing the rule to take place, and the terms of the statutory rule have been amended in accordance with this consultation. For four years it has not been necessary for the Committee to move any resolution in the Parliament that a rule be disallowed. Before that time such resolutions were not often put forward. History discloses that prior to the establishment of the Subordinate Legislation Committee under the Subordinate Legislation Committee Act 1956, a motion for disallowance of subordinate legislation was heard on only two occasions. In 1890 the Supreme Court rules were disallowed; in 1938 the Supreme Court rules were further disallowed. In 1905 notice was given of motion for disallowance of rules under the Legal Practitioners Reciprocity Act 1903 but the motion was not debated. (Legislative Assembly Hansard - Victoria (Parliamentary Debates, Session 1955-56) Vol. 249, 3750-4948, at p. 3804.) The Committee therefore believes that it is most unlikely to be necessary, in practice, to provide for this contingency arising in other than the exceptional case. Nevertheless, however remote the possibility, the legislation should make provision for it.

164.3 The Interpretation of Legislation Act 1984 deals with the effect of repeal, expiry, lapse or the otherwise ceasing to have effect of a subordinate instrument or a provision of a subordinate instrument. Section 28 provides :

(2) *Where a subordinate instrument or a provision of a subordinate instrument -*

(a) is repealed or amended; or

(b) expires, lapses or otherwise ceases to have effect -

the repeal, amendment, expiry, lapsing or ceasing to have effect of that subordinate instrument or provision shall not, unless the contrary intention expressly appears -

(c) revive anything not in force or existing at the time at which the repeal, amendment, expiry, lapsing or ceasing to have effect becomes operative;

(d) affect the previous operation of that subordinate instrument or provision or anything duly done or suffered under that subordinate instrument or provision;

(e) affect any right, privilege, obligation or liability acquired, accrued or incurred under that subordinate instrument or provision;

(f) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against that subordinate instrument or provision; or

(g) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as is mentioned in paragraphs (e) and (f) -

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if that

subordinate instrument or provision had not been repealed or amended or had not expired, lapsed or otherwise ceased to have effect.

The section is equivalent to section 14(2) of the Interpretation of Legislation Act 1984, covering repeal of Acts.

164.4 This provision is, however, designed more for the case where a subordinate instrument has been in effect for some time and action has been taken under it. In the case of a subordinate instrument the subject of a declaration of suspension by the Legal and Constitutional Committee, little or no action will have been taken under the rule, as it will not have come into operation, or would have been in operation for a short time only. The time limit placed on overruling of suspension by Governor in Council, and that relating to the time for affirmation in Parliament of the subordinate instrument having been revived by Governor in Council mean that relatively few acts, if any, could have been undertaken in relation to it.

164.5 Butera deals with the problem of revocation by Parliament in the case of an adverse report by the Legal and Constitutional Committee, or on some other initiative. (Subordinate Legislation in Victoria, 1983, at pp.113-116, 133ff.) He proposes that a special provision should be inserted into the Subordinate Legislation Act 1962 to cover the case of disallowance by Parliament. The provision should take the following form :

(1) Where any subordinate legislation or a provision of any subordinate legislation is -

(a) amended by resolution of Parliament, the amendments shall take effect as from the beginning of the day on which the resolution is passed; or

(b) disallowed by resolution of Parliament, the subordinate

legislation or provision shall be void and of no effect unless the resolution provides that sub-section (2) shall apply.

(2) Where this sub-section applies in respect of the disallowance of any subordinate legislation or provision of any subordinate legislation -

(a) subject to paragraphs (b) and (c), the disallowance has the same effect as the revocation of any subordinate legislation;

(b) any subordinate legislation or provision that had been revoked by the disallowed subordinate legislation or provision shall be revived as from the beginning of the day on which the subordinate legislation or provision was disallowed; and

(c) any subordinate legislation directly amended by the disallowed subordinate legislation or provision shall take effect without that direct amendment as from the beginning of the day on which the subordinate legislation or provision was disallowed in all respects as if the disallowed subordinate legislation or provision had not been made.

Such a provision would, in Butera's view :

* ensure that where any subordinate legislation is disallowed the effect is known, and the intention of Parliament is given effect to

* provide sufficient flexibility for Parliament to decide what the effect of the disallowance should be

* lay down the primary rule that the effect of disallowance is the same as if the subordinate legislation was ultra vires the enabling power - void and of no effect

* enable the Parliament to provide in the resolution that sub-section (2) applies in which case the previous operation of the subordinate legislation is not affected but as from the beginning of the day on which the disallowance is made the situation before the subordinate legislation was made is restored

164.6 The Committee believes that a provision along these lines should be incorporated into the Subordinate Legislation (Deregulation) Bill 1983, but that it should take into account the Committee's recommendation for an affirmative procedure in relation to an adverse report of the Legal and Constitutional Committee on a subordinate instrument, under Recommendation 38.

165 RECOMMENDATION 42

The Committee recommends that a provision should be inserted into the Subordinate Legislation (Deregulation) Bill 1983 to provide that where a statutory rule is declared by the Legal and Constitutional Committee to be suspended, and that suspension is not overridden by Governor in Council, the rule shall be deemed during the time of suspension to be void and of no effect, and that the deeming shall continue where the rule is not affirmed by the Parliament in debate under the proposed section 6 of the Subordinate Legislation Act 1962 (see Recommendation 38). Further, where the suspension of the Committee is overruled by Governor in Council, unless the Parliament affirms the lifting of the suspension by debate in accordance with proposed section 6, the rule shall be deemed to have been void and of no effect from the time of declaration of suspension by the Committee. It should further be provided that if the adverse report of the Legal and Constitutional Committee is debated in the Parliament, then at that time the Parliament should have the

option to determine whether acts done or not done under the rule should be dealt with as if the rule was void and of no effect.

Clause 7 : Availability of Statutory Rules

166 Clause 7 : Outline of Availability Provisions. Clause 7 of the proposed Act deals with the availability of statutory rules. It proposes that a new section 9B should be inserted into the Subordinate Legislation Act 1962 to ensure that copies of statutory rules are readily available to the public. The proposed section states :

> *9B (1) The Minister administering the Act under which any statutory rule is made shall take such steps as are necessary to ensure that a copy of the statutory rule printed in accordance with section 4 or where a reprint of the statutory rule has been prepared in accordance with section 9 a copy of the reprint and any subsequent amending statutory rule -*
>
> *(a) can be purchased on demand by any member of the public during normal office hours from the Sales Branch of the Government Printing Office or some other appropriate public office specified by the Minister by a notice published in the Government Gazette; or*
>
> *(b) is available for inspection by any member of the public without charge during normal office hours at the Department of the Minister or some other appropriate public office specified by the Minister by a notice published in the Government Gazette.*

167 Clause 7 : Availability of Statutory Rules - The Issues. A number of comments on this provision were received by the Committee. For example, the Department of Conservation, Forests and Lands, Division of Forests commented that the requirement of clause 7 "whereby a statutory rule is to be available for inspection by the public 'at some other appropriate public office specified by the Minister' could be a problem to administer in a Department which has field locations - first, if the rule applies to a particular area, the public will expect

to be able to have access to the rule immediately it is made and at the site nearest to that to which it relates; and secondly, the publication in the Government Gazette of the locations at which the rule can be inspected will mean nothing to most members of the public as the majority of people do not know how to obtain access to a Government Gazette." (Written submission, 23 February 1984, at pp.1-2.) The Ad Hoc Committee of the Law Institute of Victoria commented that the wording of the proposed section "could be interpreted as meaning that the obligations of the Minister are fulfilled if one copy of a statutory rule is made available" at the Minister's office. (Written submission, 28 March 1984, at p.3.) Similar comments were made by witnesses appearing before the Committee.

167.1 The Committee is acutely aware of the limited circulation of the Government Gazette and the fact that notices published in it cannot by any means be considered to come to the attention of the general public in the State of Victoria. The Committee is also aware that occasions have arisen where statutory rules have been out of print and therefore unavailable at the sales branch of the Government Printing Office or at any other public office. On the other hand, statutory rules may be available at some public libraries and although these and like sources are not mentioned in the provision, it is reasonable to expect that citizens can make themselves familiar with delegated legislation by this means. (This is not to suggest that the Committee believes many citizens of Victoria could be expected to spend their days haunting libraries and other repositories of subordinate instruments to acquaint themselves with the law; it is simply to note that avenues do exist for access to delegated legislation if individuals are aware and knowledgeable of sources, and are able to avail themselves of those sources.)

167.2 The Committee also notes the comments in Watson v Lee (1980) 144 C.L.R. 374 on the question of availability of delegated legislation for public information. In that case, Justice Mason was critical of the idea that publication in the Government Gazette should be considered to be sufficient notice to the populace of the existence of regulations. He said :

> *... the very notion that notification of a regulation in the Gazette and of the place where a copy of it can be purchased is contributing in a substantial way to public awareness of the contents of the regulation is a fiction. It may be that commercial organizations make it their practice to subscribe to the Gazette, if that be possible, and to comb through it for matters of interest to them, but it is quite ludicrous to suggest that the arid information which it purveys is read by the ordinary citizen.* (At p.408.)

Chief Justice Barwick held that laws should be accessible to people, and that this was a matter of supreme importance for the proper operation of the law :

> *No inconvenience in government administration can, in my opinion, be allowed to displace adherence to the principle that [citizens] should not be bound by a law the terms of which [they have] no means of knowing. Thus in my opinion, if it is proved that copies of the regulations were not available for purchase at the place specified, the regulations would not have commenced to operate.* (At p.381.)

This statement was made in the context of a judgement concerning section 49(1)(a) of the Acts Interpretation Act 1901 (Cth) requiring all regulations made under a power conferred by an Act should be notified in the Government Gazette; and section 5(3) Rules Publication Act 1903 (Cth) providing that where any regulations require publication or notification in the Government Gazette, it shall be sufficient compliance with that requirement if a notice appears in the Gazette of the regulations having been made, and of the place where copies can be purchased.

167.3 Justice Gibbs took a harder line on the matter, taking the view that a lesser responsibility is placed upon an authority promulgating regulations. He said :

> *The object of the statutory provisions was to bring the existence of*

the regulations to the notice of the public, and to inform interested persons where copies of the regulations could be obtained. This object would be substantially achieved if copies were available at the named place, even though they were not available on the very day when the Gazette was published ... I consider that if the notice stated the place where copies of the regulations could be purchased, and copies could in fact be purchased at that place, although not until some time after the Gazette was published, there will have been a substantial compliance, and the regulations will have taken effect, at least from the date when copies become available for purchase at that place. (At p.385.)

167.4 The Committee does not accept the view of Justice Gibbs as stated in Watson v Lee (1980) 144 C.L.R. 374. Certainly the Victorian Parliament has taken a strict view of the responsibility of authorities in complying with provisions in Victorian legislation for publication of regulations. In 1980 the Parliament resolved, pursuant to section 6(2) of the Subordinate Legislation Act 1962 (and following an adverse report of the Subordinate Legislation Committee) that the Liquefied Gases (Transportation and Gas Transfer) Regulations 1979 and the Liquefied Petroleum Gas (Amendment) Regulations 1979 should be disallowed on the ground that copies were not available at the time the making of the regulations was notified in the Government Gazette, and the regulations were not laid before Parliament within the prescribed time.

167.5 Subsequent to this episode, the Subordinate Legislation Committee laid down principles to be followed in the matter of publicity about the coming into existence of statutory rules :

(a) *many regulations do not create offences or impose liabilities on the public but are of a purely administrative nature or are facultative. In fact, many confer benefits of some sort. It would be unfair in these cases to penalise persons likely to benefit by enforcing requirements as to publication and tabling*

which could have the effect of delaying operation or could lead to disallowance and the necessity for re-promulgation;

(b) *Insofar as regulations prejudicially affect anyone they should remain inoperative until published - penalties should not be imposed and offences should not be created under regulations until such time as the regulations are published and freely available (or their effects have been well publicised). However, legislative requirements as to tabling and publication should not be so harsh as to lead to the disallowance of regulations which are in all other ways satisfactory;*

(c) *the publication of regulations is in the public interest whereas legislative requirements as to tabling are machinery matters and are of lesser significance; and*

(d) *some allowance should be made to cater for emergency situations when it may not be possible to produce printed copies of regulations within a reasonable time but urgent action is required.*

(Progress Report upon a General Inquiry into Subordinate Legislation (Publication, Tabling and Disallowance), 11 November, 1980, at p.4; and see Butera, Subordinate Legislation in Victoria, 1983, LLM Thesis, University of Melbourne, at pp. 37-8; Cranston, oral evidence, 30 March 1984, at pp.99-100.)

167.6 As a result of this Report, the Subordinate Legislation Act 1962 was amended to include section 3 outlined below, as amended by the Interpretation of Legislation Act 1984. (See para. 175.5.)

167.7 A further statement by Chief Justice Barwick in Watson v Lee (1980) 144 C.L.R. 374 is notable :

From statements made to the court from time to time, on occasions by representatives of the Crown, it is apparent that there has been neglect on the part of government in providing adequate copies of regulations for purchase by the public. It should be borne in mind that not only should they be capable of purchase at the time they are notified or by the time they are said to operate but they ought to be available to the citizen subsequently if an occasion arises for him to know with precision what exactly they provide. Too often, one hears the statement that the regulations are 'out of stock'. This, in my opinion, is an unbearable and completely unacceptable situation. There can be no impediment whatever to government ensuring that stocks are maintained of all regulations available to be procured by the citizen on demand. It may be a manifestation of laxity that does enter into the making of law by regulation. (At p. 380.)

167.8 The Committee believes that it is important that a positive duty should lie upon those responsible for administering delegated legislation to make it readily accessible - at least, as far as is practicable - to the public, and particularly to those who may be affected by it. The Committee understands that extra burdens may be placed on those departments which have regional offices and operations in far flung sites. However, the Committee also believes that it is important for legislation to be readily available to persons as close as possible to the site/s where they may be affected. The fact that some departments have regional offices is in fact a plus in terms of dissemination of information about delegated legislation and the activities and requirements of government. The Committee believes that Ministers should indicate to the public that at least one copy of all delegated legislation administered by their respective departments is available in all offices of the departments, whether in the metropolitan area or in the country, and ensure that this is so.

167.9 The Committee considers that every effort must be made by the Department of Property and Services, which is responsible for the Government

Printing Office, to ensure that every library in every municipality having over 10,000 population should carry at least one copy of all statutory rules and other relevant delegated legislation. Municipal councils should ensure that at least one copy of relevant by-laws is available for perusal by members of the public at the council offices during office hours, and in the instance of municipalities of 10,000 persons, by-laws are available in the library of the municipality.

167.10 The Committee also considers that, as the Government Gazette is the official newsletter of government, containing essential information for citizens of Victoria, the Department of Property and Services should explore ways of ensuring that the publication has a wider readership. A copy should be available at every municipal library in areas of more than 10,000 persons, and regional offices of government departments as well as metropolitan offices should be required to have current copies of the Government Gazette available for public inspection.

167.11 The Committee understands that the Government Printer is keenly aware of the need to disseminate legislative and other government information as widely as possible. The Government Printing Office Commercial Operations Group has been working toward devising means of ensuring that there is greater public awareness of the Government Printer's publications. To this end, a bimonthly newsletter is planned for publication, commencing in mid-August. This newsletter will contain a list of all Acts passed in the session preceding publication; all Acts coming into effect in the period; and all proclamation dates during the period. On a biannual basis, the newsletter will be published with this information and with a listing of all legislation in effect in Victoria. Each issue will be published one month after Parliament has risen.

167.12 The bimonthly and biannual newsletters will be distributed free to subscribers. Currently, major subscribers to the Government Printer include solicitors and barristers and other members of the legal profession. Few libraries are subscribers. The Committee believes it is important that

subscribers to the Government Printer increase in number. To this end, it is important that the Department of Property and Services should allocate the resources necessary for the launching of a publicity campaign to inform potential subscribers of the Government Printer's monthly and biannual newsletter, the Government Gazette, and other government publications.

168 RECOMMENDATION 43

The Committee recommends that support be given to the Government Printer's bimonthly and biannual newsletters, and that the Department of Property and Services should allocate funding and other resouces sufficient to ensure that a publicity campaign is undertaken to inform potential subscribers of Government Printer publications, in particular the Government Gazette and the bimonthly and biannual newsletters.

169 RECOMMENDATION 44

The Committee recommends that the Department of Property and Services, in conjunction with the Government Printing Office, should explore ways in which statutory rules can be more widely disseminated, particularly to local libraries, in the most cost-effective manner.

170 Clause 7 : Availability of Statutory Rules - Ministerial Responsibility. In relation to the proposed section 9B, the Committee believes that the inclusion of the words "take such steps as are necessary" to ensure that "a copy of the statutory rule ... can be purchased on demand ... or is available for inspection by any member of the public ..." could be read as meaning that once all necessary steps are taken, should some contingency be overlooked and the statutory rule not be available for purchase or perusal, this would absolve the Minister from responsibility. The Committee therefore believes that these words should be omitted, to ensure that the Minister is responsible without equivocation for making statutory rules readily available.

171 RECOMMENDATION 45

The Committee recommends that the proposed section 9B(1) of clause 7 should be amended to read :

(1) The Minister administering the Act under which any statutory rule is made shall ensure that a copy of the statutory rule printed in accordance with section 4 or where a reprint of the statutory rule has been prepared in accordance with section 9 a copy of the reprint and any subsequent amending statutory rule -

(a) can be purchased on demand by any member of the public during normal office hours from the Sales Branch of the Government Printing Office or some other appropriate public office specified by the Minister by a notice published in the Government Gazette; or

(b) is available for inspection by any member of the public without charge during normal office hours at the Department of the Minister or some other appropriate public office specified by the Minister by a notice published in the Government Gazette.

172 RECOMMENDATION 46

The Committee recommends that all Ministers should be required to ensure that where their departments have regional offices, those regional offices should carry at least one copy each of statutory rules and other delegated legislation administered by the department, to be available for perusal by the public. These offices should be specified by the Minister by a notice published in the Government Gazette as provided in the proposed section 9B(1) of clause 7 of the Subordinate Legislation (Deregulation) Bill 1983.

173 RECOMMENDATION 47

The Committee recommends that all Ministers should be required to ensure that where they have on site operations, where statutory rules or other subordinate legislation is relevant to the operations or works, these statutory rules or other subordinate legislation should be available on site for perusal by the public. Site offices should be required to be notified in the Government Gazette as provided in the proposed section 9B(1) of clause 7 of the Subordinate Legislation (Deregulation) Bill 1983.

174 RECOMMENDATION 48

Recognising that the Government Gazette, although necessarily used for the dissemination of much government information and in particular the publication of statutory rules and other subordinate legislation, and being named in the Subordinate Legislation (Deregulation) Bill 1983 as a means of informing the public of the whereabouts of subordinate legislation for their perusal, is not readily identified or obtained by many members of the public in Victoria, the Committee recommends that the Minister for Administrative Services should explore (and put into effect) practical ways of ensuring that the Government Gazette reaches a wider public than is currently the case.

175 Clause 7 : Conviction, etc. Where Rule Unavailable for Scrutiny. Subsection (2) of the proposed section 9 in clause 7 of the Subordinate Legislation (Deregulation) Bill 1983 provides :

> *A person shall not -*
>
> *(a) be convicted of an offence consisting of a contravention of the statutory rule where it is proved that at the time of the alleged contravention or at any time within seven days after the alleged contravention; or*

(b) be prejudicially affected or made subject to any liability by the statutory rule where it is proved that at the relevant time or at any time within 7 days after the relevant time -

a copy of the statutory rule or of the reprint of the statutory rule could not be purchased or inspected as provided by sub-section (1).

175.1 The Committee endorses generally the import of this provision - that is, that a responsibility should lie upon the promulgators of delegated legislation to ensure that it is readily available to the public, and that persons should not be prosecuted or adversely affected if they were unable to ascertain the content and import of delegated legislation because of a lack of care on the part of those responsible for its promulgation. On the other hand, the proposed provision raises some difficulties.

175.2 The Committee initially considered accepting the provision as written, with the amendment of its terms to the extent that a person "shall not ... be convicted ... or be prejudicially affected ... where it is proved ... that a copy of the statutory rule or of the reprint of the statutory rule could not be purchased or inspected as provided by sub-section (1)" or was not otherwise available. This would ensure that if the relevant rule/s were available in libraries, then no person who had contravened provisions of subordinate legislation could escape liability, despite there being a realistic means of acquainting oneself with the provisions of the legislation.

175.3 However, problems created by the proposed provision went beyond this. The Ad Hoc Committee of the Law Institute of Victoria in commenting on the proposed section stated :

... in relation to the proposed section 9B(2), the words 'or at any time within 7 days after ...' creates a legislative presumption that a statutory rule which is not available at any time within seven days

of an alleged contravention was not available on that date ... Presumably, the object of this provision is to enable a person charged or otherwise made aware of a statutory rule he or she had contravened to personally prove the unavailability of the document at the limited later date, rather than to rely on government records to prove that it was not available at the time of the offence. (At p. 3.)

The Ad Hoc Committee went on, however, to state :

This escape provision is unjust if it can be proved that the person contravening was aware of the statutory rule or of its purport - for example :

Should an employer have a total defence to an action for breach of a statutory duty of which she or he was well aware by reason only of the temporary unavailability of a regulation made ten years before? Further, the seven day period could also be abused if a copy was not available for inspection by arranging for others to purchase all remaining copies and then being in a position to prove unavailability within the seven days. (Written submission, 28 March 1984, at p.3.)

175.4 The State Electricity Commission also found some difficulty with the provision. Pointing out that the clause "seems to some extent to duplicate the existing section 3(2) of the Subordinate Legislation Act ..." The Commission went on to comment :

As well, a Department or Authority may find itself in an unfortunate position if, for example, a new Rule were made but not printed in time for a person to be charged under it for reasons outside the control of the Department or Authority. (Written submission, 23 February 1984, at pp.1-2.))

175.5 Section 3(2) of the Subordinate Legislation Act 1962 states :

Notwithstanding the coming into operation of a statutory rule, a person shall not -

(a) be convicted of an offence consisting of a contravention of the statutory rule or provision in question where it is proved that at the time of the alleged contravention the statutory rule had not been printed and published by the Government Printer in the Government Gazette unless it is proved that at that time reasonable steps had been taken for the purpose of bringing the purport of the statutory rule or provision in question to the notice of the public or of persons likely to be affected by it or of the person charged; and

(b) a person shall not be prejudicially affected or made subject to any liability by the statutory rule or provision in question where it is proved that at the relevant time the statutory rule had not been printed and published by the Government Printer or notice of the making of the rule had not been published in the Government Gazette unless it is proved that at the time reasonable steps had been taken for the purpose of bringing the purport of the statutory rule or provision in question to the notice of the public or of persons likely to be affected by it or of the person concerned.

175.6 The Committee recognises that the existing provision and the provision proposed under the Subordinate Legislation (Deregulation) Bill 1983 are designed to deal with two distinct situations. That is, the existing provision in the Subordinate Legislation Act 1962 is aimed at the original commencement and notification of a statutory rule. The provision in the Subordinate Legislation (Deregulation) Bill 1983 is designed to cover the need for an ongoing

obligation to make available statutory rules in their present form. The first provision covers the case of "just made" rules; the second covers the situation years after the rule has been made. In the latter instance, the relevant time is that at which the alleged offence is committed; the relevant time is "now" : "is the statutory rule readily available?" is the question to be asked, rather than has its making been notified in the Government Gazette ten or eight or twenty years - or twelve months - ago. Therefore it is necessary to preserve the existing section 3(2) of the Subordinate Legislation Act 1962. However, is the proposed section 9B in clause 7 of the Subordinate Legislation (Deregulation) Bill 1983 the best way of dealing with the second contingency? The Committee believes redrafting is necessary.

175.7 The Committee believes it is important to ensure that the public has adequate notice of statutory rules as an ongoing matter and a real opportunity to acquaint themselves at all reasonable times with the contents of statutory rules. Therefore, proposed section 9B(2) of the Bill should be redrafted to provide for this.

176 RECOMMENDATION 49

The Committee recommends that the proposed section 9B(2) in clause 7 be omitted from the Subordinate Legislation (Deregulation) Bill 1983.

177 RECOMMENDATION 50

The Committeee recommends that a new subsection (2) of proposed section 9B in clause 7 of the Subordinate Legislation (Deregulation) Bill 1983 should be drafted to provide :

(2) Where a statutory rule has come into force -

(a) *a person shall not be convicted of an offence consisting of a contravention of the statutory rule or provision in question unless it is proved that at the time of the alleged contravention a copy of the statutory rule or of the reprint of the statutory rule could be purchased or inspected as provided by subsection (1); and*

(b) *a person shall not be prejudicially affected or made subject to any liability by the statutory rule or provision in question unless it is proved that at the relevant time a copy of the statutory rule could be purchased or inspected as provided by subsection (1).*

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Clause 8 : Guidelines for Preparation and Content of Statutory Rules

178 Clause 8 : New Part II - Outline. Under clause 8, a new Part II is proposed for inclusion in the Subordinate Legislation Act 1962. That proposed Part deals variously with -

* guidelines with respect to the preparation and content of statutory rules and procedures to be implemented and steps to be undertaken for ensuring consultation, co-ordination and uniformity in preparation of statutory rules

* examination of proposed statutory rules by Parliamentary Counsel and the Department of Management and Budget

* provision for a "fast track", where the Premier certifies in writing that a proposed statutory rule need not be subject to the guidelines and examination procedures

* review of statutory rules by the Legal and Constitutional Committee

179 Clause 8 : Proposed Section 11 - Guidelines. The proposed section 11 states :

(1) The Attorney-General shall in consultation with the Legal and Constitutional Committee prepare and issue and may from time to time amend guidelines with respect to the preparation and content of statutory rules and the procedures to be implemented and the steps to be udertaken for the purpose of ensuring consultation, coordination and uniformity in preparation of statutory rules.

(2) Without in any way derogating from the generality of sub-section (1), the guidelines shall deal with the matters specified in Schedule 1.

(3) The Attorney-General shall cause guidelines prepared under this section to be -

(a) published in the Government Gazette;

(b) issued to all Ministers and any other persons and bodies whether corporate or unincorporate involved in the preparation of statutory rules;

(c) laid before each House of Parliament; and

(d) forwarded to the Legal and Constitutional Committee.

(4) The Legal and Constitutional Committee may cause guidelines prepared under this section to be reviewed at regular intervals and where appropriate may make recommendations for their revision and amendment to the Attorney-General.

(5) Until the Attorney-General prepares and issues guidelines under this section, the guidelines specified in Schedule 2 shall apply.

179.1 The proposal that guidelines should be outlined in legislation for the formulation and promulgation of subordinate legislation led to the greatest number of comments, both positive and negative, from departments, authorities and other bodies, and from experts consulted by the Committee. The Ad Hoc Committee of the Law Institute of Victoria "welcomed the spirit" of the provisions in Part II generally, but expressed concern that the procedures "could unnecessarily impede the flow of essential statutory rules". (Written submission 28 March 1984, at pp.3-4.) The Department of Conservation, Forests and Lands

(Division of Lands) commented on the "additional human and financial resources ... required to cope with the additional workload imposed by the Part II procedure." (Written submission, 1 March 1984, at p.2.)

179.2 On the other hand, some departments and authorities considered guidelines would bring some order to the drafting process, or would simply put in legislative form the process currently operating in the formulation of subordinate legislation. The Education Department commented that the guidelines laid down in Schedule 2 contained "the same general principles" as those by which the Department "has been preparing statutory rules". (Written submission, 27 February 1984, at p.1.) The State Electricity Commission stated that it is "useful to have uniformity of drafting style and coordination between authorities" which the guidelines and other procedures outlined in Part II are designed to bring about. (Written submission, 23 February 1984, at p.1.) A representative of the Health Commission stated that it would "probably take no more time to create a regulatory impact statement so far as gathering the evidence is concerned, because we do that anyway". She continued :

> *However, I should anticipate that it would probably take more time in the formal preparations. At the moment I feel as if I could do with a few assistants, and I would probably need a few more then. It would increase the workload because there would be formal submissions to be made and formal procedures to be followed. That would take more time and increase the strain on resources.*

(Powell, oral evidence, 4 July 1984, at p. 390.)

179.3 The research that the Committee was able to carry out into the operations of the various departments and authorities making written submissions; and those appearing before the Committee; and those whose views were summarised by the Department of the Premier and Cabinet confirmed that a number of departments and authorities in essence are following unstated guidelines in the formulation of subordinate legislation. The

Education Department commented on this, stating that there "seems to be no reason why the Attorney-General's Department could not set guidelines administratively for the preparation of subordinate legislation, without the need for legislative enactment". (Written submission, 27 February 1984, at p.1.)

179.4 However, the Committee does not believe that guidelines should be set administratively. It has become clear to the Committee that some departments are more orderly in their approach than others, and that all departments would be helped by the existence of guidelines listing points to be taken into account in a systematic way, when new subordinate legislation is mooted, or when existing subordinate legislation requires review. Rather than hindering or impeding the process, orderly guidelines would enable departments and authorities to approach the formulation and review of subordinate legislation with method. A list of matters to be given regard should lead to greater rather than less speed, greater rather than less efficiency.

179.5 The guidelines should be laid down in legislation, so that not only do the departments and other authorities drafting subordinate legislation know what they are, but persons outside the formal process can learn how subordinate legislation is drafted -

* what steps are taken

* who is consulted

* whether there is a requirement to consult

* what are the general procedures

That the guidelines are laid down in legislation means that they will always be accessible to the public as well as to departments. If members of the public believe that the guidelines are inappropriate or in some way deficient, or that they are not being followed, they will be able to urge that they be changed.

This could be done directly through Parliamentary processes or by adverse publicity. Administrative guidelines are not available for public scrutiny - at least not as a matter of course; they may become obsolete yet continue in force; despite updating and introduction of new guidelines, there may be confusion about which guidelines are applicable. If guidelines exist in legislation, there should be no mistake as to the guidelines in force; the mislaying of the guidelines will not create any impediments - they will always be readily available in the Subordinate Legislation Act.

180 RECOMMENDATION 51

The Committee endorses in principle the proposal that guidelines for preparation of subordinate legislation and procedures to be followed in that preparation should be laid down in the Subordinate Legislation Act as a schedule, these guidelines to be prepared by the Attorney-General in consultation with the Legal and Constitutional Committee.*

181 RECOMMENDATION 52

The Committee endorses the inclusion of the proposed section 11 in the Subordinate Legislation (Deregulation) Bill 1983, subject to Recommendation 78.

182 Clause 8 : Proposed Section 12 - Regulatory Impact Statement. Proposed section 12 of the Subordinate Legislation (Deregulation) Bill 1983 deals with regulatory impact statements and the content and procedures

* The content of these guidelines as proposed under the Subordinate Legislation (Deregulation) Bill 1983 will be discussed fully in this Report in Schedule 2 : Guidelines, at pp. 381-403.)

necessary in relation to such statements. At this point, the Committee considers it is necessary to comment briefly upon the term "regulatory impact statement". The Committee believes that the term "regulatory impact statement" is one which may cause unnecessary alarm amongst those responsible for the administration and formulation of subordinate legislation. The Committee therefore emphasises that in its view "regulatory impact statement" is a term denoting, in effect, an "accounting" procedure - one which takes into consideration various factors relevant to the formulation and operation of subordinate legislation. There is no cause for alarm, on the part of those responsible for formulating and administering subordinate legislation, at the suggestion that the subordinate legislation for which they are responsible should be subjected to a regulatory impact statement procedure. The Committee suggests that prudent readers will read on before making judgements on the value or otherwise of regulatory impact statements and upon the value or otherwise of subjecting all subordinate instruments (apart from those outlined in this Report as to be exempted) to the regulatory impact statement procedure.

182.1 A matter requiring immediate clarification, however, is that of which statutory rules will be covered by proposed section 12 of the Bill. Section 12 as proposed provides :

> *(1) Where a statutory rule is proposed to be made which is of a type or class in respect of which the guidelines operating under section 11 require the preparation of a regulatory impact statement the following provisions shall apply ...*

That section does not make clear whether a regulatory impact statement will be necessary in relation to all subordinate instruments, or in relation to a select number of such instruments. Proposed section 11 is of no assistance in this respect, and although section 12 apparently assumes that some subordinate instruments may not be susceptible to the regulatory impact statement procedure, it is not immediately clear which they are. There is no indication

upon what criteria any determination is to be made as to whether a statutory rule may or should be subjected to a regulatory impact statement.

182.2 Schedule 2 of the Bill contains a provision which is germane to this question. Paragraph 1(f) of that schedule states :

> *A regulatory impact statement shall be prepared under section 12, unless the proposed statutory rule relates only to matters which :*
>
> *(i) are of a fundamentally declaratory or machinery nature; or*
>
> *(ii) deal with relations, organisations or procedures within or as between departments or statutory bodies; and*
>
> *(iii) impose no appreciable burden, cost or disadvantage upon any sector of the public.*

This provision amplifies the already existing problem of confused and confusing practices regarding the nature and uses of subordinate instruments, a problem referred to by the Committee earlier in this Report. (See Part I, Regulations Generally - Delegated Legislation, "Background Issues", at p.11ff; and Part II, Subordinate Legislation (Deregulation) Bill 1983 - The Provisions of the Bill, "Clause 4 : Declaration of Instrument which is not of a Legislative Character", at p.243ff; and Recommendation 18, at p.249.)

182.3 The Committee is of the view that regulatory impact statements should not be required to be made in accordance with the formal process of the Bill in every case. The Committee further believes that it is essential to make clear, at the point at which regulatory impact statements are first mentioned in the proposed Act, which subordinate instruments will be subjected to the impact procedure and which will not.

182.4 However, the question arises as to whether the distinction made in Schedule 2, paragraph 1(f) of the Bill is an appropriate one. The Committee believes that the subordinate instruments which need not be subjected to a regulatory impact statement should be those outlined in Schedule 2, paragraph 1(f)(i) and (ii), also taking into account the Commitee's earlier recommended "code" of subordinate legislation. However, with regard to paragraph 1(f)(iii), the Committee considers that to determine whether a statutory rule "imposes no appreciable burden, cost or disadvantage upon any sector of the public" will virtually require a department or authority to undertake an assessment as provided in the proposed guidelines and thus to fulfil the basics of a regulatory impact statement, whether it is called for or not. The Committee therefore considers it is artificial to include in the list of subordinate instruments exempted from the regulatory impact statement the requirement that these should be exempted only if there is "no appreciable burden or cost". In the Committee's view, it is appropriate that some subordinate legislation need not be made subject to cost/benefit and intangible assessment, at least as required by the impact procedure.

182.5 The Committee believes that the subordinate legislation which should not be subjected to any regulatory impact statement procedures of a formal nature under the proposed Act should include those dealing with matters which :

(i) are of a fundamentally declaratory or machinery nature only; or

(ii) deal with relations, organisations or procedures within or as between departments or statutory bodies.

182.6 The Committee considers that a third category of instrument should be included, namely that :

(iii) involving the setting of fees where a rise is made at the

direction of the Department of Management and Budget as an across the board measure made in accordance with a Consumer Price Index rise or similar price rise indicator.

As noted earlier in this Report, it is unclear whether such a statutory rule would be considered to be "of a fundamentally declaratory or machinery nature". (See paragraph 118.2 at p.245-246.)

182.7 The Committee also believes it is preferable to spell out the types of statutory rule which will not be subject to the formal regulatory impact process in a more precise way than simply by using the term "of a fundamentally declaratory or machinery nature". This would be achieved by reference to the Committee's proposed rationalisation of subordinate instruments. (See Recommendation 18, at p.249.) Accordingly, the subordinate instruments which should be excluded from the process include proclamations; orders in council (which cover the setting of fees across the board); and those dealing with relations, organisations or procedures within or as between departments or statutory bodies.

182.8 At the same time it would be necessary to incorporate an interim provision in the Bill to ensure that subordinate legislation made under enabling clauses in already existing Acts comes within the terms of the Subordinate Legislation (Deregulation) Bill 1983 and thus, where appropriate, into the exempt categories.

183 RECOMMENDATION 53

The Commmittee recommends that a new sub-section should be inserted in proposed section 12 to precede proposed section 12(1) in clause 8 of the Subordinate Legislation (Deregulation) Bill 1983. This would be numbered 12(A1), and provide :

(A1) Where a statutory rule is proposed to be made which relates only to matters which :

(a) are made by way of proclamation; or

(b) are made by way of order in council; or

(c) deal with relations, organisations or procedures within or as between departments or statutory bodies;

the preparation of a regulatory impact statement is not required.

184 RECOMMENDATION 54

If the Committee's recommendation for a rationalisation of subordinate instruments is not adopted as an amendment to this Bill, then the Committee recommends that until such time as a subordinate instrument "code" is drafted in accordance with Recommendation 18 a new sub-section 12(A1) to precede proposed section 12(1) should be incorporated into clause 8 of the Subordinate Legislation (Deregulation) Bill 1983 to provide :

(1) Where a statutory rule is proposed to be made which relates only to matters which :

(a) are of a fundamentally declaratory or machinery nature only; or

(b) deal with relations, organisations or procedures within or as between departments or statutory bodies; or

(c) involve the setting of fees where a rise is made at the direction of the Department of Management and Budget as an across the board measure calculated in accordance with a Consumer Price Index rise or similar price rise indicator,

the preparation of a regulatory impact statement is not required.

The Committee further emphasises that with acceptance of Recommendation 18, this provision would necessarily be incorporated in the Bill as an interim measure until all enabling clauses in existing Acts, and subordinate instruments made under them, have been revised and amended in accordance with the code to be introduced by that Recommendation or Recommendation 19.

185 With the inclusion of the new proposed section 12(A1) as outlined in Recommendation 53 or Recommendation 54 the proposed section 12(1) in clause 8 of the Subordinate Legislation Bill 1983 as drafted requires amendment.

186 **RECOMMENDATION 55**

In consequence of Recommendation 53 the Committee recommends that the proposed section 12(1) of the Subordinate Legislation (Deregulation) Bill 1983 be amended to provide :

Subject to sub-section (A1) of this section, where a statutory rule is proposed to be made the following provisions shall apply :

(a) [as provided in the Subordinate Legislation (Deregulation) Bill 1983],

187 Clause 8 : Regulatory Impact Statement - Notice. The proposed section 12(1) in clause 8 of the Subordinate Legislation (Deregulation) Bill 1983, as amended by Recommendation 55, states :

... where a statutory rule is proposed to be made the following provisions shall apply :

(a) A notice shall be published in the Government Gazette and in a daily newspaper -

(i) *specifying the reasons for the proposed statutory rule and the objectives to be achieved;*

(ii) *summarising the results of the regulatory impact analysis;*

(iii) *advising where a copy of the regulatory impact statement may be obtained; and*

(iv) *inviting public comments and submissions within 21 days of the publication of the notice;*

(b) *The Minister administering the Act under which the statutory rule is to be made shall cause all the comments and submissions received under this section to be considered before the statutory rule is made;*

(c) *A copy of the regulatory impact statement shall be forwarded to -*

(i) *The Chief Parliamentary Counsel;*

(ii) *The Director-General of the Department of Management and Budget; and*

(iii) *The Legal and Constitutional Committee; and*

(d) *A copy of all the comments and submissions received under this section shall be forwarded to the Legal and Constitutional Committee.*

187.1 Regarding the proposed section 12(1)(a), the Committee has doubts whether publication of a notice in the Government Gazette and a daily newspaper would necessarily achieve the object of ensuring that those persons

who might have an interest in the content and operation of proposed regulations would thereby be alerted to the proposal that a statutory rule is to be made. The Committee notes that interest in some regulatory matters can be engendered through major daily newspaper comment (see for example articles and correspondence on the liquor industry, The Age 7, 12 June 1984, p. 19; 20 June 1984, p.13; 26 June 1984, pp.19, 22; 3 July 1984, p.19; 10 July 1984, p.23; 17 July 1984, p.19; 31 July 1984, pp.1, 4; 1 August 1984 p.13; 2 August 1984, p.13.) However, it is conceivable that a proposed statutory rule might have a localised operation, in which case publication in a local newspaper might ensure greater publicity than publication in the Government Gazette and a daily newspaper alone. (The comments of the Committee in relation to the Government Gazette at paragraphs 166-178 and Recommendations 43-50 are relevant also in this context.) Trade, business and professional journals and public interest newsletters and circulars may be more likely to alert interested and potentially affected parties to proposals. There is no dearth of such newspapers and newsletters, and various organisations would be willing to publicise proposed statutory instrument making through their newspaper or newsletter channels.

187.2 For example, in evidence before the Committee a representative of the Victorian Chamber of Manufactures pointed out that the Chamber's newsletter has no less that 6,000 members. He indicated a willingness on the part of the Chamber of Manufactures to publicise proposed delegated legislation where it might have a potential to affect business, or where business interests might be minded to comment - or would at least appreciate foreknowledge of government proposals. (Crompton, oral evidence, 18 June 1984, at p. 353.) The Victorian Council of Social Service indicated that the Council produces a number of newsletters which circulate to various interest groups. The Director of the Victorian Council of Social Service, said :

> *There is an extensive network of communication that occurs that is fluid, as it is hard to keep account of it continually. The most obvious manifestation of it is the newsletters that the Victorian Council of Social Service sends out each month. There is a*

newsletter in the employment area; one in the emergency relief area; one in relation to technology, computers and change; one in the health area; and one in the legal area. People read those newsletters because they relate to their day to day work and they tend to be written in a way that helps them understand how those issues relate to them. I see that as a very important means of communication.

Increasingly government is coming to us asking us if it can use our mailing list or whether we would be prepared to feed the material out. We will not hand over our mailing list but those networks [can be used for feeding material out] ... I believe [they] should be utilized to a larger extent than they are at the moment.

(Raysmith, oral evidence, 22 May 1984, at p.245.)

187.3 It was further added that radio can be used as "a more effective medium than television" :

[The Victorian Council of Social Service] concentrate more on radio because there is a higher percentage of output. On the radio the news is read once an hour, for example, and one can get one or two sentences on the radio without difficulty. One can work all day to prepare oneself for television and end up getting nothing. Radio is a good medium. Local newspapers are extremely effective in country areas and can be utilised more than they are. I am reminded of the early 1970s when the Social Security Department decided to let people know more about their entitlements and benefits. The department began running what could almost be described as "Dorothy Dix columns" and the number of applications rose dramatically in country areas, because all sorts of people read that sort of material. (At p.246.)

187.4 The Committee does not suggest that it is possible to redraft the Subordinate Legislation (Deregulation) Bill 1983 to take into account all possible avenues of publication of governmental proposals in the subordinate legislation area. However, it believes that departments and other authorities should keep these channels in mind and use them where deemed appropriate. It is also possible to redraft sub-section (a)(i) to take some account of more localised possibilities than merely the Government Gazette and a daily newspaper, and the Committee proposes that this should be done. It may also be appropriate to commit to a schedule a more comprehensive list of avenues of publication.

188 RECOMMENDATION 56

The Committee recommends that proposed section 12(1)(a) of the Subordinate Legislation (Deregulation) Bill 1983 should be redrafted to provide :

> *(a) A notice shall be published in the Government Gazette and in a daily newspaper, and where appropriate a trade, professional, business, and/or public interest journal, newsletter, newspaper or circular -*

189 Clause 8 : Regulatory Impact Statement - Proposed Section 12(1)(a)(ii). Sub-section (1)(a)(ii) deals with the summary of the results of a "regulatory impact analysis". Throughout the Bill "regulatory impact statement" is used, and it is appropriate that that term should be used in this instance. Consultation with the Honourable A.J. Hunt, M.L.C., who introduced the Subordinate Legislation (Deregulation) Bill 1983, revealed that it was not intended that a factor different from the regulatory impact statement should be introduced at this point, and "regulatory impact analysis" has no place in the Bill.

189.1 The Committee also observes that there is a potential for confusion

between this provision and the intent of Schedule 3. This possible conflict is discussed later in this Report. (See Clause 8 : Schedule 3, at pp. 404-406.)

190 RECOMMENDATION 57

The Committee recommends that the word "analysis" in section 12(1)(a)(ii) should be replaced with "statement", the provision to read :

> *(1)(a)* ...
>
> *(ii) summarizing the results of the regulatory impact statement;* ...

191 Clause 8 : Obtaining Copy of Regulatory Impact Statement. Sub-section (a)(iii) provides that advice should be given as to where a copy of the regulatory impact statement may be obtained. The Committee notes that such a provision may not be able to be used by some interest groups unless departments and authorities make photocopies available at a reasonable cost. The Committee does not believe that it would be fruitful for government departments, statutory bodies and authorities to be engaged in photocopying regulatory impact statements for interest groups without regard to their own time and cost constraints. However, copies should be made available within a reasonable time at a reasonable cost. Some government departments already operate under rules for supplying material on request by the public, and those which have not already adopted a systematic approach to this question should do so. Standards adopted in relation to freedom of information requests may be applicable.

192 RECOMMENDATION 58

To ensure that adequate access to regulatory impact statements is available to those having a real interest in them, departments and authorities should adopt a sensible approach to providing copies of regulatory impact statements on

request, within a reasonable time and at a reasonable fee where necessary.

193 Clause 8 : Regulatory Impact Statement - Public Comment. Section 12(1)(a)(iv) grants a period of 21 days for public comments and submissions, following publication of the notice of the proposed statutory rule. A number of departments and authorities in written submissions and statements before the Committee commented upon the possibility that regulatory impact statement requirements may lead to delay in the formulation and promulgation of statutory rules. The Committee is not convinced that a 21 day requirement would impede progress. Indeed, it has heard of current consultation procedures which take months and some which extend into years. From the viewpoint of possible delay, it does not believe a 21 day limit would cause problems. It therefore has no hesitation, in that regard, in endorsing the 21 day requirement.

193.1 On the other hand, those interested in consultation between interested parties and bodies formulating subordinate legislation may believe that the 21 day period is too short. The Committee accepts that those who will be most highly favoured to submit their comments on a proposed rule within the 21 day limit will be those having resources to devote to fulltime work on submissions. The problem here seems not to be the time limit set on receipt by departments and authorities of comments and submissions; rather it lies in the lack of resources on the part of some bodies which may have a real interest in formulation of particular regulations, and whose comments and submissions would advantage the body putting the proposed regulation forward. This lack of resources is not a matter which the Legal and Constitutional Committee can fully address in the course of this Report. However, the evidence which has come before the Committee and the research done into the formulation, operation and importance to the general community and particular interest groups of regulation, leads the Committee to endorse the view that it would be of advantage to government to ensure that groups which are currently hamstrung through lack of resources in making valuable inputs into the government process are better resourced. The Committee reiterates that consideration should be given to funding arrangements for public interest

groups, or taxation or other benefits to encourage private donations to such groups, which would ensure that public interest groups might have a real opportunity of participating in governmental consultative processes, and notes Recommendation 9 at p.213 in this regard.

193.2 The Committee accepts, however, that 21 days may prove to be too short a time for consultation and comment. Rather than select another period, which itself might continue to give rise to complaints of being too short (or may add to anxieties of departments which already consider the period in the Bill to be too long), the Committee believes that the 21 day period should remain, with the added caveat that it be "no less than" 21 days. Once the Bill is passed and the Act comes into operation, practice will eventually show whether or not the time period is adequate. At that time, it would be appropriate to amend the Act accordingly.

194 RECOMMENDATION 59

The Committee recommends that proposed section 12(1)(a)(iv) should be amended to read :

> *inviting public comments and submissions within such time, being not less than 21 days from publication of the notice, as specified in the notice ...*

If, after the Subordinate Legislation (Deregulation) Bill 1983 becomes law and comes into operation it becomes evident that the time period is too short, then an appropriate amendment should be made increasing time for public comment and consultation.

195 Clause 8 : Regulatory Impact Statement - Consideration of Comments and Submissions. Proposed section 12(1)(b) states that all comments and submissions made in relation to proposed statutory rules subject to

regulatory impact statements should be taken into account before the making of the particular statutory rule. The State Electricity Commission was doubtful of the utility of public comment procedures, saying "The requirement that an invitation to the public for comments and submissions be attached to the mandatory publication of proposed statutory rules will delay the process, and although it appears a good idea in principle to invite public comment upon proposed regulations, [it] is a further burden to be borne by the department or authority". (Written submission, 23 February 1984, at p.2.)

195.1 The Committee is not unmindful of economic considerations in the operation of government departments and authorities. It does not endorse placing unnecessary burdens on the public purse. On the other hand, the Committee does not believe that consultation in relation to regulation making involves an unwise use of resources. Indeed, it may prove to be vitally necessary. Furthermore, as various departments pointed out to the Committee, comments and criticisms by members of special interest groups and, on occasion, members of the public, are taken into account in the making of some regulations under the present system. For example, the Department of Agriculture confirmed this (see Transcript, 26 June 1984, at p.355ff), as did other departments and authorities.

195.2 The Health Commission consults widely in relation to some of its regulations. Currently it is dealing with health regulations requiring Moslem corpses to be sealed in plastic bags for burial, which runs counter to the desire of Moslems to have their dead buried in contact with the soil. A representative of the Commission told the Committee :

> *... the Moslem belief is that a person should not be buried in a coffin so we have ... come up with another method of burial which is in contact with the earth.*

(Race, oral evidence, 4 July 1984, at p. 391.)

A second representative added :

> *After four years of negotiations it was ... agreed that ... the system [would involve plastic bags] but since then they have said that they would like to again negotiate ...*
>
> *At one stage in the history of the Melbourne General Cemetery ... [there] was a health hazard when people [were] buried without any sort of containment ... It is possible to allow funerals to take place where there are no coffins; that may not be such a big problem now.*

(Powell, oral evidence, 4 July 1984, at p. 391.)

195.3 Thus proposed section 12(1)(b) should not in any way impede the progress of regulation making in Victoria. Indeed it may be that those departments (if they exist) who have not in the past taken into account comments from outside - those of business, trades unions, professionals, the community - may by utilising this procedure enhance their regulation making processes.

196 RECOMMENDATION 60

The Committee endorses the inclusion of proposed section 12(1)(b) in clause 8 of the Bill, noting that it puts into statutory form a process which currently exists in many departments and authorities in relation to the formulation and review of regulations, and that consideration of comments and submissions received from outside the department or authority proposing a statutory rule is likely to enhance the regulation making process.

197 Clause 8 : Regulatory Impact Statements - Submissions to be Sent to Various Bodies. The provisions contained in proposed paragraphs (c) and (d) of

section 12(1) in clause 8 of the Subordinate Legislation (Deregulation) Bill 1984 are relevant to proposed sections 13 and 14, to be dealt with later in this Report. (See Clause 8 : Examination of Draft Statutory Rules, at p.349ff.) Those sections cover scrutiny of draft statutory rules by Parliamentary Counsel, the Department of Management and Budget, and the Legal and Constitutional Committee. In the Committee's view, it is inappropriate for a regulatory impact statement to go to Parliamentary Counsel, as this implies that Parliamentary Counsel should involve themselves in examining policy issues rather than the legalities of a proposed rule. In the Committee's view it is not the role of Parliamentary Counsel to pronounce upon policy issues in this way, and the provision should not stand. However, it is important for Parliamentary Counsel to be aware of the object a statutory rule seeks to achieve. It is equally important for that objective to be made clear to all who read a statutory rule. The Committee believes the objective should therefore be stated in the preamble to a statutory rule.

197.1 However, with regard to that information going before the Department of Management and Budget and the Legal and Constitutional Committee, different considerations apply. The regulatory impact information is integral to any assessment to be made by the Department of Management and Budget as to the efficacy of the draft rule. For the Legal and Constitutional Committee, it is necessary to receive a copy of the regulatory impact statement to assess whether the comments and submissions received by the department or authority have been given due regard. Therefore proposed sections 12(1)(c)(ii) and 12(1)(c)(iii) in clause 8 should remain in the Bill.

198 RECOMMENDATION 61

The Committee recommends that as the Parliamentary Counsel's task is to examine the legalities of proposed statutory rules, sub-section (1)(c)(i) of proposed section 12 in clause 8 should be deleted from the Subordinate Legislation (Deregulation) Bill 1983. However, provision should be made for the objectives sought to be achieved by a statutory rule to be made clear to

Parliamentary Counsel and to all reading the rule. To that end, a statement of the objectives of the statutory rule should be contained in the preamble to the proposed rule, and should remain in the preamble when the rule comes into effect.

Clause 8 : "Fast Track" Provisions

199 Clause 8 : Proposed Section 13 - Outline of "Fast Track" Provision. Under the proposed section 13, a draft statutory rule is to be submitted for making by or consent or approval of the Governor in Council only where it is submitted together with a copy of advice obtained from Chief Parliamentary Counsel and the Director-General of the Department of Management and Budget. (The requirements in relation to the obtaining of these advices are discussed later in this Report; see Clause 8 : Examination of Proposed Statutory Rules, at p.349ff.) However, the obtaining of such advices is unnecessary if -

s.13(2)...

(a) the Premier certifies in writing that in his opinion in the special circumstances of the particular case the public interest requires that the proposed statutory rule should be submitted for making by or for the consent or approval of the Governor in Council without complying [with the requirements about obtaining advice from Parliamentary Counsel and the Director of the Department of Management and Budget]; and

(b) a copy of the certificate is submitted with the proposed statutory rule.

200 Clause 8 : "Fast Track" Provision - Commentary. Many of those giving written submissions to the Committee or appearing in person commented on the "fast track" provision, suggesting that the Premier would be deluged by departments requesting a certificate in writing in accordance with the proposed section 13(2). The Ad Hoc Committee of the Law Institute of Victoria commented that the procedures introduced under the guideline provisions "could ... result in excessive used of proposed section 13(2) 'fast track'". (Written submission 28 March 1984 at p.2.) The Education Department said that even the 'fast track' provided by proposed section 13(2) might harbour delays.

(Written submission, 27 February 1984, at p.2.)

200.1 Another point was raised by the Melbourne and Metropolitan Board of Works, which pointed out in evidence to the Committee that not all by-laws made by the Board are required to go to Governor in Council for approval. Therefore they would escape the procedure outlined in proposed sections 12 and 13 without any requirement that the Premier grant a certificate to "fast track" those subordinate instruments. (Further on the issue of particular instruments escaping the provisions of the Subordinate Legislation (Deregulation) Bill 1984 as a whole, or particular provisions of it, see Part I, Regulations Generally - Delegated Legislation, "Background Issues", at p.11ff; and Part II, Subordinate Legislation (Deregulation) Bill 1983 - The Provisions of the Bill, "Clause 4 : Declaration of Instrument which is not of a Legislative Character", at p.243ff, and Recommendation 18, at p.249.)

200.2 The problem of particular subordinate instruments escaping the procedures of the Bill without recourse by a department or authority to proposed section 13(2) has been dealt with earlier in this Report. (See sources cited "Clause 4 : Inclusion of All Relevant Subordinate Legislation in Bill's Provisions", at p.245.) The Committee notes, however, that the way in which the "fast track" provision is currently drafted would not absolve departments and instrumentalities from going through the regulatory impact statement procedures outlined in the Bill, apart from the sending of a proposed rule to Parliamentary Counsel and to the Department of Management and Budget. (It mentions only proposed section 13, not proposed section 12 - regulatory impact statement procedures). The Committee believes, however, that the intention of the drafters of the Bill was to ensure that a statutory rule placed in the "fast track" would bypass the provisions of proposed section 12. In its deliberations on the provision, the Committee assumed this intention. Indeed, it would not hasten the procedure at all if the only steps which a department or instrumentality did not have to follow were those of reference of the proposed rule to Parliamentary Counsel and the Department of Management and Budget for financial and economic advice, as under proposed section 13. (Even if in the

"fast track", in the Committee's view it would be wise to seek Parliamentary Counsel's advice about the legalities of a proposed rule, and a "fast track" rule could be placed on a priority listing with Parliamentary Counsel, which would speed up that limb of the process.)

200.3 In considering the provision, the Committee therefore looked at whether it is appropriate that some proposed statutory rules should be enabled to escape the regulatory impact procedures under proposed section 12, and the necessity of being referred to Parliamentary Counsel and to the Department of Management and Budget for advice under proposed section 13. Additionally, the question of requests to the Premier for "fast track" treatment is one which was addressed.

200.4 The Committee recognises that the "fast track" proposal may raise initial problems in that fear of the Subordinate Legislation (Deregulation) Bill's requirements, resulting from a lack of understanding of its aims and procedures (or simply a desire of a department or authority to avoid what it wrongly sees as a laborious and painful process), may lead departments or authorities to take what they perceive to be the easy way out - and request a certificate from the Premier under proposed section 13(2). However, the Committee believes that this approach would be short lived. Clearly the Premier would not be attracted to a system where constant requests were flowing in from departments and authorities for fast track certificates. Furthermore, no prudent Premier would allow the processes to be by-passed in this way as a matter of routine. Requests would no doubt be refused unless they were backed up with clear evidence of emergency or the need for haste "in the public interest".

200.5 Apart from this consideration, it is doubtful that any Premier would readily certify in writing that in her or his opinion the special circumstances of a particular case required, in the public interest, the proposed statutory rule going into the fast track.

200.6 Even in the "fast track", statutory rules would continue to be required to be laid before Parliament in the usual manner, and would come before the Legal and Constitutional Committee for review. The certificate of the Premier that the statutory rule should necessarily be placed in the "fast track" would also come with the statutory rule, so there would be oversight of this procedure by Parliament and the Committee: 13(2)(b).

200.7 On balance, the Committee believes it is necessary to provide a "fast track" procedure for emergency regulations and other statutory rules which in the special circumstances of the case require, in the public interest, being formulated and promulgated without time being taken, as would normally be the case, on the procedures outlined in proposed sections 12 and 13. The Committee therefore endorses the inclusion of proposed section 13(2) in the Subordinate Legislation (Deregulation) Bill 1983. However, it is necessary to amend the proposed section to exempt statutory rules placed in the fast track from being required to comply with proposed section 12.

200.8 As well, the Committee notes that in accordance with the Report on the Interpretation Bill 1982, Recommendation 33 that non-gender specific language should be used in the drafting of legislation, it is necessary to amend proposed section 13(2) of the Bill.

201 RECOMMENDATION 62

The Committee endorses the inclusion of proposed section 13(2) of clause 8 in the Subordinate Legislation (Deregulation) Bill 1983 in amended form, to read :

> *(2) It shall not be necessary to comply with section 12 or section 13(1) if -*
>
> > *(a) the Premier certifies in writing that in her or his opinion in the special circumstances of the*

particular case the public interest requires that the proposed statutory rule should be submitted for making by or for the consent or approval of the Governor in Council without complying with sub-section (1); and

(b) a copy of the certificate is submitted with the proposed statutory rule.

Clause 8 : Examination of Proposed Statutory Rules

202 Clause 8 : Examination of Draft Statutory Rules by Parliamentary Counsel - Outline. Proposed section 13(3) in clause 8 of the Bill deals with reference of proposed statutory rules to the Chief Parliamentary Counsel for expert drafting advice. It states :

A proposed statutory rule shall be submitted to the Chief Parliamentary Counsel for advice as to whether the proposed statutory rule -

(a) appears to be within the powers conferred by the Act under which it is proposed to be made;

(b) appears to be in accord with the general objectives of the Act under which it is proposed to be made;

(c) appears to be consistent with and likely to achieve the objectives set out in the proposed statutory rule or, where the proposed statutory rule is to amend an existing statutory rule, the objectives set out in the existing statutory rule;

(d) appears to infringe the rules of natural justice;

(e) appears without clear and express authority being conferred by the Act under which the statutory rule is to be made -

(i) to have a retrospective effect;

(ii) to impose any tax, fee, fine, imprisonment or other penalty;

(iii) to shift the onus of proof to a person accused of an

offence; or

(iv) to sub-delegate powers delegated by the Act;

(f) is expressed as clearly and unambiguously as is reasonably possible;

(g) appears to significantly or substantially duplicate, overlap or conflict with other existing legislation or subordinate legislation;

(h) appears to have been prepared in accordance with the guidelines operating under section 11.

203 Clause 8 : Parliamentary Counsel Examination of Draft Rules - The Issues. Some departments or authorities commenting on this provision stated that having expertise readily available in their departments or the authority itself, it was unnecessary to consult with Parliamentary Counsel. Some said they would consult where necessary but saw no need for a legislative requirement that Parliamentary Counsel should have oversight of all statutory instruments in accordance with the terms of the Bill. The Ad Hoc Committee of the Law Institute of Victoria noted their concern "about the added burden imposed on Chief Parliamentary Counsel". (Written submission, 28 March 1984, at p.1.)

203.1 On the other hand, some departments saw value in the provision. The State Electricity Commission stated that it "is in favour of a requirement that proposed statutory rules be submitted to the Chief Parliamentary Counsel". The Commission added that in fact it "has been the Commission's practice to involve Parliamentary Counsel throughout the course of preparation of statutory rules". (Written submission, 23 February 1984, at p.2.) The Education Department approved the checking of statutory rules by Chief Parliamentary Counsel, surmising that "the requirement that the Chief

Parliamentary Counsel check proposed statutory rules for validity and clarity might obviate the need for guidelines" as required under proposed section 11 of the Bill. (Written submission, 27 February 1984, at p. 1.)

203.2 The Committee believes that it is important for Parliamentary Counsel to have the opportunity of overseeing subordinate legislation at a relatively early stage. Although a number of departments and authorities have expert legal assistance on the spot, not all do; and even experts can gain from an experienced counsel coming fresh to a drafted instrument. The Committee endorses the principle that Parliamentary Counsel should have proposed statutory rules submitted in accordance with proposed section 13(3). At the same time, the Committee is aware that the additional volume of work may lead to a need to increase the staff of Parliamentary Counsel's Office. The Committee suggests, however, that in the final analysis this would result in a saving of public expenditure, in that if doubtful drafting is corrected at the earliest possible stage, fewer problems will result and the problems will be more susceptible to correction than at some later stage prior to promulgation - or when the legislation is in force, with the prospect of costly legal proceedings.

204 Clause 8 : Parliamentary Counsel Scrutiny - "Powers Conferred by Act". However, the Committee is not satisfied that the terms outlined in the proposed section 13(3) should go forward as drafted. The Committee believes that as section 13(3)(e) in effect outlines matters that are relevant to "the powers conferred by the Act" under which a statutory rule is proposed to be made, its placement as the fifth point in the proposed section is inappropriate. The Committee debated whether, in fact, it is necessary to adumbrate these points or whether, on the contrary, it is sufficient to leave section 13(3)(a) as a "catch all", with no need for specificity of its terms. Ultimately the Committee considered that in accordance with the proposition that legislation should be clear to lawyers and non-lawyers alike, where possible, the terms should be spelt out. However, the Committee considers section 13(3)(e) would be better placed immediately following section 13(3)(a) in clause 8.

205 **RECOMMENDATION 63**

The Committee recommends that proposed section 13(3)(e) of clause 8 should become 13(3)(ab), to appear immediately following 13(3)(a) :

> *(3) A proposed statutory rule shall be submitted to the Chief Parliamentary Counsel for advice as to whether the proposed statutory rule -*
>
> *(a) appears to be within the powers conferred by the Act under which it is proposed to be made;*
>
> *(ab) appears without clear and express authority being conferred by the Act under which the statutory rule is to be made -*
>
> *(i) to have a retrospective effect;*
>
> *(ii) to impose any tax, fee, fine, imprisonment or other penalty;*
>
> *(iii) to shift the onus of proof to a person acused of an offence; or*
>
> *(iv) to sub-delegate powers delegated by the Act; ...*

206 Clause 8 : Parliamentary Counsel Scrutiny - Objectives of Principal Act. The Committee considered that proposed section 13(3)(b) may imply that Parliamentary Counsel should be taking into account policy matters. That is, it refers to a statutory rule appearing to be "in accord with the general objectives of the Act under which it is proposed to be made". The Committee believes it would be unsatisfactory for Parliamentary Counsel to be placed in a position where counsel were required or apparently required to comment upon the policy aspect of the proposed rule or the legislation. In the Committee's view it would

be preferable to redraft section 13(3)(b) to provide that Parliamentary Counsel should give advice on whether a statutory rule "appears to be within the general objectives of the Act ..."

207 RECOMMENDATION 64

The Committee recommends that proposed sub-section 13(3)(b) should be redrafted to read :

> *(b) appears to be within the general objectives of the Act under which it is proposed to be made; ...*

208 Clause 8 : Parliamentary Counsel Scrutiny - Objectives of Proposed Statutory Rules. A similar problem arises in relation to proposed section 13(3)(c) in the words "appears to be consistent with and likely to achieve the objectives set out in the proposed statutory rule ..." The Committee believes that it would be preferable not to promote the possibility that Parliamentary Counsel might be placed in a position of being required to form a subjective judgement as to the possible result of a statutory rule, to redraft the provision omitting the word "likely".

209 RECOMMENDATION 65

The Committee recommends that proposed section 13(3)(c) in clause 8 should be redrafted to read :

> *(c) appears to be consistent with and to achieve the objectives set out in the proposed statutory rule or, where the proposed statutory rule is to amend an existing statutory rule, the objectives set out in the existing statutory rule; ...*

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210 Clause 8 : Parliamentary Counsel Scrutiny - "Rules of Natural Justice". The Committee had difficulty with the use of "the rules of natural justice" in the context in which they are used in proposed section 13(3)(d). It is understood that "equity" or "justice" in the general sense is meant, however the Committee believes that this may be more apparent if the clause is amended to provide "appears to be inconsistent with principles of justice and fairness".

211 **RECOMMENDATION 66**

The Committee recommends that section 13(3)(d) of clause 8 be redrafted to read :

> *(d) appears to be inconsistent with principles of justice and fairness*

212 Clause 8 : Parliamentary Counsel Scrutiny - Other Issues. The Committee endorses the proposal that Parliamentary Counsel should scan draft statutory rules to ensure that they are expressed clearly and unambiguously. This should be done in accordance with proposed section 13(3)(f). Parliamentary Counsel should also scan draft statutory rules to ascertain whether they appear "to significantly or substantially duplicate, overlap or conflict with other existing legislation or subordinate legislation".

212.1 On the principle embodied in the proposed section 13(3)(g), the Committee points out that this is an important reason for ensuring that Parliamentary Counsel have oversight of statutory rules being put forward by departments and authorities. It is unlikely that each department and authority will have a thorough knowledge or, in some cases, any knowledge at all, of proceedings and policies being followed in other departments or authorities. Certainly the Melbourne and Metropolitan Board of Works in its written submission to the Committee stated :

[The Bill] requires that the objectives of proposed rules be checked to ensure that they are not inconsistent with the objectives of other legislation, statutory rules and stated government policies. However 'proceedings' and 'policies' are not always readily available or known. (Written submission, 30 March 1984, at p.2.)

The Committee believes it is important to ensure that as far as possible there is coordination between departments where matters dealt with by one are likely to touch upon matters dealt with by another. However, this is not a goal which is likely to be achieved to the optimum degree, at least within the foreseeable future. Therefore it is important that a body concerned with the drafting of legislation should have an oversight of all legislation being drafted in diverse departments and authorities. It is not unprecedented for legislation drafted in one department to be designed to enforce different standards from or even conflicting standards with legislation drafted in another department. Where it is possible to introduce a mechanism for guarding against this, at least as far as possible, this mechanism should be implemented without delay.

212.2 As for proposed section 13(3)(h), the Committee believes that Parliamentary Counsel should not be required to determine whether legislation is in accordance with guidelines for preparation of subordinate instruments as proposed to be introduced by draft section 11 in clause 8 of the Subordinate Legislation Bill 1983. This is more appropriately to be dealt with by the Legal and Constitutional Committee in its role as overseer of subordinate legislation. The Committee notes that in accordance with Recommendation 61 the objectives of a proposed rule will be stated in the preamble to the rule.

213 RECOMMENDATION 67

The Committee recommends that proposed paragraphs (f) and (g) of section 13(3) of clause 8 remain a part of the Bill, but that paragraph (h) be omitted from the Bill.

214 Clause 8 : Proposed Section 13 - Examination of Draft Statutory Rules by Department of Management and Budget - Outline. Proposed section 13(4) in clause 8 states:

> *A proposed statutory rule shall be submitted to the Director-General of the Department of Management and Budget for advice as to -*
>
> *(a) the estimated costs directly and indirectly likely to be incurred in the administration of and compliance with the proposed statutory rule; or*
>
> *(b) where a regulatory impact statement has been prepared under section 12, whether the statement appears to adequately assess the likely impact of the proposed statutory rule.*

214.1 That is, there are two issues with which the Department of Management and Budget is required to deal. Proposed section 13(4)(a) is relevant where a regulatory impact statement has not been prepared. In the Bill, it is necessary to go to Schedule 2, paragraph 1(f) to ascertain when this case arises. That paragraph provides :

> *A regulatory impact statement shall be prepared under section 12, unless the proposed statutory rule relates only to matters which :*
>
> *(i) Are of a fundamentally declaratory or machinery nature; or*
>
> *(ii) Deal with relations, organization or procedures within or as between departments or statutory bodies; and*
>
> *(iii) Impose no appreciable burden, cost or disadvantage upon any sector of the public.*

Thus, under the Bill, the proposed section requires the Department of Management and Budget to give advice to the relevant department or authority. Advice should relate to the estimated costs likely to be incurred directly and indirectly in the administration of and compliance with a proposed statutory rule which is of a fundamentally declaratory or machinery nature. It should also give advice where a proposed rule deals with relations, organisation or procedures within or as between departments or statutory bodies. In both cases, this arises where the department or authority determines the statutory rule will impose no appreciable burden, cost or disadvantage upon any sector of the public.

215 Clause 8 : Department of Management and Budget - Advice Where No Regulatory Impact Statement Required. The key word in the provision is "advice". Unlike the United States situation where the Office of Management and Budget has a prime role in overseeing regulation formulation, which has led in the words of some commentators to a "chill factor" alleged to cause agencies to decline putting forward regulatory proposals in the fear that they will be refused, in the Subordinate Legislation (Deregulation) Bill the Department of Management and Budget is not given any control over departmental regulation formulation.

215.1 It is conceivable that the giving of advice may lead to oversight by the Department of Management and Budget of the amounts departments or authorities are likely to invest in regulation of the type outlined in paragraph 1(f) of Schedule 2. This could conceivably lead to their suggestion that a particular department or departments should cut back their budget/s at departmental budget talks, when departments and authorities are usually required to shear their ambit claims anyway.

215.2 However, in discussion with the Committee, a representative of the Department of Management and Budget gave little credence to the "chill factor" in the Victorian context. He said :

We do not have any shortage of requests from departments for extra money if they feel they have a need. If the Minister perceives a need for subordinate legislation I do not think [departmental] officers will be reluctant to come forward and have it processed.

(Baker, oral evidence, 25 July 1984, at p. 408.)

215.3 But apart from this issue, the question is whether the Department of Management and Budget has the time and resources to give advice in relation to proposed statutory rules of fundamentally declaratory or machinery nature, and those dealing with relations, organisation or procedures within or as between departments or statutory bodies. (As well as those dealing with across the board fee rises as recommended by the Committee.)

215.4 The rationale underlying the provision is, apparently, that if a department or authority has declined to make a regulatory impact statement on the ground that the proposed statutory rule would not impose any appreciable burden, cost or disadvantage upon any sector of the public, the Department of Management and Budget can give costing advice. Presumably this may show a department or authority to have been wrong in its original calculations, and it may be required to undertake a regulatory impact statement.

215.5 The Committee does not endorse this proposal. As earlier noted, if the Schedule 2, paragraph 1(f) provision remains in the Bill, departments and authorities will have done an assessment taking into account the types of factors relevant to a regulatory impact statement to ascertain the negligible nature of the costs involved in a proposed statutory rule, in order to bring it within the provision. There seems to be little value in having the Department of Management and Budget do a reassessment. If it is necessary for a department to seek advice, presumably that department would use its initiative and seek such advice.

215.6 The Committee questions whether it is a useful expenditure of Management and Budget's time and resources to give advice on costing of proclamations, orders in council, rules dealing with organisation or procedures between or in departments, or fee rises across the board. (In the latter case, if it is seen as germane to an overall fee rise, the Department of Management and Budget presumably will have undertaken such a review prior to advising of the fee rise.)

215.7 Officers of the Department of Management and Budget informed the Committee that if they were to undertake advisings on the scale suggested in the Bill, resources would have to be increased substantially. The Committee does not believe that this is necessary or justified, at least in respect of the statutory rules to which proposed section 13(4)(a) refers.

216 RECOMMENDATION 68

The Committee does not believe it should be mandatory for departments or authorities to seek Department of Management and Budget advice on the costs likely to be incurred in administration of and compliance with proposed statutory rules of a fundamentally declaratory nature, involving internal departmental operations, or interdepartmental operations, or involving fee rises across the board. It therefore recommends that proposed section 13(4)(a) in clause 8 should be removed from the Subordinate Legislation (Deregulation) Bill 1983.

217 Clause 8 : Proposed Section 13. The Committee also notes that should it be considered appropriate, despite Recommendation 68, for section 13(4)(a) to remain in the Bill, the placement of words should be changed. That is, rather than refer to "costs directly and indirectly likely to be incurred", it would be preferable to refer to "costs likely to be incurred directly and indirectly in the administration ..."

218 RECOMMENDATION 69

The Committee recommends that if proposed section 13(4)(a) in clause 8 is, despite Recommendation 68, retained in the Bill, then it should be redrafted to provide :

> *"the estimated costs likely to be incurred directly and indirectly in the administration of and compliance with the proposed statutory rule; or ..."*

219 Clause 8 : Department of Management and Budget - Advice Where Regulatory Impact Statement Required. In relation to proposed section 13(4)(b), again the Department of Management and Budget is placed in a position of giving advice only : this facility would be of value to those departments having little or no economic expertise, giving them an indication of the economic costs and disadvantages and economic benefits and advantages which proposed statutory rules might incur.

219.1 As for whether the Department of Management and Budget has the resources or is appropriate to carry out this advisory role, in evidence before the Committee the Director of Finance said :

> *[A quarter of the statutory rules passed in 1983 would have] a significant impact on some part of the private sector ... there you have to extend [regulatory impact] studies not only to the costs in the public sector but to the costs and burdens on the private sector, and go on to have a look at what the benefits may be and whether those benefits can be quantified.*
>
> *In all cost benefit studies it is not a difficult task to work out the capital costs and the running costs and debt charges on a particular capital project but when it comes to perceiving the benefits to*

individuals and to communities and putting values on them, that is a difficult task. The Bill seems to indicate that [the Department of Management and Budget] should attempt to quantify them where we can, but where we cannot, there is a requirement to try to indicate the method used to find out whether there are benefits which can be quantified or perceived.

The departments are required to do this under the Bill but I would imagine most of them would look to DMB for guidance on where they might find the particular benefits if there are any. So while DMB really is required to take the impact study and decide whether or not it is a proper and adequate assessment of the likely impact, I think it would be required to go through the details of the work done by the particular department and then carry out the other applications of the Bill and see if all the alternatives have been properly examined and whether this proposed statutory Bill gives the least cost benefit or least cost solution, or least possible cost - that is [in the words of] the schedule ...

We may perceive something in DMB that goes beyond what the department has found, and ... that would impose a lot of work on that section of the department ... responsible.

(Baker, oral evidence, 25 July 1984, at pp. 399-400.)

219.2 Alluding directly to resources, the Director of Finance said :

In your letter to me you have indicated that we should speak as to whether or not DMB have the resources to do [the advising and what it entails]. The answer is no, we have not at the moment with the present role statement of DMB and the purpose the government has given it. There is no section which could cope with this detailed administration at the moment. So [it would be necessary] to establish a separate unit which would require varied skills, not only

financial skills, to carry out the type of studies which ... the Bill envisages. (At p. 400.)

219.3 A second Department of Management and Budget spokesperson (from the Policy and Planning Division) took up the problem of resources and private sector contact :

> *It is my view ... that the regulatory review function is best placed in a department which has day to day contact with the private sector. In fact there is already a number of staff in the Department of Industry, Commerce and Technology that looks in a minor way at regulatory review matters ...*

(Craigie, oral evidence, 25 July 1984, at p. 400.)

219.4 Department of Management and Budget representatives expressed reservations about its business experience, stating that it would be more useful for departments and other authorities to have advice from the Department of Industry, Commerce and Technology when proposed regulations would have a business impact. That Department has a business sector network providing it with additional information and expertise :

> *... it would be fairly difficult for DMB to assess the costs and benefits, particularly the costs, of regulation on the private sector without that day to day contact with the private sector. When you look at a bureaucratic review unit with a consultative mechanism ... that mechanism would do a lot of the work ... [there would be] the resources of the various associations which would canvass their members as to the costs of the regulation and would not be dealing with the matter in isolation, which is what a unit located in DMB would have to do. (At p.400.)*

219.5 The Department of Management and Budget would be "entering the area for the first time ... it would be a new experience to be operating in the private sector. [But] DMB has experience with cost benefit analyses as applied to the public sector investment projects, and in certain cases ... that experience might be able to [be applied] to regulation". (At p.401.) Some departments would have their own networks, and would be better placed to do their own calculations than would the Department of Management and Budget. The departmental representatives added that business expertise alone would not, however, be the sole determinant, at least in some cases.

219.6 The Committee accedes to this view, and also recognises that business linkages and expertise will be important in many assessments of regulatory impact. However, the Committee further observes that business expertise is not the sole determinant - or should not be - of which body is appropriate to act as advisor on regulatory impact. It is conceivable that the Department of Community Welfare might see itself as a more expert advisor, considering social (or community) impact to be the overall issue to which regard should be had.

219.7 In the final analysis, the Committee considers that to a large extent the identity of the department giving advice is less important than the nature and quality of advice given, and the sources individual departments and authorities use for gaining their initial information and doing their initial impact assessment. Whether advice is given by the Department of Management and Budget or the Department of Industry, Commerce and Technology, the advice should take into account not only economic and business factors, but also social and community factors. The Committee believes that it is important for one department to build up expertise that can readily be drawn upon by departments drafting delegated legislation, although simultaneously it recognises that it is vital for the individual departments and authorities themselves to be mindful of economic, social, community and business factors in their own assessments of the utility of proposed delegated legislation.

220 RECOMMENDATION 70

The Committee recommends that one department be given the task of being an adviser to other departments and authorities on economic, social, community, and business factors affecting the possible application of proposed regulations and that that department should be the Department of Management and Budget or the Department of Industry, Commerce and Technology. The Committee emphasises, however, that the relevant department should be required to foster its ability to take into account social and community factors from a human rather than business perspective. Accordingly, the Committee recommends that proposed section 13(4)(b) in clause 8 should remain a provision of the Act.

221 Clause 8 : Proposed Section 14 - Review of Statutory Rules by the Legal and Constitutional Committee - Outline. Proposed section 14 of the Subordinate Legislation (Deregulation) Bill 1983 sets out the matters to be considered by the Legal and Constitutional Committee in having regard to the terms of a statutory rule laid before Parliament under section 5 of the Subordinate Legislation Act 1962.

Section 5 of that Act provides :

(1) A copy of every statutory rule shall be laid before both Houses of Parliament on or before the sixth sitting day after notice of the making thereof has been published in the Government Gazette and a copy of every such statutory rule shall be posted or delivered to each Member of Parliament.

(2) A failure to comply with sub-section (1) does not affect the operation or effect of the statutory rule but the Legal and Constitutional Committee may report the failure to each House of Parliament and the statutory rule shall be disallowed after each House of Parliament passes a resolution in accordance with sub-section (3).

(3) A resolution to disallow a statutory rule pursuant to section (2) -

(a) must be given in the House in question on or before the eighteenth day upon which that House sits after the Legal and Constitutional Committee has reported to that House on the failure to comply with sub-section (1); and

(b) must be passed on or before the twelfth day upon which that House sits after notice of the resolution has been given in that House -

But the power of either House to pass a resolution disallowing the statutory rule shall not be affected by the prorogation or dissolution of the Parliament or of either House of the Parliament and for the purpose of this section the calculation of days upon which a House has sat shall be made as if there had been no such prorogation or dissolution.

221.1 Proposed section 14 of the Subordinate Legislation (Deregulation) Bill 1983 provides :

(1) Where the Legal and Constitutional Committee considers that a statutory rule laid before Parliament under section 5 -

(a) does not appear to be within the powers conferred by the Act under which the statutory rule was made;

(b) does not appear to be in accord with the general objectives, intention or principles of the Act under which the statutory rule was made;

(c) *makes unusual or unexpected use of the powers conferred by the Act under which the statutory rule was made having regard to the general objectives, intention or principles of that Act;*

(d) *embodies principles of major substance or controversy or contains any matter which principles or matter should properly be dealt with by an Act and not by subordinate legislation;*

(e) *unduly trespasses on rights and liberties of the person previously established by law;*

(f) *unduly makes rights and liberties of the person dependent upon administrative and not upon judicial decisions;*

(g) *infringes the rules of natural justice;*

(h) *without clear and express authority being conferred by the Act under which the statutory rule was made -*

(i) *has a retrospective effect;*

(ii) *imposes any tax, fee, fine, imprisonment or other penalty;*

(iii) *purports to shift the onus of proof to a person accused of an offence; or*

(iv) *provides for the sub-delegation of powers delegated by the Act;*

(i) *requires explanation as to its form or intention;*

(j) has been prepared in contravention of any of the provisions of this Act or of the guidelines prepared under section 11 and the contravention is of a substantial or material nature; or

(k) is likely to result in costs being incurred directly and indirectly in the administration of and compliance with the statutory rule which outweigh the likely benefits sought to be achieved by the statutory rule -

the Legal and Constitutional Committee may report to each House of Parliament as provided in sub-section (2).

221.2 The Subordinate Legislation (Deregulation) Bill 1983 then provides that the report of the Legal and Constitutional Committee under the proposed section 14, subsection (2) -

... may contain such recommendations as the Committee considers appropriate including a recommendation that the statutory rule should be -

(a) disallowed in whole or in part;

(b) suspended in accordance with section 6 pending consideration by Parliament;

(c) amended as suggested in the report.

222 Clause 8 : Legal and Constitutional Committee Scrutiny - "Powers Conferred by Act". As in relation to the setting out of similar provisions covering the role of Parliamentary Counsel in reviewing subordinate instruments in proposed section 13, clause 8, of the Bill, the Committee believes that the placement of (1)(h) should be altered so that it follows

immediately after (1)(a) which refers to the powers conferred by the Act under which the statutory rule was made.

223 RECOMMENDATION 71

The Committee recommends that proposed section 14(1)(h) should become (1)(ab), so that the proposed section reads :

> *(1) Where the Legal and Constitutional Committee considers that a statutory rule laid before Parliament under section 5 -*
>
> *(a) does not appear to be within the powers conferred by the Act under which the statutory rule was made;*
>
> *(ab) without clear and express authority being conferred by the Act under which the statutory rule was made -*
>
> *(i) has a retrospective effect;*
>
> *(ii) imposes any tax, fee, fine, imprisonment or other penalty;*
>
> *(iii) purports to shift the onus of proof to a person accused of an offence; or*
>
> *(iv) provides for the sub-delegation of powers delegated by the Act; ...*

224 Clause 8 : Legal and Constitutional Committee - Objectives of Principal Act. Proposed section 14(1)(b) raises the possibility that the Committee may consider itself required by the provision to look at policy matters in relation to the statutory rule. That is, the provision refers to the criteria of not "appearing to be in accord with the general objectives ..." The

Committee does not believe it is appropriate for policy issues to be re-debated in the subordinate legislation stage. (See further Contemporary Issues, "Parliamentary Committee Review" at p.214ff.)The Committee believes that clarity would be brought to the provision if it were redrafted to read "does not appear to be within the general objectives ..."

225 RECOMMENDATION 72

The Committee recommends that the proposed section 14(1)(b) be amended to read :

> *(b) does not appear to be within the general objectives, intention or principles of the Act under which the statutory rule was made; ...*

226 Clause 8 : Legal and Constitutional Committee Scrutiny - "Unusual or Unexpected Use of Powers". The State Electricity Commission raised the question of proposed section 14(1)(c) of the Act, stating :

> *Reservations are expressed about the inclusion of section 14(1)(c), as there are no indications as to what would be considered to 'make unusual or unexpected use' of the powers of the Act under which the proposed statutory rule is to be made.* (Written submission, 23 February 1984, at p.2.)

The Commission continued :

> *Could it not be argued that the use of a power might be unusual or unexpected if it is being invoked for the first time? There might, however be good reasons for invoking a power in a particular way.* (At p.2.)

226.1 However, the Committee considers that this is a standard phrase which has a recognised meaning. It is a relevant criterion to include in the scrutiny powers of the Committee, and therefore should remain in the Bill.

227 RECOMMENDATION 73

The Committee recommends that proposed section 14(1)(c) should remain in Clause 8 of the Subordinate Legislation (Deregulation) Bill 1983.

228 Clause 8 : Legal and Constitutional Committee Scrutiny - Principles of Major Substance or Controversy. The Committee believes that the terminology of proposed section 14(1)(d) may raise problems of policy encroachment once more. That is, the inclusion of the word "controversy" is unfortunate and should be removed from the provision.

229 RECOMMENDATION 74

The Committee recommends that proposed section 14(1)(d) should be amended to omit "controversy" to read :

> *(d) contains any matter or embodies any principles, which matter or principles should properly be dealt with by an Act and not by subordinate legislation; ...*

230 Clause 8 : Legal and Constitutional Committee Scrutiny - "Rules of Natural Justice". As in the case of this provision being included in the "checklist" of matters to which Parliamentary Counsel should have regard in assessing subordinate legislation, the Committee believes that "rules of natural justice" would better be replaced by "appears to be inconsistent with principles of justice and fairness". (See also Cranston, oral evidence, 30 March 1984, at p.99.)

231 **RECOMMENDATION 75**

The Committee recommends that proposed sub-section 14(1)(f) in clause 8 be amended to remove the words "rules of natural justice" and replace them with the words "principles of justice and fairness" to provide :

is inconsistent with principles of justice and fairness

232 Clause 8 : Legal and Constitutional Committee Scrutiny - Other Issues. The Committee considers that the other matters stated in proposed section 14 to be within the purview of the Legal and Constitutional Committee in its scrutiny of subordinate legislation should be included in the Bill.

233 **RECOMMENDATION 76**

The Committee recommends that the remaining provisions - proposed paragraphs (e), (f), (i), (j), and (k) of proposed section 14(1) of clause 8 remain a part of the Bill.

234 Clause 8 : Report of the Legal and Constitutional Committee. Proposed section 14(2) provides :

A report of the Legal and Constitutional Committee under this section may contain such recommendations as the Committee considers appropriate including a recommendation that the statutory rule should be -

(a) disallowed in whole or in part;

(b) suspended in accordance with section 6 pending consideration by Parliament; or

(c) amended as suggested in the report.

In accordance with Recommendation 33 that the Legal and Constitutional Committee should have power to declare a suspension of a statutory rule rather than simply "propose" or recommend such suspension, proposed section 14(2) requires modification. To make this clear, there should be two parts to proposed section 14(2), the first covering a recommendation for disallowance or amendment, the second with a declaration of suspension.

235 RECOMMENDATION 77

The Committee recommends that proposed section 14(2) of clause 8 remain part of the Bill, but that it be recast to provide :

(BA) A report of the Legal and Constitutional Committee under this section may contain such recommendations and declarations of suspension as the Committee considers appropriate, including :

(a) a recommendation that the statutory rule should be -

(i) disallowed in whole or in part; or

(ii) amended as suggested in the report; and

(b) a declaration that the statutory rule should be suspended in accordance with section 6 pending consideration by Parliament under this Act.

Clause 8 : Schedule 1 Guidelines

236 Clause 8 : Schedule 1 Guidelines - Matters to be Included in Guidelines - Outline. Schedule 1 lists those matters which are to be included in guidelines prepared under section 11 in clause 8 of the Bill, the guidelines to be prepared and issued by the Attorney-General in consultation with the Legal and Constitutional Committee. Schedule 1 of the Bill lists as to be included :

1 Guidelines as to the types of matters appropriate for inclusion in statutory rules rather than in Acts or in instruments which are not of a legislative character.

2 Procedures to be followed to ensure coordination and consultation between government agencies empowered to make or responsible for preparing statutory rules.

3 Procedures to be implemented to ensure that -

(a) the need for a proposed statutory rule can be justified;

(b) the objectives of a proposed statutory rule are formulated and included in any proposed principal statutory rule;

(c) alternative means of achieving the objectives to be achieved by a proposed statutory rule such as self-regulation and voluntary codes of conduct have been considered;

(d) a proposed statutory rule embodies the alternative which achieves the objectives of that statutory rule at the least possible cost:

(e) in appropriate cases a proposed statutory rule sets performance standards rather than prescribing detailed requirements; and

(f) a detailed examination of the costs of the proposed statutory rule is undertaken.

4 Guidelines as to the types of statutory rules in respect of which a regulatory impact statement under section 12 is to be obtained.

5 Guidelines as to the style and language to be used in drafting statutory rules.

6 Guidelines as to the printing and submission of statutory rules to the Governor in Council.

7 Guidelines as to how the provisions of this Act can be most effectively and efficiently implemented.

237 The Committee recognises that were no guidelines for the implementation of the Act included in Schedule 2, Schedule 1 might have been necessary to indicate to the Attorney-General and the Legal and Constitutional Committee the matters to be taken into account in drawing up those guidelines. (See proposed section 11 in clause 8.) However, the proposed section II clearly indicates the types of matters that should be taken into account in drawing up guidelines. Further, the guidelines in Schedule 2 clearly indicate what matters are relevant. Therefore the Committee believes it is unnecessary and potentially confusing to include Schedule 1 in the Bill.

238 **RECOMMENDATION 78**

The Committee recommends that Schedule 1 be omitted from the Bill. Furthermore, sub-section (2) of proposed section 11 in clause 8 of the Bill should be omitted.

239 Clause 8 : Schedule 1 Guidelines - Further Comments. If it is nonetheless considered that Schedule 1 should remain part of the Bill the Committee believes that some of the matters dealt with therein should not remain in the Schedule. The following five recommendations (Recommendation 79 to Recommendation 83) are germane only if Recommendation 78 is not accepted.

240 Clause 8 : Schedule 1 Guidelines on Matters Appropriate for Inclusion in Statutory Rules. The Committee considers that it is inappropriate to include in a schedule those types of subordinate instrument which are to be covered by the provisions of the Subordinate Legislation (Deregulation) Bill. The Committee would remove paragraph 1 of Schedule 1. A "code" of subordinate legislation should be incorporated into the Subordinate Legislation Act 1962. (See Clause 4 : Declaration of Instrument which is not of a Legislative Character, at p.243ff and Recommendation 18, at pp.256.)

241 **RECOMMENDATION 79**

The Committee recommends that paragraph 1 of Schedule 1 be omitted from the Bill and a "code" of subordinate legislation be incorporated into the Subordinate Legislation Act 1962 in accordance with Recommendation 18. (Appropriate provision would necessarily be made so that subordinate legislation already existing would be covered.)

242 Clause 8 : Schedule 1 Guidelines for Coordination and Consultation Procedures Between Government Bodies. In commenting on consultation with other government departments and authorities, witnesses appearing before the Committee had differing views. Discussion revealed that some departments and authorities consult with other departments and authorities where relevant; others do not, because they do not see consultation as relevant.

242.1 The Committee believes that it is essential for departments and authorities to consult and coordinate their proposals for delegated legislation in appropriate cases. It believes that the appropriate case may more often arise than some departments and authorities suggest. That is, it is clear that delegated legislation drafted and introduced into areas administered by one department may relate to, or impinge upon, delegated legislation drafted and introduced into areas administered by another department or authority. It is conceivable that one department might draft regulations at odds with regulations drafted by another department or authority. It is conceivable that relatively similar regulations may exist in one area, which are administered by different departments or authorities. Obviously, this may be wasteful and unnecessary, and may lead to confusion within departments and authorities, and in the general community, or amongst special interest groups or businesses that are affected by the regulations.

242.2 Clearly confusion and waste could be obviated by the existence of consultative and coordinating procedures enabling departments and authorities to discuss proposed regulations and the use of those consultative and co-ordinating procedures by departments and authorities. The Committee acknowledges that some bodies already follow sensible consultative and co-ordinating procedures. In such cases, the existence of guidelines outlining these procedures should cause no problems : they will simply put into legislative form procedures already in existence. Where departments or authorities have no consultative or coordinating procedures, it is high time they had them : the outlining of such procedures in guidelines under the Subordinate Legislation Act 1962 would undoubtedly assist them in going about commonsense consultation and coordination.

242.3 The Committee does not believe that exhaustive enquiries should be made of all departments and authorities as to whether proposed subordinate legislation impinges or might conceivably impinge upon areas covered already by those bodies. The Committee believes that the introduction of consultation and coordinating procedures would not require any department or authority to

conduct its business in this way, which would obviously be time consuming, wasteful and would not advance the cause of sensible administration.

242.4 However, the Committee believes that the existence of guidelines (which should be what they are named - "guidelines" - for guidance only), applied in a sensible manner, would enhance administration and the operations of government. The Committee believes that most departments and authorities are capable of utilising such guidelines in a commonsense way.

243 RECOMMENDATION 80

The Committee therefore endorses the inclusion of paragraph 2 in Schedule 1, and notes that under Schedule 2 guidelines are provided which ensure that departments and authorities should alert themselves to the necessity (if there is such a necessity) for consulting with other governmental bodies.*

244 Clause 8 : Schedule 1 Guidelines for Procedures - Justification; Objectives; Alternative Means; Performance Standards; Costs. Paragraph 3 of the Schedule 1 guidelines outline the matters to be taken into account in stipulating procedures to be followed by government bodies in formulating statutory rules. The Committee believes that each of the factors listed should rightly be taken into account in formulating guidelines. However, the Committee is concerned on two counts. First, on the question of "alternative means"; secondly , that of "costs". The matter of alternatives is dealt with later in this Report. (See Schedule 2, Statutory Rules, paragraph (c) at p.388.) As for "costs" the Committee considers that the emphasis on cost in Schedule 1

* For comments of the Committee on the content of these guidelines, see Schedule 2 : Guidelines with Respect to the Preparation and Content of Statutory Rules, at pp. 381-403.

could be taken to imply that monetary burden is the only cost to which the guidelines should refer, and thus the only cost to which departments and authorities should give their attention.

244.1 The Committee believes that "cost" or "costs" is an unfortunate term, because governmental bodies should be required to take into account not only monetary costs, but monetary benefits, and also costs and benefits which are not directly measurable in cash terms. Discussion with the Honourable A.J. Hunt, M.L.C., who was responsible for the Subordinate Legislation (Deregulation) Bill 1983, revealed that his intention was not to draw the line at financial costs only, but to take into account financial benefits and other costs and benefits of a non-financial kind. (Transcript, 22 February 1984, at p.1ff; transcript, 13 June 1984, at p.305ff.)

244.2 The Committee believes that it is insufficient to assume that departments and authorities will automatically assume that "cost" is not to be interpreted in the narrowest sense. Rather the Schedule should spell out more clearly the intention of the legislation. It is therefore necessary, wherever "cost" or "costs" appears to indicate that the broad meaning is relevant. To this end, the Committee believes it is essential in paragraph 3 of Schedule 1 to explicitly note "benefits" and "non-financial" aspects.

245 RECOMMENDATION 81

The Committee recommends that where "cost" and "costs" appear in sub-paragraphs 3(d) and (f) of paragraph 3, these terms should be qualified to indicate that non-financial as well as financial costs and benefits are to be given adequate regard in reviewing proposed delegated legislation. To this end, those sub-paragraphs should be amended to provide :

> *(d) a proposed statutory rule embodies the alternative which achieves the objectives of that statutory rule at a financial and social cost which is less than the financial and social*

benefits which may result from the alternative:

...

(f) a detailed examination of the financial and social benefits and the financial and social costs is undertaken.

246 Clause 8 : Schedule 1 Guidelines for Regulatory Impact Application. As a regulatory impact statement should not be necessary in relation to particular types of delegated legislation - such as those which relate to machinery or declaratory matters - it is essential that this be made clear in the body of the proposed Act, as indicated by the Committee at Recommendation 53 Readers of the Bill should be able to determine from the outset what statutory rules are subject to the Bill, and to which procedures these are subject. It is inappropriate for this matter to be dealt with by way of Schedule.

247 RECOMMENDATION 82

The Committee recommends that the question of which delegated legislation should or should not be subject to regulatory impact procedures should not be contained in a Schedule but in the body of the proposed Act in accordance with Recommendation 53 and to this end paragraph 4 of Schedule 1 of the Subordinate Legislation (Deregulation) Bill 1983 should be omitted from the Bill.

248 Clause 8 : Schedule 1 Guidelines for Style and Language. The State Electricity Commission stated in its written submission to the Committee that it "is useful to have uniformity of drafting style and coordination between authorities". (28 February 1984, at p.3.) The Committee agrees that this is so, and therefore endorses the proposal that guidelines should be drawn up which direct departments and authorities to the need for uniformity of language and drafting in the field of subordinate legislation. This was a concern of the Committee in its Report on the Interpretation Bill 1982. Accordingly the

Committee believes that every effort should be made to ensure that departments and authorities recognise this need.

249 Clause 8 : Schedule 1 Guidelines for Printing and Submission to Governor in Council. Again, the Committee endorses a need for uniformity in printing of statutory rules and uniform methods of submitting statutory rules to Governor in Council. A variety of styles is not conducive to good administration, is wasteful of time and resources, and can lead to confusion amongst departments and authorities, ministers, members of the Executive Council, and the public alike. The Committee therefore endorses the need for guidelines on these matters.

250 Clause 8 : Schedule 1 Guidelines for Effective and Efficient Implementation. As the Subordinate Legislation (Deregulation) Bill 1983 proposes to introduce new procedures for the drafting and assessment of subordinate legislation, it is essential that guidance be given to governmental bodies for the implementation of the Act. For this purpose, guidelines for the assessment of proposed subordinate legislation and regulatory impact statement procedures will, in the Committee's view, be sufficient to fulfill this objective. The Committee believes that paragraphs 1 to 6 of Schedule 1 adequately cover these matters, and that paragraph 7 is unnecessary. The Committee also believes that it is preferable, in a Bill which could give rise in some departments and authorities, at least, to some initial anxiety (although in the Committee's view such anxiety is misplaced), to be as sparing as possible in inclusions. Therefore paragraph 7 would better be omitted from Schedule 1 as adding nothing of value to it, and rather serving possibly to confuse.

251 **RECOMMENDATION 83**

The Committee recommends that paragraphs 5 and 6 of Schedule 1 remain in the Bill, but, being unnecessary to the good operation of the proposed Act, paragraph 7 of Schedule 1 be omitted from the Subordinate Legislation (Deregulation) Bill 1983.

Clause 8 : Schedule 2 Guidelines

252 Clause 8 : Schedule 2 Guidelines - Content Generally. Schedule 2 sets out the procedures which are to be followed in relation to the formulation of all statutory rules. Although at first glance the guidelines may appear complex, the Committee believes that they simply outline procedures which many - if not all - government departments and authorities are, according to evidence received by the Committee, already following. Rather than adding anything new, complex or frightening to the subordinate legislation making process, they outline in clear, concise and easily followed form the existent process, improving it and making it relevant to all departments and instrumentalities.

252.1 The Committee's views on the efficacy of the procedures laid down in Schedule 2 have been formulated in conjunction with its researches, including discussion with a number of government departments and authorities, and written submissions from departments and authorities. The Committee has also had regard to submissions made to it on these procedures by academics and others making written submissions and considered comments made by witnesses appearing before it during the course of its inquiries.

252.2 The Education Department in its written submission to the Committee stated that the procedures "will impose additional duties of research and administration on the small number of officers [in the Department] already busy in these legislative tasks." (27 February 1984, at p. 2.) Similarly the Department of Conservation, Forests and Lands (Division of Lands) said that "additional human and financial resources will be required to cope with the additional workload imposed by Part II procedures". (Written submission, 1 March 1984, at p.2.)

252.3 For the other side, the State Insurance Office stated that it was in favour of greater consultation between departments and statutory bodies before

the making of statutory rules, and endorsed the guidelines in this particular. (Written submission, 27 February, 1984 at p.1.) Other departments and witnesses expressed similar views, which are endorsed by the Committee. (See further on the Committee's assessment of consultation procedures in Part I, Contemporary Issues, "Consultation" at p.194ff; and Recommendations 7 and 8 at p.212; Part II, "Clause 8 : Schedule 1 Guidelines for Consultation", at p.373ff and Recommendation 80 at p.377).

253 RECOMMENDATION 84

The Committee endorses the objectives underlying the procedures outlined in Schedule 2, and recommends the inclusion of such a Schedule in the Bill, taking into account amendments in accordance with the recommendations of this Report.

254 Clause 8 : Schedule 2 Guidelines - Emphasis on "Costs". In particular, the Committee was concerned with untoward emphasis placed by the guidelines upon costs or cost. As in relation to the statement of matters to be included in guidelines as contained in Schedule 1, paragraph 3, sub-paragraphs (d) and (f) (at "Clause 8 : Schedule 1 Guidelines - Costs", at p.377ff and Recommendation 81 at p.378.) the Committee believes that it is important to explicitly provide that not only financial costs are to be taken into account, but financial benefits and benefits of a non-financial kind should be given equal regard. It is here that the Committee acknowledges very real problems may arise for departments and authorities in determining whether it is appropriate to introduce a statutory rule, or whether the benefits anticipated to accrue from the statutory rule will be outweighed by the costs.

254.1 This problem of an emphasis on costs arises in paragraph 1, sub-paragraphs (b), (c), (e) and (f). Sub-paragraph (b) refers to

(iv) ... costs or disadvantages which are disproportionate to the benefits to be achieved; ...

Sub-paragraph (c) refers to :

... costs and disadvantages, both direct and indirect; ...

Sub-paragraph (e)(i) provides that the proposer of a statutory rule should take into account whether the rule is likely to impose :

... any appreciable burden, disadvantage or cost, whether direct or indirect ...

254.2 The Committee was concerned with the implication in the Schedule that decisions about the "rightness" or "wrongness" of regulations should be made according to a form of cost-benefit analysis, without any indication that cost-benefit analysis, to be effective, has to be seen in the context of political and policy considerations as well as simple monetary or non-financial costs and benefits. It was also concerned that there appeared to be a greater emphasis on costs than benefits, and no definite spelling out of the importance of non-financial benefits and costs. (Further on cost-benefit, see Part I, Contemporary Issues, "Cost-Benefit Analysis", at p.177ff and Recommendation 5 at p.193.).)

254.3 The Committee believes that it would be unsound to allow the Bill to be interpreted as emphasising costs and benefits, at least in narrow financial terms, as the only matters of importance (or the major matters) to be addressed by departments or other authorities in devising subordinate legislation. It is important to ensure that these bodies take into account less tangible aspects of regulation.

254.4 In this regard, it was also significant that a number of those writing to or appearing before the Committee commented upon what they perceived as

an undue emphasis on costs rather than benefits, and a belief that "costs" referred to monetary matters rather than other less tangible costs (and benefits) or disadvantages (and advantages). Other views were expressed. For example a representative of the Department of Management and Budget stated that in his view intangibles were not ignored by the terms of the Schedule. Rather, there was an emphasis on benefits to the community, advantages to the community, and community interests - all of which in his view the Bill quite clearly considered should be taken into good account by departments or authorities in deciding whether or not to approach a problem by way of regulation, and in determining how best to draft subordinate legislation. The Committee's attention was drawn to paragraphs of the Schedule, including paragraph 2(e) "maximizing the aggregate net benefits to the community" and paragraph 2 (c) "maximize the net benefits to the community". (Transcript, 25 July 1984, at p.409.)

254.5 As the Committee is concerned that intangible benefits and advantages should be given equal consideration to those of a financial nature, despite the fact that there is mention in the Schedule of "advantages" and "benefits" to the community and the like, the Committee believes that it is necessary to make amendments to the terms of Schedule 2 to ensure that no department or authority can be under any misapprehension as to the import of the Bill. To this end, the Committee believes it is important to amend certain paragraphs, adding the concept of non-financial social and intangible costs and benefits, advantages and disadvantages.

254.6 The Committee also notes that it is inappropriate to refer to "costs or disadvantages which are disproportionate to the benefits to be achieved", as is done in sub-paragraph (b)(iv). The Centre of Policy Studies, Monash University, in a submission to the Committee stated :

> *[The] phrase, 'are disproportionate to' ... is objectionable in a silly way : a regulation with huge benefits and trivial costs would seem to fail the test of 1(b)(iv). More importantly, the phrase is imprecise*

and ... could be usefully replaced by the words 'are less than', so that regulations would be disallowed if they promise less benefit than cost."

(Written submission, 5 March 1984, at p.2.)

The Committee accedes to this view.

255 RECOMMENDATION 85

The Committee recommends that Schedule 2 should be amended to ensure that departments and authorities in proposing delegated legislation take into account tangible and intangible costs and benefits, advantages and disadvantages, and do not give undue emphasis to monetary costs. Those amendments should include a new paragraph AI stating :

A1 In this Schedule, wherever costs and benefits, advantages and disadvantages are referred to, social and economic costs and benefits, advantages and disadvantages, are required to be taken into account, and shall be given due consideration.

256 RECOMMENDATION 86

The Committee recommends that sub-paragraph 1(b)(iv) be amended to replace the words "are disproportionate to" with "less than".

257 RECOMMENDATION 87

Wherever "costs" and "disadvantages" are referred to, the provisions should refer equally to "benefits and "advantages". Consequently the Committee recommends that the following amendment* be made to the provisions of paragraph 1 :

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(b) ...

(iv) Do not involve costs or disadvantages which are less than the benefits or advantages sought to be achieved.

(c) Alternate means of achieving those objectives (whether wholly or substantially and whether by way of self regulation, ... or otherwise) shall be considered and an evaluation made of the benefits and advantages expected to arise from each such alternative as compared with the costs and disadvantages, both direct and indirect, tangible and intangible.

...

(e) (i) Where a proposed statutory rule is likely to impose any appreciable burden, disadvantage or cost, whether direct or indirect, tangible or intangible, upon any sector ...

258 RECOMMENDATION 88

In accordance with Recommendation 85 the Committee recommends that the following amendment* be made to the provisions of paragraph 2 :

...

(d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost or the greatest benefit to the community shall normally be chosen; and

...

*Amending words are underlined

259 **RECOMMENDATION 89**

In accordance with Recommendation 85 the Committee recommends that the following amendment* be made to the provisions of paragraph 3 :

A statutory rule shall :

...

(d) Adopt the means of achieving those objectives which appear likely to involve the least burden or the greatest advantage to the community;

...

260 Clause 8 : Schedule 2 Guidelines - Consultation. The Schedule refers to "consultation" in several of its paragraphs. In this regard, the Committee considers it is important that the Schedule should make it clear to makers of subordinate legislation that those who should be consulted, where appropriate, include the public, community groups, special interest groups, trades unions, and business interests. This should be explicitly stated in the Schedule.

261 **RECOMMENDATION 90**

The Committee recommends that Schedule 2 be amended to make clear the interests which should be consulted, where appropriate. To this end, a new paragraph A2 is to be inserted to provide :

A2 In this Schedule, wherever consultation is required such consultation should take place with the public, community groups, special interest groups, trades unions, and business

* Amending words are underlined.

interests where appropriate.

262 Clause 8 : Schedule 2 Guidelines - Language. Paragraph 3(f) of Schedule 2 refers to the need to express statutory rules in plain and unambiguous language, "in accordance with modern standards of draftsmanship applying in the State of Victoria". The Committee endorses the thrust of this paragraph, and notes that subsequent to the Committee's Report on the Interpretation Bill 1982 and recommendations contained therein, Parliamentary Counsel have been directed to draft statutes and subordinate legislation in non-sexist language. Consequently, the word "draftsmanship" should be revised.

263 **RECOMMENDATION 91**

In accordance with non-sexist principles of language, the Committee recommends that sub-paragraph (f) of paragraph (3) of Schedule 2 should be redrafted to provide :

A statutory rule shall :

...

(f) Be expressed plainly and unambiguously, consistently with the language of the enabling Act and in accordance with modern standards of drafting applying in the State of Victoria.

264 Clause 8 : Schedule 2 Guidelines - Legal Requirements of Statutory Rules. Paragraph 4 of Schedule 2 sets out the standards to which a statutory rule should legally conform. The Committee notes that, as with proposed sections 13(2) and 14(1) of the Bill , sub-paragraph (g) refers to not infringing "the rules of natural justice". In accordance with Recommendations 66 and 75 the Committee believes that the phrase to be used should be "inconsistent with principles of justice and fairness". (See also Cranston oral evidence, 30 March 1984, at p.99.) Additionally, sub-paragraph (h) is misplaced and in accordance with Recommendations 63 and 71 it should be replaced as sub-paragraph (ab).

265 RECOMMENDATION 92

The Committee recommends that sub-paragraph (g) of paragraph 4 of Schedule 2 be redrafted to read :

is inconsistent with principles of justice and fairness

266 RECOMMENDATION 93

The Committee recommends that sub-paragraph (h) of paragraph 4 of Schedule 2 be replaced as sub-paragraph (ab), so that the paragraph reads :

4 A statutory rule shall not :

(a) Exceed the powers conferred by the Act under which the rule purports to be made;

(ab) Without clear and express authority in the enabling Act -

(i) have any retrospective effect;

(ii) impose any tax or fee, or any fine, imprisonment or other penalty;

(iii) purport to shift the onus of proof to a person accused of an offence;

(iv) provide for any further delegation of powers delegated by the Act.

267 Clause 8 : Schedule 2 Guidelines - Alternatives to Regulation. Throughout Schedule 2 there is an emphasis on the need for government departments and instrumentalities to seek alternative means of dealing with problems arising where regulation is perceived to be required. For example, paragraph 1(c) provides :

> *Alternative means of achieving those objectives (whether wholly or substantially, and whether by way of self-regulation, voluntary codes of conduct or otherwise) shall be considered and an evaluation made of the benefits expected to arise from each such alternative as compared with the costs and disadvantages both direct and indirect.*

Paragraphs 2(b) and 2(d) respectively provide :

> *Regulatory action shall not normally be undertaken unless the potential benefits to the community from the proposed statutory rule outweigh the potential costs to the community; ...*
>
> *Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to the community shall normally be chosen; ...*

Paragraph 3 states :

> *A statutory rule shall :*
>
> ...
>
> *(d) Adopt the means of achieving those objectives which appear likely to involve the least burden on the community ;*
>
> *(e) Wherever appropriate set performance standards rather than prescribe detailed requirements as to the manner in which those standards shall be achieved;*
>
> ...

267.1 A number of comments on the emphasis on alternatives were received by the Committee. The Dandenong Valley Authority simply stated that this "could cause problems". The State Electricity Commission in its written submission commented :

> *The 'alternative means' to achieve objectives as provided in Schedule 2, paragraph 1(c) might commend themselves to the Legal and Constitutional Committee or the Department of Management and Budget. If the authority is persuaded to pursue the objectives by the alternative means rather than by statutory rule it might be challenged in court and the means found to be invalid or ultra vires.* (At p.2.)

Representatives of the Centre of Policy Studies, Monash University, also highlighted difficulties. (See Pincus, oral evidence, 2 April 1984, at p.133; Porter, oral evidence, 2 April 1984, at p.132.)

267.2 Dr. R. Cranston of the Faculty of Law, Australian National University, alluded to the issue, saying :

> *One of the matters referred to ... has to do with alternative means of achieving the objectives sought to be achieved. The notion is that attention will be given to self regulation or the voluntary code of conduct. Later on attention [is] given to whether performance standards are more desirable than detailed requirements. This general issue is a matter of legal policy ...*
>
> *I make the argument that ... much [will] depend on the circumstances ... [S]elf regulation has to be treated rather sceptically, although in some cases it can be justified but in many cases it is not effective. I also make an argument that performance standards [will] often ... be undesirable.*

(Oral evidence, 30 March 1983, at p. 109.)

Cranston put a particular case to the Committee in respect of the regulation of pollution :

> *The notion of a performance standard would be that a factory should not emit pollution beyond a certain measure. But it might be more effective in terms of achieving a particular result if detailed requirements are prescribed; if in fact that factory is obliged to instal a particular pollution preventer it might be easier in terms of the enforcement of that requirement in determining what the level of pollution is under a performance standard. A lot [will] depend on the circumstances. I do not think that one can make an a priori assumption that self regulation or voluntary codes are a good thing, or that performance standards are a good thing.* (At p. 109.)

267.3 In summary, on the question of alternatives to regulation Cranston concluded :

> *Certainly it is useful when regulations are made that those matters [of self regulation and performance standards] be addressed. One of the difficulties I have with the Bill is that there seems to be a predisposition in favour of deregulation, a predisposition towards self regulation, voluntary code and performance standards.* (At p. 109.)

267.4 The Director of Social Impacts also addressed the question of alternatives to regulation and the implications of an alternative approach for business, the community, and government. Saying that in her view regulation should basically be to the public benefit, and that the role of government is to protect the common good, the Director put forward various ways of achieving this end, "legislation being only one option available" :

> *[Government] can use legislation, but can also control activity by funding and by administrative guidelines, by incentives and*

disincentives and through the creation of a climate. ... A climate can be created in which desirable behaviour is reinforced and encouraged.

(Gorman, oral evidence, 13 April 1984, at pp.193-194.)

She gave as an example the Life : Be In It programme, which created a climate to make people more responsible for their own health : "The ... health trend is ... interesting ... to follow through, because it involves a tremendous amount of regulation and changes in public attitude ... It is a balance between ... these ... that the government takes that can be used [constructively]". (At p.194.)

267.5 The efficacy of self regulation or setting performance standards is dependent, ultimately, upon the attitude of business. Gorman spoke of three different levels of attitude held by organisations; that is, the distinction between the social obligation, social responsibility, and social responsiveness. She said :

The social obligation ... relates to an attitude of mind, which means that one relies on regulation and does nothing more and nothing less than the regulation says one has to do. When there is that state of mind, there needs to be, generally speaking, ... a [deal] of policing and perhaps some fines would need to be imposed.

Social responsibility is an advance on that, in that this is a moral recognition of the need to do something that is over and above social obligation. ... Social responsiveness is my view of the world as it might be some time in the future and, I hope, to which we are moving. (At p.194.)

267.6 Relating these attitudes to present development in Australian business, Gorman opined :

I do not know of too many organizations that are totally socially responsive. It presumes that people will be open in their dealings with the public and the government and their own stakeholders, shareholders, and so on, and that they will be looking into the future to see how they need to be responding to change.

Social obligation is adversarial; social responsibility is conciliatory; and social responsiveness is pro-active. 'Pro-active' is an expression ... that represents a forward looking approach to social change. (At pp.194-195.)

267.7 The example of occupational health and safety was raised as an illustration of the various approaches to the adoption of standards in line with the desire of government to ensure that companies embrace sufficiently high levels of concern to ensure that workers are not put at risk :

There have been rules and regulations related to occupational health and safety which have been in effect for many years in this country. They have proved almost impossible to police and, obviously, everybody is looking for other ways. One of the most potent reasons for organisations [to] look to comply with legislation to a greater extent than what is their obligation, and so leading to the adoption of socially responsible activity in this area is the cost of workers compensation. That appears to be the bottom line. Further, there is much discussion in the media about the cost of workers compensation and the issue of occupational health and safety. There has also been much comment about changing technology, which presents all sorts of different and new challenges in this area. (At p.195.)

It is a combination of these factors that may, in Gorman's view, lead to business going beyond the technical approach of merely adhering to legislatively set standards, and recognising their own responsibilities. She added, however, that generally there is a contrast between Australia and the United States of

America "because the question of social responsibility has hardly arisen in Australia, and yet there is a widespread debate and a vast amount of literature on the subject in the United States". (At p. 194.)

267.8 That a combination of factors may underlie business adherence to standards (or lack of them) is dealt with by Cranston in an article discussing legislative techniques for achieving goals. The basic mechanisms channelling corporate behaviour are "the market mechanism, the private law mechanism, and the public regulation mechanism" :

> *The three are of course interrelated. For example, government regulation confers private law rights, duties, privileges, and immunities through such processes as the granting to a corporation of a charter, a license, or a franchise.*

(Cranston, "Reform Through Legislation : The Dimension of Legislative Technique" (1978) 73 (No. 5) Northwestern University Law Review 873, at p. 879.)

267.9 Looking at each of these mechanisms in depth, of the market mechanism Cranston says :

> *By utilising the market mechanism, the state may seek to enhance competition on the assumption that it maximizes economic welfare. Advocates of this approach usually assume that it involves minimizing government interference in the market although they may concede that legal measures are necessary against fraud, restrictive trade practices, and monopoly power. However, using the market mechanism can also mean government as entrepreneur. State enterprises may be created to compete actively with private corporations.* (At p. 879.)

267.10 As for private law mechanisms, Cranston's view is that enhancing these mechanisms "involves not only changing civil law and procedure but also strengthening the political power of citizens in the hope that this will force businesses to modify their behaviour" :

> *To this end the state might confer special privileges, such as tax exemptions or immunity from certain civil suits, on workers or on environmental and consumer groups and might also create special agencies to represent their interests in government policy making. A related measure is for the state to promote self-regulation on the part of businesses. By threatening government regulation, the state might spur businesses to improve standards or adopt codes of practice relating to issues like labor relations, pollution, and consumer problems.* (At pp.879-880.)

267.11 Three major techniques can be identified as comprising government regulations, says Cranston : they are broad statutory standards, administrative regulation, and licensing. He continues :

> *The simplest form of government regulation is where legislation announces a standard of behaviour in broad terms and imposes penalties on any deviation from it. In some cases the standard is taken from private law, so that it is simply the remedial law that is changed. Administrative regulation overlaps with that involving broad statutory standards, but there is the difference that it operates preventively and is more selective in its field of application. With administrative regulation, businesses are specifically directed as to the nature of their products, practices, or processes, and are usually prohibited from acting if they do not attain certain detailed standards. An attempt may also be made to control conduct which, although innocent in itself, could lead to objectionable activity.* (At p.80.)

He outlines a third variation of public regulation as being "where businesses

responsible for particular products, practices, or processes are directly controlled, through general licensing, on the assumption that this will indirectly control their products, practices, or processes. A yet more detailed method of control is where businesses must obtain premarket approval for what they produce or the way they operate." (At p.880; see also Hart and Sacks, The Legal Process : Basic Problems in the Making and Application of Law, 1958; Hetherington, "Fact and Legal Theory : Shareholders, Managers, and Corporate Social Responsibility" (1969) 21 Stanford Law Review 248; Carson, "Symbolic and Instrumental Dimensions of Early Factory Legislation : A Case Study in the Social Origins of Criminal Law" in Crime, Criminology and Public Policy, Hood, editor, 1974.)

267.12 The Committee acknowledges the problems of self regulation and performance standards. It is easy to declare that businesses will adhere to adequate standards set by self regulation without recognising that there are many instances of failure to do so, or a failure to establish proper controls through self regulation. The Committee recognises the existence of cynicism in the public arena about the bona fides of some businesses which promote the view that self-regulation is without exception a "good thing" inevitably benefiting the community. The Committee is also aware that many professions which adopt the self regulation approach as being a sufficient - or only - way of dealing with inevitable problems of performance, suffer accordingly in the eyes of a public which does not readily believe that self-policing is sufficiently objective. (See for example publications on self regulation of the legal profession resulting from the New South Wales Law Reform Commission inquiry Second Report on the Legal Profession, "Complaints, Discipline and Professional Standards", 1982, Government Printer, Sydney; Discussion Paper ("Complaints, Discipline and Professional Standards - Part I"), 1979, Government Printer, Sydney; Background Paper - I (Complaints, Discipline and Professional Standards"); Background Paper - III ("Complaints, Discipline and Professional Standards"), 1979, Government Printer, Sydney; also note complaints about the standards set by the Press Council of Australia and the failure of complaints which others may think are well justified.)

267.13 The Committee recognises that the question of alternatives to regulation will not always be easy to answer. Departments and authorities may be faced with a situation where there are no alternatives to regulation; however in such a case, this should be stated clearly in the impact assessment - fanciful alternatives are not required to be "conjured up" according to the spirit of the proposed Act. It is also clear to the Committee that misgivings about the need to note possible alternatives may be overstating the issue. Many departments would, it must be assumed, consider various means of dealing with problems which might be dealt with by way of regulation. This would appear to be good administrative practice and good sense in departmental terms. Indeed, evidence before the Committee confirms that some departments, at least , do consider alternative ways of ensuring that objectives are met. For example, the Department of Agriculture does not always introduce regulations to deal with agricultural matters. A representative of the department stated that alternatives are considered in the normal course :

> *The department has resorted to codes of practice more often during the past five years than it did in the previous period. Codes of practice exist which relate to the protection of animals and which seek to advise farmers on the management of animals within the context of the Protection of Animals Act. The department will probably move more towards codes of practice in the dairy industry for hygiene where there are other ways of dealing with cases of either malpractice or poor hygiene; where something new comes in, the department seeks to deregulate and offer guidance through codes of practice.*

(Hore, oral evidence, 26 June 1984, at p.363.)

267.14 The Deputy Director-General of the Department of Agriculture was asked whether the department believes that "there will be cases where ... regulations [may be necessary] even though codes of practice exist". It was agreed that this is so. (At p.363.) The question was asked whether there has been any difference in having codes of practice versus regulations; has the

industry still worked along well and lived up to its standards, yet problems with contamination and ill health nevertheless arise? The Deputy Director replied :

> *The codes of practice related to the Protection of Animals Act have probably been extremely effective. They have no weight or legality as a regulation would; they are flexible and can be changed.*
>
> *The codes of practice represent a concensus between the farmer and the people in the community who have an interest in what happens in farming. They can be used in issues that relate to animal protection.*
>
> *The department has always found persuasion is better than the heavy hand in dealing with the industries and all interest groups. It has found that the codes of practice particularly in this area have been a reasonable guide, regulation might be the next step. People generally see the codes of practice as being more effective.*

(Hore, oral evidence, 26 June 1984, at p.363.)

267.15 In accepting that in some circumstances self regulatory codes of performance may be more effective, the Committee recognises that it would be foolish to assert that this would always be the case, and no department or authority did so. The Committee also recognises that there may be deep divisions within the community as to the efficacy of self-regulation or codes of performance as opposed to regulation. It is also clear that some reasons said to support the self regulation approach in fact do not do so. For example, it has been said that airlines would universally adopt safety procedures and checks of machinery without regulation, because in order to gain passengers and freight it is important that aeroplanes do not drop out of the sky. Such an occurrence would have such a negative effect on the particular airline, that it is in their interests to ensure that it never happens. This argument is dealt with in many recitations of failure on the part of various companies in the airline industry and in other industries to take a short term view; to take unwarranted risks;

and to disregard the rights of consumers in the pursuit of profits, which lead them to ignore the long term effect of loss of reputation through safety and other failures.

267.16 Nonetheless, the Committee recognises that adumbrating alternatives in an assessment of regulatory impact does not mean that the alternative should be chosen. Even if on paper an alternative to regulation appears to be less costly in monetary terms, the guidelines make it clear that intangibles and social and other non-monetary costs and benefits, advantages and disadvantages are required to be taken into account. Any impression that departments or authorities may have gained in reading the Bill or the guidelines that alternatives to regulation are the top priority is misplaced. The Committee strongly emphasises that the Bill is not, in its view, designed to eliminate regulation making by departments and authorities. Rather, it is designed to ensure that sensible, methodical steps are taken to ensure that, on balance, the introduction of particular regulations is justified in the contemporary context.

268 RECOMMENDATION 94

The Committee recommends that no provision need be included in the guidelines emphasising the need to deal in a common sense manner with any proposed alternatives to regulation, but that in accordance with the Report on the Interpretation Bill 1982 and section 35 of the Interpretation of Legislation Act 1984 it should be taken by departments and other authorities proposing regulations that they need not search exhaustively for alternatives, nor should they presume that self regulation and/or the setting of performance standards is inevitably preferable to regulation.

269 Clause 8 : Schedule 2 Guidelines - Publicity for Proposed Statutory Rules. Paragraph 5 of Schedule 2 provides :

Where a proposed statutory rule is likely to impose an appreciable burden, disadvantage or cost, whether direct or indirect, upon any sector of -

(a) industry or commerce;
(b) consumers;
(c) the public; or
(d) the State;

the permanent head or chairman of the department or statutory body proposing the statutory rule shall before it is submitted to the Governor in Council, seek reasonable publicity for the proposal and its implications in a newspaper or journal serving that sector.

269.1 The Committee questions the need for this provision. Proposed section 11 of the Bill deals with the issue of publicity, and the Committee in Recommendation 56 has given regard to the question of trade journals and community newsletters and the like. Furthermore, where a statutory rule would come within paragraph 5, it would be subject to proposed section 12 and would be covered by the provision for a regulatory impact statement to be publicised. The Committee therefore believes that this paragraph as it stands should be omitted from the Act.

269.2 However, should this recommendation not be accepted, the Committee notes that in accordance with its Report on the Interpretation Bill 1982, the stated policy of the present government, and paragraph 3(f) of Schedule 2, sub-paragraph (f) should be redrafted to conform with standards of non-sexist language. In this regard, "chairman" should be replaced by "chairperson".

270 RECOMMENDATION 95

The Committee recommends that paragraph 5 of Schedule 2 should be omitted from the Bill as being unnecessary.

271 RECOMMENDATION 96

If this recommendation is not endorsed by the Parliament, the Committee recommends that in accordance with the principle stated in the Report on the Interpretation Bill 1982 and with stated government policy following acceptance of that Report, the word "chairman" should be replaced by the title "chairperson".

272 Clause 8 : Schedule 2 Guidelines - Publicity After Consultation and Decision. There is, however, another reason for including a provision about publicity as to the making of statutory rules. This relates to the situation where an impact assessment has been undertaken, submissions have been received, and decisions have been made in accordance with that procedure. At that stage, the Committee believes it is important for a department or authority to alert those with an interest as to whether or not their submissions have been taken into account. This should occur prior to the statutory rule going to the Governor in Council.

272.1 This procedure would enable any group or individual continuing to believe that the statutory rule should not be made to alert their Member of Parliament to this. Thus a means would exist whereby a statutory rule might nevertheless be disallowed.

272.2 This could be effected by including a new paragraph 5 requiring publicity after all submissions have been considered and consultation has taken place as required under the guidelines.

273 **RECOMMENDATION 97**

The Committee recommends that a new paragraph 5 be inserted in the Subordinate Legislation (Deregulation) Bill providing :

5(a) *Where a regulatory impact statement has been prepared under Section 12 and a decision has been made that the statutory rule the subject of that regulatory impact statement should be made, the permanent head or chairperson of the department or statutory body making that determination shall, before it is submitted to the Governor in Council, publish that decision in the Government Gazette and a daily newspaper.*

(b) *Where a regulatory impact statement has been prepared under Section 12 and a decision has been made that the statutory rule the subject of that regulatory impact statement should not be made, or that an alternative means should be used to carry out the object as stated in the regulatory impact statement, the permanent head or chairperson of the department or statutory body making that determination shall, before it is submitted to the Governor in Council, publish that decision in the Government Gazette and a daily newspaper.*

Clause 8 - Schedule 3

274 Clause 8 : Schedule 3 - Provisions Applying to Regulatory Impact Statements. Schedule 3 provides :

A regulatory impact statement should include the following :

1 A statement of the objectives of the proposed statutory rule.

2 An identification of the different means by which the objectives of the statutory rule can be achieved.

3 An assessment of the costs and benefits of each alternative including resource allocation, administration and compliance costs and where the benefits cannot be assessed solely in monetary terms an identification of the methodology used to quantify the benefits.

4 A summary of any alternatives to the making of a statutory rule which have been considered and of the reasons why such alternatives are not appropriate.

275 Clause 8 : Schedule 3 - Placing of the Schedule. The Committee believes that this provision should not appear as Schedule 3, but as Schedule 1 to the proposed Act (if the existing Schedule 1 is omitted as proposed by Recommendation 78 or 1A if the existing Schedule 1 is retained). Schedule 2 in effect "fills out" the provisions of Schedule 3, in that it relates the types of matters that should be taken into account in putting forward subordinate legislation, and those matters which will necessarily have to be taken into account in drawing up a regulatory impact statement as outlined in Schedule 3. The Committee considers that it would be more comprehensible for departments or authorities to sight first the points to be included in a regulatory impact statement; then to proceed to the background guidelines for statutory rules.

276 **RECOMMENDATION 98**

The Committee recommends that Schedule 3 of the Bill become Schedule 1, as this will give those dealing with the proposed Act a more immediate understanding of the regulatory impact statement procedure.

277 Clause 8 : Schedule 3 - Costs and Benefits - Methodology. As for the substance of Schedule 3, the Committee reiterates the need to make it clear to departments and authorities (and to those receiving the publicity of statutory rule proposals) through publication of a regulatory impact statement, that costs and benefits to be taken into account include not only monetary costs but also social benefits, as well as tangible and intangible benefits and costs. There is an implication that they should, but the Committee believes there should be explicit reference to them. Accordingly, paragraph 3 of Schedule 3 should be redrafted to include these factors.

277.1 Additionally, the Committee is concerned with the possible implications of the requirement that a regulatory impact statement should include "an identification of the methodology used to quantify" benefits unassessable solely in monetary terms. Rather, the Committee believes that the statement should be required to contain a summary of the social costs and benefits.

278 **RECOMMENDATION 99**

The Committee recommends that paragraph 3 of Schedule 3 be redrafted to provide :

> A regulatory impact statement should include the following matters -
>
> ...

3 *An assessment of the monetary and social costs and benefits of each alternative including resource allocation, administration and compliance costs and where the benefits and costs cannot be assessed solely in monetary terms an outline of the social costs and benefits.*

279 Clause 8 : Schedule 3 - Mandatory Requirements. Schedule 3 states that a regulatory impact statement "should" include the various matters outlined. The Committee believes that the requirements should be mandatory, and to that end "should" ought to be replaced with "shall". (On this issue, see Report on the Interpretation Bill 1982, at pp.163-170 and Recommendation 42 in that Report.)

280 **RECOMMENDATION 100**

The Committee recommends that where the word "should" appears in Schedule 3 it be replaced by "shall" to read :

A regulatory impact statement shall include the following matters:

Clause 8 : Parliamentary Committees Act

281 Clause 8 : Parliamentary Committees Act Amendments. Sub-clause (2) of clause 8 provides that the Parliamentary Committees Act 1968 shall be amended as follows :

(a) *In section 4B for paragraph (b) there shall be substituted the following paragraph :*

'(b) such functions as are conferred on the Committee by the Subordinate Legislation Act 1962'; and

(b) *In section 4F for sub-section (5) there shall be substituted the following section :*

'(5) Notwithstanding anything to the contrary in this section, the Legal and Constitutional Committee shall give priority to the functions conferred on the Committee by section 14 of the Subordinate Legislation Act 1962'

282 Clause 8 : Priorities of the Legal and Constitutional Committee. The Committee observes that the introduction of the Subordinate Legislation (Deregulation) Bill 1983 will bring with it an increased role for the Committee in regard to the scrutiny of subordinate legislation and, in accordance with Recommendation 3, an increased role in regard to the scrutiny of Bills. In this respect, the Committee notes that the Scrutiny of Bills Committee and Subordinate Legislation Committee of the Australian Parliament are able to make use of the good offices of legislative experts on a part-time basis to give advice on statutory rules and Bills. The Committee emphasises that additional resources would be required to fulfill these tasks in Victoria.

282.1 The Committee observes in this regard that in evidence given to it in its inquiries into the provisions of the Bill, the Hon. A.J. Hunt, M.L.C. stated :

The Committee must have adequate resources ... it must have immediate availability to counsel, either Parliamentary counsel or some independent counsel, to assist it, but pre-sifting of information needs to be done by experts. One cannot expect individual Parliamentarians to have either the time or, as Ms. Coxsedge put it, the experience necessary to make judgment on every regulation, nor would it be reasonable to expect anyone on a cursory reading of one regulation to see all the perceivable [issues].

(Oral evidence, 22 February 1984, at pp13-14 and see also p.28.)

282.2 Similarly referring to the work of Committees generally in looking at subordinate legislation, in his book Delegated Legislation in Australia and New Zealand Pearce comments :

It is not really practicable to expect a member of a committee, even though [that member] be a lawyer, to undertake the time consuming task of carefully perusing the 400 or so pieces of delegated legislation that are produced each year, reading them into the existing legislation if they are amending instruments, checking them against their empowering Acts, ... This is something which should be done for the committee by a legal adviser who should be paid for [that] assistance.

(At pp.83 and 83-84 generally; see similar comments at p.35 (re Senate Standing Committee on Regulations and Ordinances); p.45 (re NSW Legislative Council Committee of Subordinate Legislation); pp.54-55 (re Queensland Committee of Subordinate Legislation); pp.57-58, 60 (South Australian Joint Committee on Subordinate Legislation); p.63 (West Australian Legislative Review and Advisory Committee); p.67 (Tasmanian Subordinate Legislation Committee); pp.75, 76 (Northern Territory Subordinate Legislation and Tabled Papers Committee).

282.3 In 1970 the Subordinate Legislation Committee's General Report commented upon the need for independent counsel to be engaged to advise the Committee on its work. (Parliamentary Paper D. No. 9, 18 March 1970, Melbourne, and see comments Pearce, Delegated Legislation, 1977, Sydney at pp.51-52.)

283 RECOMMENDATION 101

The Committee recommends that in having regard to the recommendation of this Report and the content of the Subordinate Legislation (Deregulation) Bill 1983 generally, the Parliament recognise the need for resources to be available to the Committee for the carrying out of its increased functions.

APPRECIATION

284 The Committee wishes to place on record its thanks to the Honourable A.J. Hunt, M.L.C. for making available a number of published articles, reports and other materials relating to United States and Canadian developments in regulatory reform.

285 The Committee also wishes to record its appreciation of the valuable work done and assistance received from the Committee staff.

Committee Room,
12 September 1984

APPENDIX I

Guidelines for Public Servants Responding to Parliamentary Committee Inquiries

APPENDIX I

PROVISION OF INFORMATION AND EVIDENCE TO VICTORIAN PARLIAMENTARY COMMITTEES

General

The Committee system can, in general terms, be seen as an extension of the Parliament as regards powers and privileges. It is one of the major means by which the Parliament carries out its examination of Government activity.

Committees have the power to send for persons, papers and records. In scrutinising the affairs of Government, this is done in the knowledge that Government officers and employees are called to give evidence of activities carried out under the direction and responsibility of the Minister. This accords with the basic Westminster principle that for activities of Government, the Minister answers to the Parliament; officers and employees through the Head of their Department or Agency, are responsible to the Minister. The exceptions to this principle are of course those bodies which have a statutory responsibility, deliberately given on account of their unique responsibilities, to report direct to the Parliament. These bodies are in Victoria the Auditor-General and the Ombudsman.

The Government sees the role of official witnesses as being to speak to any statement provided to the Committee to provide factual and background material pertinent to its inquiries, to give factual explanation of Government policy if required, and to assist the Committee's understanding of any issues involved.

Officers and employees should be aware of Section 95 of the Constitution Act and officers affected by it should also be aware of Public Service Regulation 97. Questions of executive privilege which could arise in certain circumstances are addressed later in these guidelines.

Officers and Employees Appearing in Private Capacity

Officers may not, except with the consent of their Minister or Permanent Head as appropriate, utilise or refer in their submissions to information gained in the course of official duties. Neither should they seek to attribute status to their submissions by virtue of their official position.

Senior officers, and Permanent Heads in particular, are expected to consult with their Minister in respect of any submissions they may wish to make as private individuals. Any opinions offered by officials should be expressly identified as their own.

Arrangements to Provide Evidence or to Appear Before a Committee

As a matter of practice, arrangements for an official to attend a Committee inquiry in an official capacity, or to provide material to it, are made through the relevant Minister.

The Permanent Head will advise the Minister on the official(s) most appropriate to provide the evidence sought by the Committee from the Department or Authority.

Any original official statement, and the provision or production of other documentary evidence, will be cleared with the Minister before it is submitted.

A request for more time to prepare evidence may be made to the

Committee by the Minister (or the Department acting on his or her behalf) if the notice is considered insufficient.

Conduct during Hearings

Officials should adopt a co-operative and frank approach and should submit pertinent and precise evidence. This should however be of a factual kind. On matters of Government business, officials appear before Parliamentary Committees as representatives of Ministers. They are not expected therefore to answer questions :

(a) seeking their personal views on Government policy;

(b) seeking evidence or identification of considerations leading to a Ministerial or Government decision or possible decision, unless those considerations have already been made public or the giving of evidence on them has been approved;

(c) which would require the witnesses to offer judgements on the policies or policy options of the Victorian or other State governments;

(d) on matters which could give rise to a claim of privilege (see below).

The Chairman may rule out of order questions falling within the above paragraph. If an official witness is directed to answer such a question, permission should be sought to defer an answer until the matter can be discussed with the Minister or Permanent Head. The witness should alternatively request that the answer to the particular question be reserved for submission in writing.

Official witnesses, when preparing for questioning, should be careful to consider the wider ramifications of any response or submission which

might bring it within an area of public controversy. This includes background material or information.

It is important that as questions are answered during hearings, witnesses should take care not to intrude into responsibilities of other departments and agencies. Where a question falls within the administration of another department or agency an official witness may request that it be directed to that department or agency or be deferred until that department or agency is consulted.

Parliamentary and Crown Privilege

Claims of Privilege by Ministers

Claims of privilege are a significant step and should only be made by a Minister (normally the responsible Minister), consulting the Premier. As far as practicable, the question whether a claim of privilege should be made should be decided before a hearing, so that a certificate by the Minister can be produced.

If an official witness, when giving evidence to a Committee, believes that circumstances have arisen to justify a claim of privilege he or she should request a postponement of evidence, or of the relevant part of that evidence, until the Minister can be consulted.

The guidance of the Minister should be sought in relation to any requests for the following categories of documents, which, subject to the Freedom of Information Act 1982 and guidelines issued pursuant to it, he may determine to withhold

(a) Cabinet documents and proceedings;
(b) Documents containing matters communicated by another Government;
(c) Internal working documents;
(d) Law enforcement documents;
(e) Documents affecting legal proceedings or subject to legal professional privilege;
(f) Documents affecting personal privacy;
(g) Documents relating to trade secrets or other matters of a business, commercial or financial nature;
(h) Documents containing material obtained in confidence;
(i) Documents affecting the economy and certain documents concerning operations of agencies;
(j) Certain documents arising out of companies and securities

legislation;

(k) Documents to which secrecy provisions of enactments apply.

Documents to which secrecy provisions of enactments apply would normally be exempt as one of the categories listed above. However, official witnesses should seek instructions from the Minister if unclear and consult with the originator of the document.

In relation to oral evidence, the same considerations apply as outlined above, as to information which, while not contained in a document, is of a secret nature.

Evidence in Camera

There may be occasions when a Minister would wish, on a balancing of the public interests involved, to raise with the Chairman the possibility of an official producing documents or giving oral evidence in camera and on the basis that information be not disclosed or published except with the Minister's consent.

There will be circumstances where official witnesses may have to request that their evidence, or part of that evidence, be heard in camera. These circumstances might include :

(a) Cases where, although a claim of privilege could be justified, the Minister considers that the balance of public interest lies in making information available to the Committee on the basis that it be heard in camera and not disclosed or published except with his consent.

(b) Cases where, while a claim of privilege may not be justified, there are other special considerations justifying the Committee being asked to take the evidence privately, e.g. where a private individual might unfairly be prejudiced by public disclosure, say of a conversation between that individual and the witness, or the witness

might consider that giving certain evidence in public could place him or her at a physical risk from other parties.

(c) Cases where similar or identical evidence has been previously given in camera to other hearings of the Committee or other Committees of the Parliament and has not been made public.

If official witnesses, when giving evidence to a Committee, believe that circumstances have arisen to justify a request that evidence be heard in camera, they should request the postponement of their evidence, or of the relevant part of that evidence, until their Minister can be consulted and approval obtained.

In the event of witnesses being asked by a Committee to give evidence "off the record", they should request a postponement until their Minister can be consulted.

Publication of Evidence

After perusing the record of their evidence official witnesses should suggest any necessary corrections, for incorporation or noting in the published record. Where these affect the substance of the evidence previously given, it may be necessary to seek the agreement of the Committee on the way in which the correction should be made, e.g. by tendering a subsequent statement.

If an official witness believes, after perusing the record, that some relevant evidence has been omitted, the leave of the Committee should be sought, after consultation with the Minister (or Permanent Head), to lodge a further statement supplementing the earlier evidence or to give further oral evidence.

An official witness has no authority to consent to the disclosure or publication of evidence given in camera. This is a matter for the Minister.

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Costs of Appearance Before Committees

Officers and employees duly authorised by the Government to attend before committees in an official capacity and to give evidence or present submissions, clearly do so as part of their duties and any costs involved will therefore be met by the Government.

APPENDIX II

Government Statement on Regulation Review and Revocation, Sent to the Legal and Constitutional Committee by the Department of the Premier and Cabinet in Response to its Request for Departmental Comments on the Subordinate Legislation (Deregulation) Bill 1983.

STATEMENT OF THE GOVERNMENT OF VICTORIA ON THE SUBORDINATE LEGISLATION (DEREGULATION) BILL 1983

1. The notion of "deregulation" (that is, wide-ranging elimination of governmental regulation and simplification of its processes) has gained increasing publicity and support in recent years. This has been based upon assertions of the concept's attractiveness as a means of facilitating innovation, research and development, reducing business costs, enhancing profitability and promoting economic development and growth. Attractive as it may seem in theory, the deregulation concept fails to take account of the complexity and diversity of modern, advanced economies and the multi-cultural societies that develop within and around those economies.

2. As a result of the complex, interwoven relationships that characterize contemporary communities, regulation of individual and corporate activity in both the public and private sectors as a means of achieving desired economic and social objectives has become an integral part of modern government. However, it is an aspect of the contemporary governmental process that is often misconstrued. In particular, while regulation is generally aimed at achieving positive community objectives, it is often thought of and described in terms which emphasise any restrictions and limitations it may entail. Moreover, some of those who are most vehement in their denunciation of particular regulatory processes are often at least acquiescent in - and, sometimes, fiercely protective of - those regulatory programs that exist to their advantage.

3. It is in this context that the notion of deregulation must be assessed. Deregulation does not - and cannot - connote eliminating governmental involvement from economic and social processes or structures. Rather, deregulation should be seen as an attempt to adjust or reform systems of regulation to maximise their effectiveness and efficiency and to minimize any costs associated with their implementation or operation.

4. The Government's commitment to ensuring that regulation of economic and social activity is effective and efficient was made clear in its pre-election policy statements. These included undertakings to streamline bureaucratic processes faced by private industry, abolish unnecessary regulations, eliminate inefficiencies in government and improve public access to information. In relation to the use of subordinate legislation as a means of government regulation, the Government's resolve to improve the regulatory process was affirmed by the Attorney-General in the second reading debate upon the Subordinate Legislation (Deregulation) Bill 1983, when he stated that the Government treated the issues

raised seriously and wished that they be dealt with on a bi-partisan basis.

5. The Government is determined to improve the processes whereby subordinate legislation is used as an instrument of regulatory policy and will introduce legislation to:

- repeal as of 31 July 1984 statutory rules made prior to the coming into operation (on 1 August 1962) of the Subordinate Legislation Act 1962;

- repeal as of 31 July 1988 statutory rules made during the period 1 August 1962 to 31 December 1972;

- repeal as of 31 July 1992 statutory rules made during the period 1 January 1973 to 31 December 1983;

- repeal statutory rules made after 31 December 1983, at 10 yearly intervals;

- extend the specific grounds upon which the Legal and Constitutional Committee may review statutory rules to include review of those matters addressed in the Information Checklist (see paragraph 9);

- extend the power of the Legal and Constitutional Committee to enable it to require the Minister responsible for the administration of a statutory rule to provide a completed Information Checklist to the Committee if the Committee considers that it requires that information.

6. The decision to provide for a phased repeal of existing and future statutory rules constitutes a major step in rationalising existing delegated legislation and providing a workable mechanism for its on-going review. The system will ensure that rules that are no longer required or are out-of-date will be eliminated regularly and on a continuing basis. Constraints imposed by competing policies and priorities inevitably limit the effectiveness of the existing review system - where Departments review their own rules on an ad hoc basis as resources permit - and render less likely consistent, on-going review of existing and future statutory rules. The proposal to provide for the regular repeal of statutory rules removes these difficulties.

7. To counter problems that might otherwise flow from the repeal of important statutory rules in circumstances where resource constraints or other factors have prevented the making of new, up-dated rules, the responsible Minister will be empowered to extend the date of repeal for a specified period not exceeding 12 months. The responsible Minister will also be empowered to exempt specific statutory rules from repeal where he is satisfied that the reasons for which the rules were made and the circumstances in which they were made continue to apply and that revocation would serve no

useful purpose. Exercise of either of these powers will be subject to notification in the Government Gazette and report to the Legal and Constitutional Committee. The Committee will be empowered to report to Parliament if it believes the powers of extension and exemption have been exercised improperly or incorrectly.

8. The decision to introduce an Information Checklist follows findings of the Regulation Review Unit of the former State Co-ordination Council. These indicated that the existing system of rule preparation and review varied according to the policies and resources of the regulating agency, lacked systematic and standardised guidelines, did not require consultation with interested parties and did not require explicit consideration of the costs and benefits of regulatory activity or of alternative approaches.

9. As the Committee is aware, a draft Information Checklist has been prepared and has been circulated amongst agencies and private sector bodies for comment. A copy of the draft Checklist is enclosed. The matters included within the Checklist address the matters identified as relevant by the Regulation Review Unit. Agencies contemplating and preparing new rules will be compelled to give specific consideration to such matters as the existence of alternatives to the proposed form of regulation, identities and interests of parties potentially affected by the proposed rules, the rules' likely costs and benefits and their interaction with existing legislative and administrative provisions or programs. Comments have been received upon the content and format of the draft Checklist. Those comments will be taken into account in the final draft of the Checklist.

10. Under its existing powers, the Legal and Constitutional Committee is able to review statutory rules and report to Parliament as it thinks desirable. This power will remain and it is proposed to enhance the Committee's role by widening of the specific matters it is entitled to take into account in reviewing rules to include those matters addressed in the Information Checklist. This will ensure that agencies' consideration of the matters included in the Checklist will, in appropriate cases, be subject to independent, external review.

11. Much of what the Government has decided to implement is reflected in the Opposition's Subordinate Legislation (Deregulation) Bill 1983. Nonetheless, there remain some significant differences between the two proposals. The Government does not believe there is any real need for legislative implementation of regulatory impact statements. The issues sought to be addressed by that process would be largely duplicative of those issues which will be considered in the context of the Information Checklist. The preparation, publication and analysis of regulatory impact statements would also impose significant resource and administrative burdens upon agencies. The Government does not believe that the benefits claimed to flow from the use

of regulatory impact statements would exceed the substantial costs involved in their implementation.

12. While the Government has decided to extend the specific grounds upon which statutory rules may be reviewed by the Legal and Constitutional Committee and to require agencies to submit completed Information Checklists when required by the Committee, it does not believe it is necessary to alter the Committee's existing powers in relation to the making of reports to Parliament or the effect of adverse reports. The Government accepts that in relation to review of rules the Committee has, and should have, the power to report to Parliament as it thinks desirable. However, it believes that it would be inappropriate to vest the Committee with what is in effect a power to suspend the operation of statutory rules.

Conclusion

13. The Government is committed to reviewing and reforming the regulatory process. One aspect of that review and reform concerns the making and use of subordinate legislation as an instrument of regulation. The Government's commitment in this respect is evidenced by the action which it has decided to take and which is outlined above. The Government believes that its forthcoming legislation will achieve a marked improvement in the regulatory process without imposing unwarranted burdens upon agencies or preventing them fulfilling their primary responsibilities.

ATTACHMENT A

DRAFT INFORMATION CHECKLIST

FOR DEPARTMENTS AND AGENCIES WHEN PREPARING STATUTORY RULES

Title of Statutory Rule:.....

1. Under what Act (or Acts) is the statutory rule made?

2. Which sections in the Act (or Acts) contain the power which is relied upon to make the statutory rule?

3. Have the procedural requirements for making the statutory rule been complied with?

4. Why is the statutory rule being made?

5. Is the statutory rule absolutely necessary?

6. How urgent is the statutory rule?

7. As the statutory rule must be published before it comes into force, is the timetable adequate?

8. (a) Are you satisfied that none of the provisions of the empowering Act (or Acts) is repeated in the statutory rule?

   (b) Are you satisfied that no administrative guideline is included in the statutory rule?

9. Are you satisfied that the terms used in the statutory rule are unambiguous?

10. If this is an amending statutory rule -

    (a) Does the statutory rule revoke existing rules (and amendments)?

    (b) (i) Are any saving or transitional provisions necessary?

        (ii) If so, which are they?

    (c) Is it more than five years since the principal rules were reconsolidated?

(d) If it is more than five years since the last consolidation, why are you not consolidating the rules now?

11. (a) Is the statutory rule intended to overlap or interact with any Federal law, other State law or any local government laws?

(b) If so, how?

12. What groups and interests will be affected?

13. What cost (if any) will there be to affected groups and interests?

14. What consultations have taken place with -

(a) Other departments?

(b) Groups or interests that will be affected?

15. Which Minister is responsible for administering the Act under which the statutory rule is made?

16. What will be the cost of administering the proposed statutory rule?

7 September, 1983.

APPENDIX III

A Standard form by which Regulations are made.

B Standard form by which Orders in Council are made.

C Standard form by which Proclamations are made.

"

Title of Act

Short Title of Regulations

At the Executive Council Chambers, Melbourne,
the [date] .....
PRESENT :
His Excellency the Governor of Victoria
[Names of Ministers present]

IN PURSUANCE of the powers conferred by the [Title of Act] and all other powers him thereunto enabling, His Excellency the Governor of the State of Victoria, by and with the advice of the Executive Council thereof, doth hereby make the following Regulations (that is to say) :

[Regulations]

And the Honourable [Name], Her Majesty's Minister for [Title] for the State of Victoria, shall give the necessary directions herein accordingly

[Name]
Clerk of the Executive Council"

The provisions of the Acts listed in footnote number 4 provide for regulations to be made by a statutory body or a Minister but the regulations are subject to the approval or consent of the Governor in Council. The regulations are made by the statutory body or the Minister and submitted to the Governor in Council for approval. Such regulations usually take the following form :

" Title of Act

Short Title of Regulations

IN PURSUANCE of the powers conferred by [enabling provisions of Act specified] the [Name of statutory body or Title of Minister] with the approval [or consent] of the Governor in Council, hereby makes the following Regulations (that is to say) :

[Regulations]

Approved [or consented to] by the Governor in Council.

[Date]

[Name]

Clerk of the Executive Council.

These Regulations were made by [Name of statutory body or Title of Minister] on [date]

[Seal or Signatures]".

APPENDIX IIIB

An Order in Council usually takes the following form :

" Title of Act

At the Executive Council Chamber, Melbourne,
the [date].....

PRESENT :

His Excellency the Governor of Victoria
[Names of Ministers present]

WHEREAS by [empowering Act] the Governor in Council may by order [specify power to be exercised]
Now therefore His Excellency the Governor of the State of Victoria, by and with the advice of the Executive Council, doth by this Order .....

And the Honourable [Name], Her Majesty's Minister for [Title] for the State of Victoria, shall give the necessary directions herein accordingly.",

APPENDIX IIIC

A proclamation usually takes the following form :

" **PROCLAMATION**

By His Excellency the Governor of the State of Victoria and its Dependencies in the Commonwealth of Australia &c., &c., &c.

I, the Governor of the State of Victoria, in the Commonwealth of Australia, [by and with the advice of the Executive Council of the said State,] pursuant to the provisions of [Enabling Act] doth hereby proclaim :

[matter proclaimed]

Given under my Hand and the Seal of the State of Victoria aforesaid, at Melbourne, this [date], and in the [year] of the reign of [Title and Name of Sovereign].

(L.S.) [Name of Governor]

By His Excellency's Command

[Name and Title of Minister of Crown]

GOD SAVE THE QUEEN [KING] ! ".

APPENDIX IV

Executive Order No. 12291.

(Promulgated by President Reagan
of the United States in 1981.)

Executive Order 12291 of February 17, 1981

Federal Regulation

46 F.R. 13193

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations, it is hereby ordered as follows:

Section 1. *Definitions.* For the purposes of this Order:

(a) "Regulation" or "rule" means an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the procedure or practice requirements of an agency, but does not include:

(1) Administrative actions governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code;

(2) Regulations issued with respect to a military or foreign affairs function of the United States; or

(3) Regulations related to agency organization, management, or personnel

(b) "Major rule" means any regulation that is likely to result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

(c) "Director" means the Director of the Office of Management and Budget.

(d) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), excluding those agencies specified in 44 U.S.C. 3502(10).

(e) "Task Force" means the Presidential Task Force on Regulatory Relief.

Sec. 2. *General Requirements.* In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, all agencies, to the extent permitted by law, shall adhere to the following requirements:

(a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;

(b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;

(c) Regulatory objectives shall be chosen to maximize the net benefits to society;

(d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and

(e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

Sec. 3. *Regulatory Impact Analysis and Review.*

(a) In order to implement Section 2 of this Order, each agency shall, in connection with every major rule, prepare, and to the extent permitted by law consider, a Regulatory Impact Analysis. Such Analyses may be combined with any Regulatory Flexibility Analyses performed under 5 U.S.C. 603 and 604.

(b) Each agency shall initially determine whether a rule it intends to propose or to issue is a major rule, *provided that,* the Director, subject to the direction of the Task Force, shall have authority, in accordance with Sections 1(b) and 2 of this Order, to prescribe criteria for making such determinations, to order a rule to be treated as a major rule, and to require any set of related rules to be considered together as a major rule.

(c) Except as provided in Section 8 of this Order, agencies shall prepare Regulatory Impact Analyses of major rules and transmit them, along with all notices of proposed rulemaking and all final rules, to the Director as follows:

(1) If no notice of proposed rulemaking is to be published for a proposed major rule that is not an emergency rule, the agency shall prepare only a final Regulatory Impact Analysis, which shall be transmitted, along with the proposed rule, to the Director at least 60 days prior to the publication of the major rule as a final rule;

(2) With respect to all other major rules, the agency shall prepare a preliminary Regulatory Impact Analysis, which shall be transmitted, along with a notice of proposed rulemaking, to the Director at least 60 days prior to the publication of a notice of proposed rulemaking, and a final Regulatory Impact Analysis, which shall be transmitted along with the final rule at least 30 days prior to the publication of the major rule as a final rule;

(3) For all rules other than major rules, agencies shall submit to the Director, at least 10 days prior to publication, every notice of proposed rulemaking and final rule.

(d) To permit each proposed major rule to be analyzed in light of the requirements stated in Section 2 of this Order, each preliminary and final Regulatory Impact Analysis shall contain the following information:

(1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;

(2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;

(3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;

(4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of this potential benefit and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted; and

(5) Unless covered by the description required under paragraph (4) of this subsection, an explanation of any legal reasons why the rule cannot be based on the requirements set forth in Section 2 of this Order.

(e) (1) The Director, subject to the direction of the Task Force, which shall resolve any issues raised under this Order or ensure that they are presented to the President, is authorized to review any preliminary or final Regulatory Impact Analysis, notice of proposed rulemaking, or final rule based on the requirements of this Order.

(2) The Director shall be deemed to have concluded review unless the Director advises an agency to the contrary under subsection (f) of this Section:

(A) Within 60 days of a submission under subsection (c)(1) or a submission of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under subsection (c)(2);

(B) Within 30 days of the submission of a final Regulatory Impact Analysis and a final rule under subsection (c)(2); and

(C) Within 10 days of the submission of a notice of proposed rulemaking or final rule under subsection (c)(3).

(f) (1) Upon the request of the Director, an agency shall consult with the Director concerning the review of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under this Order, and shall, subject to Section 8(a)(2) of this Order, refrain from publishing its preliminary Regulatory Impact Analysis or notice of proposed rulemaking until such review is concluded.

(2) Upon receiving notice that the Director intends to submit views with respect to any final Regulatory Impact Analysis or final rule, the agency shall, subject to Section 8(a)(2) of this Order, refrain from publishing its final Regulatory Impact Analysis or final rule until the agency has responded to the Director's views, and incorporated those views and the agency's response in the rulemaking file.

(3) Nothing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law.

(g) For every rule for which an agency publishes a notice of proposed rulemaking, the agency shall include in its notice:

(1) A brief statement setting forth the agency's initial determination whether the proposed rule is a major rule, together with the reasons underlying that determination; and

(2) For each proposed major rule, a brief summary of the agency's preliminary Regulatory Impact Analysis.

(h) Agencies shall make their preliminary and final Regulatory Impact Analyses available to the public.

(i) Agencies shall initiate reviews of currently effective rules in accordance with the purposes of this Order, and perform Regulatory Impact Analyses of currently effective major rules. The Director, subject to the direction of the Task Force, may designate currently effective rules for review in accordance with this Order, and establish schedules for reviews and Analyses under this Order.

Sec. 4. *Regulatory Review.* Before approving any final major rule, each agency shall:

(a) Make a determination that the regulation is clearly within the authority delegated by law and consistent with congressional intent, and include in the Federal Register at the time of promulgation a memorandum of law supporting that determination.

(b) Make a determination that the factual conclusions upon which the rule is based have substantial support in the agency record, viewed as a whole, with full attention to public comments in general and the comments of persons directly affected by the rule in particular.

Sec. 5. *Regulatory Agendas.*

(a) Each agency shall publish, in October and April of each year, an agenda of proposed regulations that the agency has issued or expects to issue, and currently effective rules that are under agency review pursuant to this Order. These agendas may be incorporated with the agendas published under 5 U.S.C. 602, and must contain at the minimum:

(1) A summary of the nature of each major rule being considered, the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any major rule for which the agency has issued a notice of proposed rulemaking;

(2) The name and telephone number of a knowledgeable agency official for each item on the agenda; and

(3) A list of existing regulations to be reviewed under the terms of this Order, and a brief discussion of each such regulation.

(b) The Director, subject to the direction of the Task Force, may, to the extent permitted by law:

(1) Require agencies to provide additional information in an agenda; and

(2) Require publication of the agenda in any form.

Sec. 6. *The Task Force and Office of Management and Budget.*

(a) To the extent permitted by law, the Director shall have authority, subject to the direction of the Task Force, to:

(1) Designate any proposed or existing rule as a major rule in accordance with Section 1(b) of this Order;

(2) Prepare and promulgate uniform standards for the identification of major rules and the development of Regulatory Impact Analyses;

(3) Require an agency to obtain and evaluate, in connection with a regulation, any additional relevant data from any appropriate source;

(4) Waive the requirements of Sections 3, 4, or 7 of this Order with respect to any proposed or existing major rule;

(5) Identify duplicative, overlapping and conflicting rules, existing or proposed, and existing or proposed rules that are inconsistent with the policies underlying statutes governing agencies other than the issuing agency or with the purposes of this Order, and, in each such case, require appropriate interagency consultation to minimize or eliminate such duplication, overlap, or conflict;

(6) Develop procedures for estimating the annual benefits and costs of agency regulations, on both an aggregate and economic or industrial sector basis, for purposes of compiling a regulatory budget;

(7) In consultation with interested agencies, prepare for consideration by the President recommendations for changes in the agencies' statutes; and

(8) Monitor agency compliance with the requirements of this Order and advise the President with respect to such compliance.

(b) The Director, subject to the direction of the Task Force, is authorized to establish procedures for the performance of all functions vested in the Director by this Order. The Director shall take appropriate steps to coordinate the implementation of the analysis, transmittal, review, and clearance provisions of this Order with the authorities and requirements provided for or imposed upon the Director and agencies under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and the Paperwork Reduction Plan Act of 1980, 44 U.S.C. 3501 *et seq.*

Sec. 7. *Pending Regulations.*

(a) To the extent necessary to permit reconsideration in accordance with this Order, agencies shall, except as provided in Section 8 of this Order, suspend or postpone the effective dates of all major rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective, excluding:

(1) Major rules that cannot legally be postponed or suspended;

(2) Major rules that, for good cause, ought to become effective as final rules without reconsideration. Agencies shall prepare, in accordance with Section 3 of this Order, a final Regulatory Impact Analysis for each major rule that they suspend or postpone.

(b) Agencies shall report to the Director no later than 15 days prior to the effective date of any rule that the agency has promulgated in final form as of the date of this Order, and that has not yet become effective, and that will not be reconsidered under subsection (a) of this Section:

(1) That the rule is excepted from reconsideration under subsection (a), including a brief statement of the legal or other reasons for that determination; or

(2) That the rule is not a major rule.

(c) The Director, subject to the direction of the Task Force, is authorized, to the extent permitted by law, to:

(1) Require reconsideration, in accordance with this Order, of any major rule that an agency has issued in final form as of the date of this Order and that has not become effective; and

(2) Designate a rule that an agency has issued in final form as of the date of this Order and that has not yet become effective as a major rule in accordance with Section 1(b) of this Order.

(d) Agencies may, in accordance with the Administrative Procedure Act and other applicable statutes, permit major rules that they have issued in final form as of the date of this Order, and that have not yet become effective, to

take effect as interim rules while they are being reconsidered in accordance with this Order, *provided that*, agencies shall report to the Director, no later than 15 days before any such rule is proposed to take effect as an interim rule, that the rule should appropriately take effect as an interim rule while the rule is under reconsideration.

(e) Except as provided in Section 8 of this Order, agencies shall, to the extent permitted by law, refrain from promulgating as a final rule any proposed major rule that has been published or issued as of the date of this Order until a final Regulatory Impact Analysis, in accordance with Section 3 of this Order, has been prepared for the proposed major rule.

(f) Agencies shall report to the Director, no later than 30 days prior to promulgating as a final rule any proposed rule that the agency has published or issued as of the date of this Order and that has not been considered under the terms of this Order:

(1) That the rule cannot legally be considered in accordance with this Order, together with a brief explanation of the legal reasons barring such consideration; or

(2) That the rule is not a major rule, in which case the agency shall submit to the Director a copy of the proposed rule.

(g) The Director, subject to the direction of the Task Force, is authorized, to the extent permitted by law, to:

(1) Require consideration, in accordance with this Order, of any proposed major rule that the agency has published or issued as of the date of this Order; and

(2) Designate a proposed rule that an agency has published or issued as of the date of this Order, as a major rule in accordance with Section 1(b) of this Order.

(h) The Director shall be deemed to have determined that an agency's report to the Director under subsections (b), (d), or (f) of this Section is consistent with the purposes of this Order, unless the Director advises the agency to the contrary:

(1) Within 15 days of its report, in the case of any report under subsections (b) or (d); or

(2) Within 30 days of its report, in the case of any report under subsection (f).

(i) This Section does not supersede the President's Memorandum of January 29, 1981, entitled "Postponement of Pending Regulations", which shall remain in effect until March 30, 1981.

(j) In complying with this Section, agencies shall comply with all applicable provisions of the Administrative Procedure Act, and with any other procedural requirements made applicable to the agencies by other statutes.

Sec. 8. *Exemptions.*

(a) The procedures prescribed by this Order shall not apply to:

(1) Any regulation that responds to an emergency situation, *provided that*, any such regulation shall be reported to the Director as soon as is practicable, the agency shall publish in the Federal Register a statement of the reasons why it is impracticable for the agency to follow the procedures of this Order with respect to such a rule, and the agency shall prepare and transmit as soon as is practicable a Regulatory Impact Analysis of any such major rule; and

(2) Any regulation for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute or by judicial order, *provided that*, any such regulation shall be reported to the Director together with a brief explanation of the conflict, the agency shall publish in the Federal Register a statement of the reasons why it is impracticable for the agency to follow the procedures of this Order with respect to such a rule, and the agency, in consultation with the Director, shall adhere to the requirements of this Order to the extent permitted by statutory or judicial deadlines.

(b) The Director, subject to the direction of the Task Force, may, in accordance with the purposes of this Order, exempt any class or category of regulations from any or all requirements of this Order.

Sec. 9. *Judicial Review.* This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. The determinations made by agencies under Section 4 of this Order, and any Regulatory Impact Analyses for any rule, shall be made part of the whole record of agency action in connection with the rule.

Sec. 10. *Revocations.* Executive Orders No. 12044[4], as amended, and No. 12174[5] are revoked.

Ronald Reagan

THE WHITE HOUSE,
February 17, 1981.

4. 5 U.S.C.A. § 553 nt.

5. 5 U.S.C.A. § 552 nt.

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EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

FRIDAY 2 JULY 1982

34 JOINT INVESTIGATORY COMMITTEES - The Honourable W.A. Landeryou moved, by leave, That, contingent upon the enactment and coming into operation, this Session, of legislation to establish Joint Investigatory Committees:

* * * * * * * *

(b) The Honourables Joan Coxsedge, J.H. Kennan, N.B. Reid and Haddon Storey be members of the Legal and Constitutional Committee;

* * * * * * * *

Question - put and resolved in the affirmative.

WEDNESDAY 30 MARCH 1983

7 LEGAL AND CONSTITUTIONAL COMMITTEE - The Honourable W.A. Landeryou moved, by leave, That the Honourable B.W. Mier be a member of the Legal and Constitutional Committee.

Question - put and resolved in the affirmative.

TUESDAY 13 SEPTEMBER 1983

4 LEGAL AND CONSTITUTIONAL COMMITTEE - The Honourable Evan Walker moved, by leave, That the Honourable J.H. Kennan be discharged from attendance upon the Legal and Constitutional Committee.

Question - put and resolved in the affirmative.

WEDNESDAY 12 OCTOBER 1983

2 LEGAL AND CONSTITUTIONAL COMMITTEE - The Honourable Evan Walker moved, by leave, that the Honourable W.A. Landeryou be appointed a member of the Legal and Constitutional Committee.

Question - put and resolved in the affirmative.

EXTRACTED FROM THE VOTES AND PROCEEDINGS OF THE LEGISLATIVE ASSEMBLY

THURSDAY 1 JULY 1982

36 COMMITTEE APPOINTMENTS - motion made, by leave, and question -

That, contingent upon the coming into operation of the Parliamentary Committees (Joint Investigatory Committees) Act 1982 -

* * * * * * *

(b) Mr. Ebery. Mr. Evans (Ballarat North), Mr. Gray, Mr. Hill (Warrandyte), Mr. Hockley, Mr. Jasper, Mr. King* and Mr. Whiting be appointed members of the Legal and Constitutional Committee.

(Mr. Fordham) - put and agreed to.

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* Mr. King deceased on 28 January 1983. Succeeded on Committee by the Honourable B.W. Mier.

LEGAL AND CONSTITUTIONAL COMMITTEE

COMMITTEE MEMBERS

Mr. M.S. Whiting, M.P. (Chairman)

Mr. D.J.F. Gray, M.P. (Deputy Chairman)

The Honourable Joan Coxsedge, M.L.C.

Mr. W.T. Ebery, M.P.

Mr. A.T. Evans, M.P.

Mr. L.J. Hill, M.P.

Mr. G.S. Hockley, M.P.

Mr. K.S. Jasper, M.P.

The Honourable W.A. Landeryou, M.L.C.

The Honourable B.W. Mier, M.L.C.

The Honourable N.B. Reid, M.L.C.

The Honourable Haddon Storey, Q.C., M.L.C.

COMMITTEE STAFF

Dr. Jocelynne A. Scutt, Director of Research

Mr. Marcus Bromley, Secretary

Mrs. Lisa O'Bryan, Research Officer

Mr. Mark Sneddon, Research Officer

Ms. Christine Skourletos, Research Assistant

Mrs. Marion Caraher, Stenographer

Mrs. Jennifer Hutchinson, Stenographer

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SUMMARY OF FINDINGS

EFFECTING A SPEEDY TRIAL - VICTORIA

57.3 FINDING 1

The United States' experience has been that the speedy trial system soes not work well where no clear indication is given in speedy trial legislation of the grounds on which extensions will be granted. This creates difficulties for judges, counsel and accused persons. In the light of this, the Committee believes it is preferable for the Crimes Act to give some indication of Parliament's intention as to the operation of the provisions. The inclusion in the legislation of the requirement that an extension be granted "in exceptional circumstances only" would go some way toward clarification. It may later prove necessary to set out grounds more specifically; on the other hand it may be that the judiciary builds up acceptable guidelines defining "exceptional circumstances" without more specific legislation.

57.4 FINDING 2

In view of the currently prevailing atmosphere of good will and co-operation in relation to the problems of delays in the courts and efforts made by the government and others to overcome them, the Committee is reluctant to suggest that any need exists for sanctions against recalcitrant lawyers. However, the Committee is aware that although the greater majority of counsel may be working well with the new provisions, the occasion may arise when those standards are not met. In the event of such a failure it may be that the Attorney-General sees a need for the introduction of clear provisions in the Crimes Act outlining sanctions. The Committee believes that, at that time, it would be fruitful for the Attorney-General to consult with the Director of Public Prosecutions, representatives of the Law Institute and of the Bar Council on the sanctions to be devised. The United States federal Speedy Trial Act

provides a guide. (See paras 53-53.5.) Where deliberate or unjustifiable delay is found, the United States Act provides for:

* fines against prosecution or defence counsel up to 25 per cent of their fees

* censure

* suspension from practice

* dismissal from practice

57.5 FINDING 3

The Committee's research shows that in American jurisdictions the consequences of failure to meet time limits varies, in relation to the trial itself. The American Bar Association ("the ABA") standards seek to define and protect the interests of both the public and defendants in speedy hearings. In the defendant's interests, the ABA considers outright dismissal should be the consequences of failure to provide a speedy trial upon an application by the accused or defence counsel prior to discharge or plea of guilty. If no such application is made, the presumption would arise that the accused has waived the right to a speedy trial. (Standard 4.1.) The ABA expressed the view that if, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offence "the right to speedy trial is largely meaningless". (Commentary, Standard 4.1, see para 51.1.) The federal Speedy Trial Act provides for dismissal of the prosecution with or without prejudice.* Most state jurisdictions with speedy trial legislation provide for dismissal with prejudice if time limits are violated. (See para 54.2.)

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* Although Misner believes that dismissal with prejudice will be seen by the courts as the "usual" remedy. ("Legislatively Mandated Speedy Trials" (1984) 8 Criminal Law Journal 17 at p24.)

57.6 The Committee would prefer the recently introducted time limits in Victoria to operate to the optimum degree without the need for considering such provisions. However, should they prove necessary, the Committee is of the view that where a judge finds that there are no exceptional circumstances to warrant an extension of time and the responsibility for the delay lies with the prosecution, discharge "with prejudice" ought to be an available option. Such discharge would operate to bar any future prosecution for the offence or any lesser offence pertaining to the same set of facts. If such a provision were incorporated, then where an accused is discharged, the judge should be required to enter into the court record a clear statement of the exceptional circumstances leading to discharge. Where the defence is responsible for the delay different considerations apply. In the Committee's view it could be appropriate in these cases to impose sanctions on the defendant's legal representatives without prejudice to the defendant.

57.7 FINDING 4

The Committee welcomes the steps taken by the government in accordance with the Preliminary Report on Delays in Courts to ensure that additional staff and resources are provided to the Director of Public Prosecutions to assist the work necessary to cut down delays. The Committee believes that close oversight should be maintained to ensure that staff and resources are sufficient to enable time limits to be met, and continue to be met.

57.8 FINDING 5

The Committee's overseas research shows that speedy trial legislation has been introduced with good intentions, and those intentions have been met in the initial period or for some time following that introduction. However, it is clear that if the new system is left without constant attention being paid to its operations, delays may gradually begin to rebuild, despite sincere efforts to conform to time frames. The Committee therefore believes it is essential to closely monitor the speedy trial process to ensure that it is working well. This

should be done under the auspices of the Law Department in arrangement with the Law Foundation of Victoria or on a consultancy basis.

57.9 FINDING 6

The Committee believes that consideration should be given to the imposition of time limits at other stages in the criminal justice process as exists in the United States. Recognising that there may be dangers in having time frames for some parts of the process but not others (the delays in the regulated parts of the process may be reduced while delays increase in other parts) the monitoring of time limits as advised at Finding 5 may indicate the need to introduce time limits at other stages.

57.10 FINDING 7

The Committee believes that consideration should be given to enacting a legislative provision to control the use of adjournments in criminal cases. The ABA Advisory Committee's Standard 1.3 provides a guide. (See para 51.11.) The provision should require the showing of good cause before an adjournment is granted and limit adjournments to only such time as is considered necessary.

PRE-TRIAL PROCEDURE - VICTORIA

89.1 FINDING 8

The Committee believes a mechanism for monitoring the operation of pre-trial hearings should be established under the auspices of the Law Department. The Committee believes that with oversight by the Law Department, this might be appropriately done by suitable consultants under an arrangement with the Law Foundation. After the procedure has been in operation for a sufficient time, the questions listed on the reverse side of the form of Application for Pre-Trial Hearing which the judge may ask of counsel or the accused (if unrepresented)

should be reviewed. Further questions may be necessary. The involvement of the judiciary and the profession should be sought on this matter.

89.2 FINDING 9

The Committee believes that prosecutors, defence counsel and judges should consult regularly with the Attorney-General to ascertain and promote the effectiveness of the pre-trial procedure. The Committee notes that the Attorney-General has reconvened the Flanagan Committee*, whose work was referred to in the Preliminary Report on Delays in Courts. (At p300ff and generally.) That Committee has been expanded to include a member of the community and senior representatives of the following:

* Criminal Bar Associatiom
* Criminal Trial Listing Directorate
* Director of Public Prosecutions
* Law Department
* Law Institute of Victoria
* Legal Aid Commission
* Prosecutors for the Queen
* Victoria Police Force

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* The Committee appointed by the Attorney-General to examine Methods of Improving the Disposal Rate of Criminal Cases in the County Court at Melbourne

(Ministerial Statement 19 September 1984 at p5.)

The Legal and Constitutional Committee considers it is the appropriate body to coordinate such consultations.

89.3 FINDING 10

The Committee commends the Leo Cussen Institute for Continuing Legal Education for offering an extensive practical training programme in, amongst other areas, criminal law and procedure, and notes that it now includes pre-trial procedure. The Committee believes it is important that pre-trial procedure continue as part of the programme and that lawyers should avail themselves of it. The Committee also commends the University of Melbourne Law School and the Monash University Law School for their undertaking to extend continuing legal education in the criminal law area, including the administration of criminal justice. (Ministerial Statement 19 September 1984 at pp3-4.) The Committee emphasises the place that pre-trial and trial procedure should take in the university law school curriculum and suggests that pre-trial hearings be included in moot court programmes.

89.4 FINDING 11

In relation to pre-trial disclosure and discovery, the Committee in its Preliminary Report noted the view of a number of witnesses, including the Director of Public Prosecutions and Professor Ian Scott, on the pros and cons of extending these procedures. The views were diverse. (Preliminary Report "Pre-Trial Hearings" at p148ff.) In its Overseas Report the Committee has noted some of the reforms relating to disclosure overseas, particularly in Canada. The Committee appreciates that the conditions and circumstances in overseas jurisdictions do not necessarily pertain in Victoria. Nonetheless it believes that there is benefit to be gained from looking at this issue more closely in the Victorian context. The Committee has determined to publish an Issues Paper on Preliminary Hearings (see further Finding 13) and pre-trial disclosure and discovery will be discussed as a part of that Paper.

PRELIMINARY INQUIRIES/COMMITTAL PROCEEDINGS - VICTORIA

90.1 FINDING 12

The Committee believes that some overseas experience may be applicable to the Victorian situation. However to gauge Victorian opinion on this, the Committee will produce an Issues Paper on Preliminary Hearings to distribute to the judiciary and magistracy, the legal profession and the community generally, canvassing various matters including:

* the place of preliminary hearings in the Victorian criminal justice system

* arguments for and against the retention, in their present form, of preliminary hearings

* proposals put forward in Australia for possible changes to preliminary hearings

* a precis of variations suggested in overseas jurisdictions as outlined more fully in this Report

* possible options for consideration, including the retention of preliminary hearings in their present form, optional hearings, greater provision for pre-trial disclosure and discovery and other options

The Issues Paper will be distributed to promote discussion on the role of preliminary hearings in the Victorian criminal justice system. Following the hearing of witnesses on the matters raised in the Issues Paper and analysis of written submissions received, the Committee will publish a Report on Preliminary Hearings with recommendations.

COURT MANAGEMENT - VICTORIA

101.1 FINDING 13

The Committee notes that in his Ministerial Statement in response to the Committee's Preliminary Report the Attorney-General indicated that Recommendation 15 "had been strongly supported particularly in light of public discussions in recent times on the jury system". The Director of Public Prosecutions has forwarded to the Chief Judge of the County Court and the Chief Justice of the Supreme Court a draft pamphlet which is under consideration by the judges. The Attorney-General concluded by saying that it is "expected that a pamphlet will be issued by the end of [1984]". (19 September 1984 at p6.) The Committee is gratified that this should be so, and looks forward to the participation of jurors being enhanced when they are supplied with information about their role, by means of the pamphlet.

101.2 FINDING 14

The Committee considers that some of the overseas initiatives may be incorporated into the Victorian system to enhance court management in terms of judge-control, jury participation, and witness and victim participation in the criminal justice system. The matters of particular concern to the Committee include:

* the powers of the judiciary and magistracy in controlling management of the courtroom, and whether powers should be clarified or increased

* means of ensuring that juries are able to participate fully in accordance with their role in the court as arbiters of the facts

* for witnessses, means of ensuring that they are able to participate adequately in the court process

* for victims of crime, means of ensuring that they are enabled to play an appropriate and meaningful role in the system, rather than being disaffected by their experiences in the criminal courts

The Committee calls for written submissions from interested parties, taking into account the matters raised in this Overseas Report and in the Preliminary Report on Delays in Courts. In the course of its inquiries in this area the Committee intends also to call witnesses to put their views on current court management issues, to assess the relevance of overseas proposals contained in this Report, and on the introduction of schemes which may improve court management in the areas outlined, and thus serve to alleviate delays in the criminal courts of Victoria.

GUILTY PLEAS - VICTORIA

FINDING 15

120.1 In light of the overseas material contained in this Report, in conjunction with its researches as outlined in the Preliminary Report on Delays in Courts, the Committee believes that the work of the Flanagan Committee should, as far as possible, concentrate upon the area of pleas. To build upon the Flanagan Committee's earlier reports (see Appendix VA and VB, Preliminary Report on Delays in Courts, 1984, Government Printer, Melbourne at p300ff) and the Preliminary Report of the Legal and Constitutional Committee, to ensure that the system outlined by the Flanagan Committee is working efficiently and effectively without detriment to the rights of accused persons, the Committee believes that a system of monitoring guilty pleas should be established. Monitoring should take place under the aegis of the Flanagan Committee, but having regard to the resources of that Committee, the Legal and Constitutional Committee considers it would be appropriate for the Attorney-General to make available resources to enable consultants (those working in the legal, sociological or criminological areas) to carry out the monitoring.

SPECIAL SITTINGS - VICTORIA

127.1 FINDING 16

The Committee believes that at this time it would be inappropriate for the government to commence a programme of special court sittings, at least on any major scale. The government should, however, keep in mind the possibility of night courts. A pilot project might be a useful means of gauging the feasibility of such special sittings, however before any such project was begun, the Committee believes public opinion should be canvassed to determine whether people would actually avail themselves of the special sittings, and that a cost-benefit analysis should precede any such venture. (In this regard, the Committee emphasises that the issues relating to cost-benefit analysis raised in the Report on the Subordinate Legislation (Deregulation) Bill 1983 1984 Government Printer Melbourne at p177ff should be taken into account.) Additionally, if such a move is contemplated the experience relating to night courts in New South Wales and Tasmania should be taken into account as well as the overseas findings outlined in this report.

SPECIAL COURTS - VICTORIA

128.1 FINDING 17

The Committee understands that the Government intends to establish a Central Criminal Court. Over recent years, successive administrations have pursued a policy of closing small magistrates' courts and establishing regional court complexes. The Committee recommends that the results of these changes be monitored before any action is taken in relation to any creation of specialised courts. If specialised courts on any expanded basis were to be contemplated in future, the Committee believes that the regular rotation of personnel should be made a part of the system.

FIXED PENALTY NOTICES - VICTORIA

129.1 FINDING 18

In view of the overseas experience of successful transfer of a wide variety of minor offences from judicial proceedings to administrative procedures, the Committee recommends that:

* a systematic assessment should be undertaken of all offences currently dealt with administratively in Victoria

* an analysis be done of other offences which might suitably be dealt with administratively

An increase in the number of offences dealt with in this manner would decrease the flow of minor matters through the court system, thus enabling court time to be spent on more serious offences. The Committee emphasises, however, that considerations of justice and fairness must be kept in mind whenever any changes are planned which remove the usual judicial safeguards of individuals' rights.

DIVERSION - VICTORIA

136.1 FINDING 19

In the Committee's view, without further investigation it is not appropriate to recommend any major introduction of diversionary programmes along the lines of those discussed in jurisdictions overseas. This is not to say that the Committee rejects all diversionary schemes. The diversionary schemes currently operating in Victoria, and some of those developed overseas, may well have a positive effect or positive potential.

Where diversionary schemes are operating in or are contemplated for Victoria, the Committee believes that provision should be made for judicial oversight,

perhaps by way of regular reporting to a judge or judges of the types of cases being referred to diversion. Additionally, regular reports on the operation of diversionary schemes, illustrated by non-identifying case histories, should be made to the Parliament by the responsible Minister. The Committee believes that this would give Members of Parliament a more considered opportunity to determine whether or not diversionary schemes are operating effectively and fairly.

CONCILIATION - VICTORIA

137.1 FINDING 20

The Committee understands that processes of conciliation in disputes have been the subject of discussion by the Legal Aid Commission and the Law Foundation Civil Justice Project. The Committee supports the continuation of this discussion and looks forward to receiving further information about possible proposals from those bodies.

REPORT

The Legal and Constitutional Committee appointed pursuant to the provisions of the Parliamentary Committees Act 1968 (No. 7727) has the honour to report as follows:

TERMS OF REFERENCE

1 On 21 September 1982 the Committee was directed by His Excellency the Governor in Council:

> *To investigate, ascertain and make recommendations for the reduction of delays in the hearings of cases in all jurisdictions of the Supreme Court of Victoria, the County Court of Victoria and the Workers Compensation Board of Victoria, and Magistrates Courts and the Coroner's and Children's Courts, including investigation of:*
>
> *(a) the nature and extent of the delays in each jurisdiction;*
>
> *(b) the existing system of judicial administration in Victoria;*
>
> *(c) whether any and if so what changes need to be made to procedure and procedural law in each jurisdiction to reduce delay;*
>
> *(d) whether any and if so what changes ought to be made to the substantive law to reduce delays in each jurisdiction;*

(e) *whether any and if so what changes are desirable in judicial administration in Victoria;*

(f) *the role of the legal profession in the reduction of delays in courts;*

(g) *whether the staffing and other facilities of the courts need expansion in order to reduce delays;*

(h) *any other matter pertaining to delays in courts.*

2 In accordance with the Terms of Reference, the Committee presents its Report on Overseas Court Delays and Remedies, being the second report of the Committee on delays in courts.

3 The Committee's Approach

In its Preliminary Report on Delays in Courts the Committee outlined the criminal justice system in Victoria, from the point of police investigation through to disposition by courts, referring in detail to :

* the police role
* the role of the Forensic Science Laboratory
* the role of the Office of the Director of Public Prosecutions/Criminal Law Branch of the Law Department
* the role of Prosecutors for the Queen/Crown Prosecutors
* the role of the Criminal Listing Directorate
* the role of the courts generally
* the role of the Magistrates' Court
* the role of the Coroner's Court
* the role of the County Court
* the role of the Supreme Court

The Report provides an overview of the system, taking into account evidence given by witnesses coming before the Committee from each of the above areas; information and written submissions given by experts working within the system; and measures taken by the Attorney-General to ameliorate existing delays in the criminal courts of Victoria, and in the criminal justice system generally in this State.

3.1 In the Preliminary Report the Committee pinpointed areas of particular concern and put forward a number of preliminary recommendations designed for implementation immediately or as soon as possible. The Committee notes that those recommendations have been supported by the Attorney-General. (Ministerial Statement 19 September 1984.)

3.2 In the Preliminary Report the Committee identified a number of areas for further research and study. In accordance with this, the Committee considers it important to look at developments overseas (principally in the United Kingdom, the United States of America, and Canada). To this end it determined that this Report on Overseas Court Delays and Remedies should provide an overview.

4 Aim of Overseas Report. The aim of this Report is to canvass problems of delay in overseas jurisdictions; to determine the means by which such jurisdictions have sought to overcome delays in the courts; and to assess the efficacy of reforms and methods as they may apply to Victoria. These assessments may result in a finding that the causes of delay overseas are different from those in Victoria and therefore that some of the remedies employed are not readily or usefully transferrable into the Victorian system. In these cases the tendency to rely on the experience in jurisdictions such as the United Kingdom and the United States may be inappropriate. On the other hand, some experiences overseas may be similar to those in Victoria and the effectiveness of remedies introduced overseas may therefore provide great assistance to planners in Victoria.

4.1 This Report also aims to provide information to which the Committee may refer when making firm recommendations in future reports. Both the Preliminary Report on Delays in Courts and the Report on Overseas Court Delays and Remedies will be distributed widely. It is hoped that they will promote discussion and elicit views which will be relayed to the Committee so that future reports can benefit from information and expert and informed opinion from the Victorian community.

PART I

ADVERSE CONSEQUENCES OF DELAYS IN COURTS

5 Introduction. The expeditious "processing" of criminal charges is generally agreed to be highly desirable for the wellbeing of a society. It has been suggested however, that this concensus "may have contributed to a general belief that criminal courts are not afflicted with a problem of delay". (Banfield and Anderson "Continuances in the Cook County Criminal Courts" (1967-68) 35 Chicago University Law Review 259 at p260.)

6 United States' Concern. The operation of the criminal justice system attracted a great deal of attention in America in the 1920s. Interest in the operation of criminal courts revived in America in the 1960s. A great deal of attention had been given to the consequences of delay in civil litigation in the preceding decades. There had been, amongst other initiatives, a Conference under the auspices of the United States Attorney-General on "Court Congestion and Delay in Litigation" in 1956 but it was not until ten years later that the President's Commission on Crime in the District of Columbia reported the excessive delays at all levels of the criminal justice system.

6.1 In America the National Center for State Courts undertook a major research and demonstration project on trial court delay with assistance from the Law Enforcement Assistance Administration. As a preliminary stage a review of the literature on delays in courts was produced in 1978 (Church and others Pretrial Delay: A Review and Bibliography 1978 National Center for State Courts Williamsburg Virginia) which covered both criminal and civil delays. There the comment was made that, while it is axiomatic to most court reformers that court delay is an unmitigated evil that must be eliminated, few actually document the consequences of delay. (At p11.) A representative piece on criminal court delay is quoted :

Congestion and delays in courts throughout the country threaten to strangle our systems of justice. For, as delays increase, the innocent who cannot afford to make bail suffer longer in jail, the guilty who are released pose greater threats to society, and the deterrent value of speedy justice is lost. The resulting pressures to dispose of cases more and more quickly lead to still other wrongs: less and less attention is given to each case, greater reliance is placed on the disposition of cases through 'plea bargaining' and the likelihood of injustice increases.

J.B. Jennings Evaluation of the Manhattan Criminal Courts Master Calendar Project; Phase 1: Feb 1 - June 30 1971 (1972 Rand Corporation New York piii.)

6.2 The authors of Pretrial Delay: A Review and Bibliography criticise the simplistic nature of such comments. While delay may harm some litigants, it surely benefits others. They point out that there are important SOCIAL costs of delay in criminal courts but these have not been identified, described and assessed systematically. There are also adverse consequences which affect the individuals involved - the accused, the victims and the witnesses.

A brief examination of the alleged adverse consequences of delay will be made here in order to identify the types and extent of problems perceived to have resulted from criminal court delay in jurisdictions outside Victoria.

6.3 While a society may suffer when civil courts are not able to entertain promptly the disputes between its citizens, criminal court delay can have greater social costs. Excessive time to dispose of criminal cases is said to hinder all purposes of the penal law: deterrence, societal protection, even rehabilitation. Delay is also said to contribute to prison crowding and riots, to increased rates in failure to appear and finally to a lack of citizen respect for the 'image of justice in the eyes of the community'. (Church and others 1978 at p15.)

6.4 Unfortunately, some of the social costs alleged above are supported by no more than impressions gained by individuals (although they have often been well placed to gain such impressions of the system - being judges or court administrators, for example). Empirical studies of some of the asserted social costs have been undertaken but results are generally not conclusive - the problems or adverse consequences are indicated but generally speaking the actual contribution of delay is impossible to gauge in relation to the many other factors at work.

6.5 The adverse consequences of delay discussed in Pretrial Delay: A Review and Bibliography and other writings include:

* deterioration of evidence
* gaol overcrowding
* prison riots
* prolonged anxiety for victims of crime
* prolonged anxiety for persons accused of crime
* the undermining of the deterrent effect of the criminal justice system
* leniency in sentencing
* greater reliance on disposition by plea bargaining
* inconvenience to witnesses
* higher incidence of absconding by persons on bail
* erosion of citizen respect for criminal justice system
* diminished likelihood of offender rehabilitation

7 Deterioration of Evidence. For the claim that delay leads to a "deterioration" of evidence and therefore a weakening of the prosecution case there is conflicting evidence. The deterioration of the prosecution case is considered here as it so frequently appears in the literature in catalogues of "social costs". The problem of the deterioration of the defence case is not as frequently examined in the literature. While that problem has been noted, it does appear to have been generally assumed that the deterioration of evidence

has a more damaging effect on the prosecution since it has to bear the burden of proof. "Observers insist that 'staleness' is far more likely to injure the prosecution, which is responsible for the production of most witnesses and has the burden of proving guilt beyond a reasonable doubt". (Banfield and Anderson "Continuances in Cook County Criminal Courts" at p262.)

7.1 In the District of Columbia a study based on the premise that delay caused witnesses to suffer memory loss to the point that the prosecution was not worth pursuing found that the percentage rates of conviction did not change with the age of cases. The conclusion drawn was that the problem of fading memory might not be as serious as generally believed. (Johnston Court Statistical Data Collections: A Study of Overseas Developments at p48.)

7.2 Other studies have found, however, that with the passage of time the prosecution evidence is harder to marshall - witnesses moved away, died, or simply began to forget. Consequently, the prosecution felt increasingly contrained to enter into plea negotiation or, finally, to dismiss the charge. (Pretrial Delay at p13 fn 8.) The prosecution is faced with the choice of either proceeding with a case weakened by the passage of time and running the risk of an acquittal as a result of its (by then) inadequate evidence (and wasting court time), or entering into a plea negotiation to avoid a futile court exercise and accepting a plea to a charge less serious than the charge it believed to be warranted. Obviously neither alternative is desirable. Justice requires disposition of the case while the evidence and witnesses' memories are fresh.

8 Case Outcome. The allegation that the outcome of a case is affected by the length of time (delay) taken to reach trial is related to the "deterioration of evidence" claim. The claim is that convictions which should be obtained are lost - some of the offenders against the laws for the protection of society escape conviction by winning a war of attrition.

8.1 Banfield and Anderson found that there was an inverse relationship between number of court appearances and convictions:

> *The most salient relationship between number of court appearances and convictions is that, with few exceptions, the conviction rate decreases as case length increases.* (At p287.)

Martin Levin, however, found that his data did not conclusively show that there was less likelihood of conviction in the cases which took longer than average from charge to disposition. ("Delay in Five Criminal Courts" (1975) Journal of Legal Studies 83 at p91.)

8.2 The effect, if any, of delay on case outcome has not been conclusively demonstrated by any major study. (Pretrial Delay p17.) The PROMIS Research Project on case processing time in the District of Columbia concluded that "elapsed time" had an "apparently negligible impact ... upon felony conviction rates". (Institute for Law and Social Research An Analysis of Case Processing Time in the District of Columbia not dated Washington DC at p4.)

8.3 No matter what the lost conviction rate is, there is no doubt that some of the participants in the system (for example police prosecutors) believe that delay does affect case outcome. This perception will have some effect on their work and their attitude towards the system. Banfield and Anderson go so far as to say that "the impressions upon the operators of a system are often as important as the actual operation of a system ..." ("Continuances in Cook County Criminal Courts" at p287.)

9 Gaol Overcrowding. It is pointed out in Pretrial Delay that delay in the criminal justice system "affects the jails in a direct and demonstrable way". (At p16.) There are three factors upon which the jail population is logically dependent: "the arrest rate, the pretrial release date, and the length of time required for jailed defendants to reach disposition. If the arrest rate and pretrial release rate remain constant, changes in disposition time will

necessarily have a direct effect on jail population". (See Thomas Bail Reform in America 1976 Berkeley.)

9.1 The incarceration of unconvicted persons (that is those awaiting trial) creates many problems, which overseas have reached giant proportions. In America in 1971 it was estimated that 50 per cent of the gaol population was comprised of people held on remand - that is unconvicted prisoners awaiting trial. ("The Shame of the Prisons" TIME 18 January 1971 at p48.) In New York alone, the number of persons in custody awaiting trial on sentence increased from a daily average in 1980 of 7,500 to 10,000 in the latter part of 1983. While the numbers on remand in England and Wales are not nearly as high, there has been a noticeable rise: from 4,800 in 1976 to 7,200 in 1982. ((1984) 148 Justice of the Peace p66.) The dramatic increases in the remand population in America's gaols have been attributed to some extent to the introduction over the last ten years in almost all States of "mandatory sentencing legislation" (that is laws under which conviction of certain crimes necessarily attracts a gaol sentence).

9.2 A comparison can be drawn between the American figures and the figures in New South Wales. In their study of bail in New South Wales Armstrong and Neumann reproduced figures from the NSW Department of Corrective Services Report (1971-72 Sect iv at p96) on prison population:

New South Wales Prison Population; Receptions not under Sentence 1966-1971

	1966	1967	1968	1969	1970	1971
Awaiting Trial	916	744	1236	1089	6296*	9957*
On remand	4273	4704	5371	5025	—	—
Total	5189	5448	6607	6114	6296	9957
Percentage of Total	31.1	33.0	40.0	38.8	38.9	46.0

* "Awaiting trial" and "On remand" are combined for 1970 and 1971.

NB "Awaiting trial" means those in jail serving sentences on other charges.

Armstrong and Neumann listed and discussed a number of the consequences of pre-trial custody. They made the following comments:

> *The clogging of prison with unconvicted people is clearly undesirable. The lack of an adequate classification system may introduce unconvicted prisoners to the company of experienced criminals. Further ... it results in overcrowded gaols and high costs, particularly as processing such prisoners probably consumes a disproportionate share of administrative time and effort.* ("Bail in NSW" (1975-76) 1 University of New South Wales Law Journal 298 at p303.)

10 Lack of Separate/Adequate Facilities for Persons on Remand. One of the problems mentioned above by Armstrong and Neumann (the introduction of unconvicted prisoners to the company of experienced criminals) is another aspect of the problem of gaol overcrowding. To prevent unconvicted persons from being thrown together with convicted persons, when the numbers of both are increasing, places great demands on existing facilities. A survey of Commonwealth countries in 1980 found that:

> *It is the exception rather than the rule for there to be special, separate facilities for holding pre-trial detainees. Usually, people remanded in custody spend the period before trial in a local jail or its equivalent alongside those serving short prison sentences.* (Osborne Delay in the Administration of Criminal Justice : Commonwealth Developments and Experience 1980 Commonwealth Secretariat London at p7.)

10.1 The problem of unconvicted persons being thrown together with convicted prisoners - often "experienced criminals" - is a very serious one in America. Katz, Litwin and Bamberger have said "Often there is no distinction made in [the country or city] jails between the accused and the convicted ... These jails frequently permit those charged with minor offenses to associate

with those accused or already convicted of serious crimes. Often the youthful offender is thrown in with older, more experienced criminals". (Justice is the Crime : Pretrial Delay in Felony Cases 1972 Cleveland Ohio at p56.)

10.2 The Canadian Committee on Corrections reported in 1969 that some provinces had a separate jail system for those awaiting trial whereas in others the one institution served both functions. Osborne summarised the findings:

> *Overall, many of the provincial institutions used to house those awaiting trial were old and poorly equipped. Sanitation and living conditions were primitive; segregation difficult to maintain, and the security provisions, designed to meet the requirements of the most difficult inmates, had to apply to all.*

(Delay in the Administration of Criminal Justice p8 drawing on the Report of the Canadian Committee of Corrections Towards Unity: Criminal Justice and Corrections 1969 Ottawa at pp101 and 288.)

11 Prolonged Anxiety for Victims of Crime. The authors of Pretrial Delay note that:

> *[D]elay and postponement at trial have been hypothesized to have a very real effect on victims and on witnesses called to testify in court.* (At p 16 referring to Katz and others Justice is the Crime at pp53-54 Banfield and Anderson "Continuances in Cook County Criminal Courts" at pp260-263.)

Organisations such as the Victims of Crime Assistance League (VOCAL) have taken up this problem in Australia in recent times.

12 Prolonged Anxiety for Persons Accused of Crime. As is pointed out in Pretrial Delay "The effect of delay upon defendants varies considerably with pretrial custody status". (At p12.) In other words, the effect of delay upon defendants varies considerably depending upon whether they are on bail and therefore still in the community, or held in gaol on remand. In America a large proportion of defendants are prevented from being granted bail simply because they cannot raise the money required. Katz, Litwin and Bamberger in Justice is the Crime reported the TIME finding that "Of the estimated 52 per cent of people who are in jail but not convicted, 80 per cent qualify for bail but cannot meet the cash requirement for release." ("The Shame of the Prisons" TIME 18 January 1971 at p48 cited Katz at p52, fn50.)

12.1 Thomas points out the disparity between different American states as regards bail practice. Only 16 per cent of defendants charged with felony in Minneapolis are released on bail pending their trial whereas in Boston 66 percent are granted bail. At that time those cities represented the lowest and highest rates of pretrial custody respectively and the median city held 36 per cent on remand. (Bail Reform in America at p111.) When translated into time spent in remand another example of disparity is revealed: 13 days on average are spent in remand in Boston, 134 days in Denver; the median being 56 days (At p111.) The qualification to be borne in mind is that this period on remand is often taken into account in fixing the sentences for the larger number of these defendants who are eventually found guilty (Church and others Pretrial Delay p13 fn 7) but for the rest who are acquitted the days on remand represented lost days of freedom which will never be regained. Months and even years can be lost on remand.

12.2 Katz, Litwin and Bamberger describe the experience of several mistreated defendants on remand (some of whom were later acquitted):

> *Unless [a] defendant is exceptionally adept at self-defense his experience could parallel that of Michael Tait in the Orleans Parish Prison in New Orleans ... Last September, Tait, a twentyone-year*

-old pre-law student at the University of Maryland, was remanded to the Parish Prison on charges of carrying a concealed weapon. Like more than one million American offenders, he was unable to post bail of $500. Tait was placed in a dormitory-style confinement with thirty to forty other inmates who were accused of everything from minor offences to armed robbery and murder. Having been warned by a guard to avoid any fights, Tait reluctantly obeyed a cellmate's order to take a shower. When he emerged, he discovered his clothes had been taken; and when he got to his bunk he was given a severe beating. That was it for the first night. For the next nine nights Tait later reported he was forced to submit to sexual acts by other inmates. At his trial he was fined $50 and released. (Justice is the Crime : Pretrial Delay in Felony Cases at p57.)

12.3 One of the devastating effects of pretrial custody is the demoralisation of those incarcerated. Friedland in Canada found a significant number of persons who pleaded guilty only after one or more remands. Although it is not the only possible explanation for this change in plea, the accused may have desired to have the case disposed of to avoid further remands and delays. (Detention Before Trial 1965 Toronto p89.) A more recent New Zealand study has confirmed that this pattern exists. (NZ Department of Justice Study of Preliminary Hearing Procedure before Committal for Trial 1978 Wellington p12.) "The vast majority of those who change their plea may indeed be guilty, but the possibility exists that those who have a valid defence or who are innocent may also react to the demoralizing effects of prolonged detention in this way." (Osborne Delay in the Administration of Criminal Justice at p12.)

12.4 The report on court delay in British Commonwealth countries goes on to mention several studies which have purported to show that pretrial detention has adverse effects on the outcome of a trial. (For example, Friedland Detention Before Trial 1965; King Bail or Custody 1973 London; Home Office Research Unit Time Spent Awaiting Trial 1960 London and Koza

and Doob "The Relationship of Pre-trial Custody to the Outcome of the Trial" (1974-75) 17 Criminal Law Quarterly 391.)

12.5 There is of course another qualification to be borne in mind when examining pretrial custody rates and subsequent imprisonment rates:

> *The apparent correlation between pretrial status and sentence may, ... be a result of the fact that the justice or magistrate, in granting bail, takes into consideration very similar factors to those which will be taken into account in the sentencing decision. Because other factors, such as the accused's offence history and general demeanour at the court hearing, may have an effect on the sentence decision, there can be no strict correspondence between custody status and trial outcome.* (Osborne Delay in the Administration of Criminal Justice at p12.)

12.6 Other adverse consequences of delay for persons accused of crime are the wearing down of the (albeit rare) defence witness and deterioration of defence evidence. Also, the longer a person has a criminal charge hanging over him or her the more likely is the person's employer to discover that fact and the risk of the person losing or being suspended from a job increases. The loss or suspension of employment has far reaching consequences for the accused and the accused's family.

13 The Undermining of the Deterrent Effect of the Criminal Justice System. On the alleged diminution of deterrence, the authors of Pretrial Delay could find "little evidence" and concluded that the "alleged contribution of delay to diminished deterrence is usually based on the implied assumption that delay produces inappropriate leniency". (Church and others Pretrial Delay at p15.) This is perhaps an oversimplification.

13.1 Katz, Litwin and Bamberger in discussing deterrence as one of the philosophies behind incarceration said:

> *For people to be deterred by the way society treats offenders, punishment must follow swiftly upon the wrongful act and the apprehension of the wrongdoer. Instead the public is treated to the spectacle of persons charged with crimes remaining free for extended periods before the case is even called for trial.* (Justice is the Crime at p53.)

14 Leniency in Sentencing. Levin in Urban Politics and the Criminal Courts notes that the claim is often made that criminal court delays lead to more lenient sentences. This it is alleged is the result of the judges' perception that the individual offender involved (especially if held in custody prior to trial) has already been punished to a greater or lesser extent. (Urban Politics and the Criminal Courts 1977 Chicago at p193.)

Levin proceeds to examine the claim and produces evidence from his study of five courts to refute it.

> *If long delay were associated with leniency, one would expect that the dispositions in courts with long delays would be lenient and those in courts with short delay severe. But in fact the opposite was true in the five courts studied. In the two courts with generally lenient dispositions, Pittsburgh and the Chicago preliminary hearing court ... there was no evidence that long delay was associated with leniency. In the Chicago court there was in fact short delay. In Pittsburgh there was long delay, but there is no evidence to indicate that either conviction or sentencing decisions were affected by the delay in an individual case or by the court's overall pattern of delay ... there seems to be persuasive evidence ... that other factors were in fact associated with this leniency: caseload pressure, the judges' view that many of the cases were of low gravity, and most importantly, the judges' fundamental attitudes concerning*

sentencing and dispositions, which tended to be pragmatic ... based on extra legal standards such as those of the group in which the offence occurred, and oriented toward the defendants' needs rather than towards punishment or deterrence ...

There was short delay in the Minneapolis district court, and dispositions and sentences were severe. But factors other than delay seem to be associated most with this severity, especially the judges' basic attitudes: their greater concern for the needs of society than for the defendant ... Moreover, comparison of type of sentence and amount of delay indicates that the cases with the longest delay received the most severe sentences. But here again, as seems to be true in the other courts, factors related to delay were highly interrelated with the rest of the court process, and delay was not the most influential factor associated with severity. (At pp193-5.)

14.2 Levin points out however that "leniency does in fact seem to be a 'cost' of reducing large caseload pressure" and is able to support this contention with data from several courts:

The pressure of the large potential caseloads of the District of Columbia district court and the Chicago criminal division led to a screening out of a great deal of their caseload, the judges in these courts seemed to have felt much less pressure to dismiss and acquit cases and there were severe conviction rates in both courts. (At p197.)

15 Greater Reliance on Disposition by Plea Bargaining. The allegation is frequently made that pressure of caseload and backlog forces prosecutors to resort to a plea bargaining process in order to help dispose of cases. Different attitudes to plea bargaining exist in every jurisdiction but the critics agree that it is undesirable because the decisions that would in the normal course of a trial

be made by a judge are made by non-judicial officers.

> *In the absence of any immediate effective solution to this problem (of mounting backlogs) the courts and their personnel have come to depend to an increasing extent on the guilty plea to keep cases moving through the criminal justice system ... Guilty pleas are an established part of the administration of justice; they take significantly less time to process as there is no time-consuming fact-finding or jury deliberation.* (Osborne Delay in the Administration of Criminal Justice at p14.)

15.1 In some quarters the facilitation and institutionalisation of plea negotiation is propounded as a remedy for court delay. This will be examined in more detail later in this Report in the section on remedies but it is worth noting here in the context of the adverse consequences of delay that as the problem of delay becomes greater and more publicised, accused persons too become aware of the pressures on courts and prosecutors and in certain situations accused persons, sensing that "time is on their side", will not immediately plead guilty where the plea might otherwise have been entered. Awareness of delay on the part of the accused leads to their expectation of some form of plea bargaining and, when so minded, to their protracting the process.

> *It is somewhat ironic that plea bargaining may be eroding the time advantage of guilty pleas as defendants hold out until the last moment before pleading guilty in the hope of getting a better 'deal'...* (Ferguson and Roberts "Plea Bargaining: Directions for Reform" (1974) 52 Canadian Bar Review 497 at pp552-3 quoted by Osborne Delay in the Administration of Criminal Justice p21 fn43.)

15.2 The fact remains that a majority of criminal convictions are reached by way of a guilty plea. About 90 per cent of all convictions in American state courts were the result of guilty pleas according to the

President's Commission on Law Enforcement and Administration of Justice. (Task Force Report : The Courts 1967 Government Printing Office Washington DC at p9.) In England the proportion of defendants pleading guilty in the Crown Court is approximately 60 per cent according to the Judicial Statistics (1975) compiled by the Lord Chancellor's Department. "The highest percentage of guilty pleas, averaging over 70 per cent, is found in the Midlands and North East of England and the lowest, at 40 per cent, in London. These marked regional differences await explanation". (Baldwin and McConville "Conviction by Consent : A Study of Plea Bargaining and Inducements to Plead Guilty in England" (1978) 7 Anglo-American Law Review 271 at p271 fn2.) "Recent studies in Canada indicate that accused persons plead guilty in about 70 per cent of all criminal cases". (See Hogarth Sentencing as a Human Process 1971 p270; Canadian Civil Liberties Education Trust Due Process Safeguards and Canadian Criminal Justice 1971 at p39; Report of the Canadian Committee on Corrections 1969 at p134.)

15.3 But not all guilty pleas are arrived at in the same way. A distinction must be drawn between the confession, obtained immediately or soon after apprehension, and the guilty plea. It was well described as follows:

> *A confession, surrounded by various protections, requires knowledge of a factual situation; the guilty plea, however, implies a sophisticated knowledge of law in relation to the facts, which a defendant, even one guided by his counsel, often does not have. If the inducement is substantial, an accused faced with weeks or months until trial, may give up a valid defence, or plead guilty when his guilt is questionable. The longer the delay, the more attractive the guilty plea becomes.* (South Australia Criminal Law and Penal Methods Reform Committee at p119 fn10.)

15.4 On the other hand there is the allegation that plea bargaining results in "lost convictions" - the pleas finally obtained being for less serious crimes than were in fact committed. This was the point of the example in the New

York Times where a "tearful prosecutor" was described as being coerced into accepting a plea of guilty to attempted assault when the prosecutor felt the charge of rape was warranted in the interests of justice. (Katz, Litwin and Bamberger Justice is the Crime p1 referring to a report in LIFE 12 March 1971 p64.)

15.5 Injustice arising out of the unregulated process of the plea negotiation can take many forms:

> *[B]y treating guilty defendants too leniently, by allowing court-wise defendants to manipulate the system and by penalising those ignorant of the plea bargaining system who plead guilty without any concomitant 'reward' or who legitimately pursue their right to trial and are subsequently found guilty.* (Osborne Delay in the Administration of Criminal Justice at p15.)

15.6 It is beyond the scope of this report to do more than identify the area of plea negotiation as one recognised internationally as urgently requiring further research. Suffice it to say that its increasingly dubious "justice" is regarded as one of the adverse consequences of delay. The American Bar Association and the National Advisory Commission on Criminal Justice Standards and Goals have both formulated standards for plea bargaining "to move the process closer to the formality of the judicial process while retaining the flexibility which makes the process important to case disposition". (Felkenes "Plea Bargaining; Its Pervasiveness in the Judicial System" (1976) 4 Journal of Criminal Justice; 133 at p145.)

15.7 In 1973 Bottomley had this to say:

> *The vast majority of convictions are not the result of any form of trial in open court, but are the result of pleas of guilty ... therefore it is the manner in which these guilty pleas are 'decided' upon by the*

defendant in the pretrial stage that ought to be seen as the single most important aspect of decision-making in the penal process, although typically one of the most under-researched and complex of all. (Bottomley Decisions in the Penal Process 1973 London p105 quoted by Moody and Tombs Prosecution in the Public Interest 1982 Edinburgh at p100.)

15.8 Law and Society devoted its whole winter edition in 1971 to plea bargaining and suggested that "there is still a need for research to uncover the nature of plea negotiation and its impact on the criminal process". (Prosecution in the Public Interest at p103.) According to the commentators in Law and Society, "blanket condemnation of plea negotiation ignores the realities of the criminal justice process which is esentially geared to non-adversarial solutions".

15.9 The practice of plea bargaining has been curtailed in certain American jurisdictions; in Alaska it has been completely prohibited, in Oregon it has been prohibited for particular groups of offenders, and for particular types of offences in Arizona.

15.10 Attitudes toward plea negotiation and understanding of its operations and effects obviously vary greatly across America and clearly it is an area in which further research must be undertaken in Australia. Although our system formally purports not to engage in plea bargaining, there is evidence of "overcharging" which can lead to charge bargaining. (See Preliminary Report at paras 164-175.)

16 Inconvenience to Witnesses. The witness called to court, left standing in the corridor for an hour, then told that the case will not get on and has been adjourned to a later date feels disgruntled and less than enthusiastic about the operation of the criminal justice system. This experience is not unusual for witnesses in both criminal and civil cases. The delay here is

attributable in part to mismanaged calendaring and the "local legal culture" which governs attitudes to adjournment. It creates the inconvenience to witnesses which is so evident in courthouse corridors.

16.1 Ash in a paper called "Court Delay, Crime Control and Neglect of the Interests of Witnesses" describes a typical experience:

> *The witness will several times be ordered to appear at some designated place, usually a courtroom, but sometimes a prosecutor's office or grand jury room. Several times he will be made to wait tedious, unconscionably long intervals of time in dingy courthouse corridors or other grim surroundings. Several times he will suffer the discomfort of being ignored by busy officials. Bewilderment, the painful anxiety of not knowing what is going on around him, or what will happen to him, will become all too familiar. On most of these occasions, he will never be asked to testify or to give anyone any information, often because of a last minute adjournment granted in a huddled conference at the judge's bench. He will miss many hours from work (or school) and will lose many hours of wages. In most jurisdictions, he will receive at best only token payment in the form of ridiculously low witness fees for his time and trouble. In many places, he will receive no recompense at all because he will be told neither that he is entitled to fees nor how to get them. Through the long months of waiting for the end of a criminal case, he must remain ever on call, reminded of his continuing attachment to the court by sporadic subpoenas. For some, each subpoena and each appearance at court is accompanied by tension and terror prompted by fear of the lawyers, fear of the defendant or his friends, and fear of the unknown. For many the experience is dreary, time-wasting, depressing, exhausting, confusing, frustrating, numbing and seemingly endless.* (National Institute of Law Enforcement and Criminal Justice Criminal Justice Monograph : Reducing Court Delay 1973 Washington DC.)

16.2 Ash also provides a statistical picture to corroborate the description above, using figures collected by the Office of the District Attorney in Wayne County, Detroit and its suburbs, Michigan, from the Recorders' Court (which handles crimes committed in Detroit):

> *... between January 10, 1972, and March 17, 1972, a total of 1,360 cases were set for trial. Subpoenas were issued for all police and civilian state's witnesses, as well as an undetermined number of defense witnesses. During the same period, only 227 trials were actually held. In the remaining 1,333 instances nothing happened that required the testimony of witnesses. In an average week during the period, 151.1 cases were set for trial, with witnesses ordered to appear and stand ready, and only 25.2 trials were actually held. Between January 10, 1972 and March 17, 1972, 2,055 civilian witnesses and 5,048 police witnesses were ordered into court for trials that were not held. A total of 7,103 witnesses were ordered into court and then, in effect, told to go home. In an average week, 560.8 police and 228.3 civilian witnesses were subpoenaed to no purpose, for an average weekly total of 789.2.*
>
> *The figures do not reflect how many witnesses were subpoenaed for trials that were held. An average of 5.3 witnesses were subpoenaed for trials that were not held. If one makes the reasonable assumption that the average is approximately the same for trials held, then 5.0 witnesses are subpoenaed into court unproductively for every one that is subpoenaed for trial.*
>
> *This five-to-one ratio of 'waste' appearances to productive ones probably understates the situation. It takes no account, for example, of (1) witnesses who were subpoenaed for a trial that was held, but who never actually testified, and (2) <u>defense</u> witnesses unnecessarily subpoenaed. Like all statistical representations, it does not capture the anger, anguish and frustration that such a situation engenders.* (At pp6-7.)

16.3 For some witnesses there is great anxiety attached to the giving of evidence.

> *The passage of time prolongs the period of anxiety for witnesses. Particularly where the witness is one who has been the victim of an assaultive crime, there may be severe distress associated with the prospect of having to testify about the matter in court.* (See Victim/Witness Services Unit para 57A.)

(See Streatfield Committee Report p6 para 17; James Committee Report pp112-4 paras 256 258.)

> *The memory of an unpleasant event must consciously be kept in mind by the witness until the trial is concluded. If a protracted period of waiting to testify is punctuated by successive 'alerts' to be prepared to appear in court - as often happens when a case drags on for long periods of time - the distress may be exacerbated.*

In Justice is the Crime (p53) Katz points out:

> *the community is witness to the spectacle of the accused delaying his case long enough to avoid answering for his wrongful act simply because witnesses lose interest and fail to appear for trial.*

Katz and others quote from an article in the New York Times (25 August 1968 at p47):

> *[T]he cases involving free defendants are repeatedly postponed because of lack of time and judges. As a result, many of the complainants, having lost a full day from their jobs on several occasions, finally become discouraged and do not show up to press their case ... and that leads to outright dismissal of the defendant.*
>
> *Witnesses are the lifeblood of the system. Without them, few wrongdoers would be brought to justice for their acts, nor would there be any evidence to present in criminal cases. And yet no*

consideration is given to their needs or to the inconvenience that having to appear in court may cause them. (Katz and others Justice is the Crime at p54.)

16.4 Ash argues strongly for more research into the inconveniences caused to witnesses by their appearances in court. He believes that the extent to which witnesses are inconvenienced has become greater in America despite the identification of the problem at least as early as 1948. In that year a non-lawyer participant in the "Washington Experiment in Judicial Administration" wrote that there appeared to him to be "widespread reluctance by many Americans to undergo the ordeal of being a witness" and this could be traced to various factors including a perception that they were, as witnesses, "being forced into a contest against skilful opponents while knowing none of the rules". There was also a sense of outrage amongst witnesses at the delay in criminal courts and the lack of accommodation for witnesses. (Graham 1948 at p23 cited Ash "Court Delay, Crime Control, and Neglect of the Interests of Witnesses" in Reducing Court Delay 1 at p2.)

16.5 Professor Fannie T. Klein in a short report on witnesses for the Institute of Judicial Administration in 1954 described witnesses as the "forgotten" people in the judicial system. (Cited by Ash at p2.)

16.6 Ash reports that through all these years and to the present, little has been written of the problems, interests and rights of witnesses and that in reality little has been done to improve their lot. "I submit that ... the witness in criminal courts, is more abused, more aggrieved, more neglected and more unfairly treated than ever before". (At p3.)

16.7 Of course, many of the justified grievances of witnesses are not attributable to delays in the system: for instance, the lack of adequate facilities at courts and the feeling of complete ignorance experienced by some

witnesses which causes them to feel apprehensive and intimidated by the impending ordeal of examination and cross examination. These are obviously problems deserving of much more attention than can be given in the present context. However, many of them may be germane to court delay in that witnesses' frustration can lead to a lack of cooperation on their part which in turn affects delay. Also, a lack of facilities and information for witnesses may lead to unintentional or unavoidable delays on their part.

16.8 Ash contends that the treatment typically experienced by witnesses has an important two-way effect on court delay and the prevention and deterrence of crime:

> *First, crime goes unsanctioned because of the disaffection of witnesses. Every experienced prosecutor in a major urban area has a storehouse of tales to tell about how cases were lost and crime went unpunished because disgusted witnesses grew weary of wasting time, became uncooperative, and ultimately refused to appear ...*
>
> *Second, exposure to the criminal court process as it actually exists discourages countless numbers of witnesses from ever 'getting involved' again: that is, from cooperating with investigative efforts, and from providing testimony crucial to conviction.* (At pp11-12.)

16.9 He speaks from his personal experience of three years in a "large, fairly typical metropolitan prosecutor's office" in Milwaukee, Wisconsin as an assistant district attorney. To Ash the "mistreatment" of witnesses was the worst feature of the system. He found that his views largely coincided with "working level personnel throughout the country". Regrettably, there are in the literature "only tidbits descriptive of the real situation" (Ash refers to Banfield and Anderson (1968) pp283-91; James (1968) pp39-41 and passim; Remington (1969) pp1325-26; President's Commission on Law Enforcement and Administration of Justice (1967) pp89-91.) "Nowhere is there hard data on witnesses in criminal cases ..."

16.10 On the theory that convictions are lost through the "wearing out" of witnesses Ash has the following to say:

> *The likelihood of successful prosecution seems to decrease, generally with (1) the length of time between apprehension and disposition, (2) the number of appearances in court by the defendant, and (3) the number of witness appearances. At least, this is the suggestion of Banfield and Anderson (1968). It is also the firmly held belief of most of those closely associated with the operation of the criminal courts. In other words, dilatory tactics and the "wearing out of witnesses", I suggest, produce results beneficial to accused criminals, but detrimental to anyone later victimised by their misdeeds.* (At p33 fn 24.)

16.11 Clearly, much can be done to improve the lot of witnesses and research should be undertaken in Victoria in this area. Programs have been instituted in America to remedy some of the problems in the system affecting witnesses. (See Milwaukee County Victim/Witness Services Unit and also Vera's - NY County D.A.'s Office Project - Criminal Justice Monograph : Reducing Court Delay p18 and Lacy 1971.)

17 Wasting of Police Time. As well as the inconvenience and lost work time suffered by civilian witnesses, enormous expense to the community is incurred as a result of police and public servants being called as witnesses:

> *The cost of unused witnesses is substantial. A Chief Judge of one of the studied courts advised the staff that in 1978 $183,000 was paid to police for overtime where they were called to testify. He estimated that most of this time was spent by police who had been subpoenaed to appear at the courthouse for trial only to find that the defendant pleaded guilty on the morning of the trial.* (Friesen and others Justice in Felony Courts 1979 Whittier College School of Law Los Angeles California at p34.)

From his study tour of the North Americas Johnston found that "There are over 900 police in Vancouver and their overtime bill just for court appearances is $600,000 per annum". (Court Statistical Data Collections : A Study of Overseas Developments at p10.)

18 Higher Incidence of Absconding by Persons on Bail. As is reported (in Pretrial Delay) "There is evidence suggesting that delay in disposition directly affects the proportion of defendants who fail to appear in court". (At p16.) Thomas, in Bail Reform in America, concluded that the incidence of failure to appear in the 20 cities studied could have been reduced significantly if cases were brought to disposition within 60 days after defendants' pretrial release. (1976 Berkeley at p105.)

19 Erosion of Citizen Respect for Criminal Justice System. The attitude of the public towards the operation of the criminal justice system is important - not only for the actual running of the courts but also for the general wellbeing of society: the public should feel confidence in the enforcement of the criminal law. However, the public's attitude is not easy to ascertain and it would seem that there has been no systematic polling of any community.

19.1 Katz and others in Justice is the Crime: Pretrial Delay in Felony Cases spoke in very strong terms:

> *The American public has lost confidence in the criminal justice system. Strangely, that loss of confidence appears on all sides of the polarised society and includes both those who believe that the courts are protecting criminals and those who argue argue that the courts are guarding the status quo ... The problem in the system is the inordinate amount of time that elapses between the time an arrest occurs and final disposition is made of the case.* (At p2.)

19.2 In the introduction to this book some of the graphic reportage of cases where delay is alleged to have been the main reason for an undesirable outcome is quoted:

> *In New York City a defendant charged with the attempted rape of a four-year-old child was permitted to plead guilty to attempted assault. The tearful prosecutor was prodded into agreeing to this plea because of the great backlog of cases facing the court.* (Mills "I Have Nothing To Do With Justice" Life 12 March 1971 p57 at p64.)

In the same city, thirteen "Black Panthers" were tried and acquitted on all counts of a conspiracy indictment. The cost of the case was estimated at over two million dollars. (New York Times 14 May 1971 at p20 col 7.) While the Panther trial plodded along, prisoners in city detention centres rioted to protest at the delay in bringing their cases to trial (New York Times 2 Oct 1970 at p1 col 3; 4 Oct 1970 at p1 col 8). In Cleveland a man jailed for ten months on a non-bailable offence was acquitted by a jury after only forty-five minutes of deliberation. Two days before the trial was to begin, the prosecutor reduced the charge. Had the defendant originally been held on the reduced charge he would have been eligible for release on bond. (Cleveland Press 23 Feb 1971 at p4 col 5.) During the time he was in jail he was assaulted and beaten, and he had to be hospitalised for his injuries. (Justice is the Crime at p1.)

19.3 Apart from the serious problems in the system revealed by these cases, the important point to be noted here is that they were all reported in widely circulated newspapers or magazines. Court delay has been brought very much before the public eye. Cases are often reported in sensational style which is not likely to protect the image of the criminal justice system.

20 Likelihood of Rehabilitation of Offenders Reduced.

> *The prisons have become stations where idle men are left to rot in bitterness and where the dream of rehabilitation is merely a dirty joke ... Until society is willing to provide additional funds to upgrade facilities, hire trained personnel, and provide follow-up care, rehabilitation as a workable and practical idea will remain unattainable ... But it is also equally clear that even if society makes the necessary enormous investment, rehabilitation will be impeded if the inordinate delays between arrest and conviction persist. Rehabilitation is most effective when begun as close as possible to the criminal activity which necessitates the treatment.* (Katz Justice is the Crime at p55.)

Empirical support for the assertion that there is an inverse relationship between length of delay and effectiveness of rehabilitation programs is unfortunately lacking. (See Pretrial Delay at p16.)

PART II

CAUSES OF DELAYS IN COURTS

21 Introduction. The various factors which have been alleged, at one time or another, to cause delay can be separated into two types. Church and others in Pretrial Delay called them:

* "workload and resource factors"

* "administrative and procedural factors"

21.1 Under the first heading are gathered factors including:

* caseload per judge

* staffing of courts

* size of the criminal bar

* number of prosecutors

21.2 Under the second heading fall such factors as:

* court organisation (unified or hierarchical)

* calendaring system

* rules of criminal procedure

* court policy on adjournments

22 Caseload per Judge. The President's Commission on crime in the District of Columbia found no relationship between the extent of delay and the size of the caseload per judge. Between 1950 and 1966 median time from indictment to disposition in the District Court in Washington increased from 1.2 months to 4.8 months even though the number of criminal cases filed fell by 30 per cent and the number of judges remained constant. (Task Force Report : The Courts 1967 at pp247-249.)

22.1 In the United States Rhodes found virtually no relationship between the criminal case delays and the caseload per judge. He reported his findings from a study of criminal dispositions in federal courts in 1976. ("The Economics of Criminal Courts : A Theoretical and Empirical Investigation" (1976) 5 Journal of Legal Studies 311 at pp319-320 fn 9.)

22.2 However, as the data gathered from the President's Commission shows, "the relationship of backlog, delay, and judicial productivity is by no means simple". (Church Pretrial Delay pp22-3.) Also in the United States Gillespie undertook a study which focussed on this issue more closely than Rhodes'. Gillespie reported in Judicial Productivity and Court Delay: An Exploratory Analysis of the Federal District Courts (1977 Government Printing Office Washington DC) that when the number of "weighted dispositions" (that is, matters of the same degree of complexity and size) was held constant, the overall court processing time of criminal and civil cases was affected by the size of the pending caseload per judge. (At pp29-30.) In other words, Gillespie found that

> *among courts which dispose of a similar number of cases per judge, those with large backlogs of pending cases are slower in processing cases than those with smaller backlogs.* (Pretrial Delay at p23.)

22.3 There was another finding in this study which must be noted by all those who advocate the simple remedy of "more judges".

The striking finding of [Gillespie's] study, however, relates to the variability of judicial productivity. If adding more judges is to reduce backlog and delay, the existing judges on a court must not decrease their level of effort (defined as the number of yearly terminations) when new judges are added. But this study found that judges vary productivity in response to changes in the workload: '[C]ourts produce more output with no additional resources when the demand for court service increases'. (Gillespie "The Production of Court Services: An Analysis of Scale Effects and Other Factors" (1976) 5 Journal of Legal Studies 243 at p 258 quoted in Pretrial Delay at p23.)

The authors of Pretrial Delay point out that the obvious corollary is that

if resources are augmented and the demand for court services stays constant, individual judicial productivity may fall. It is thus by no means clear that the simple expedient of adding judges will necessarily result in a decrease in either pending cases or overall case processing time. (At p23.)

22.4 With experience in the United Kingdom, the United States and Australia Professor Scott makes a similar observation:

growth in court resources, either in real terms, for example, in the form of more judges and courtrooms, or in relative terms, for example, where cases awaiting trial decrease because of a lower input demand, seem to have the effect of increasing trial times. ("Productivity in the Crown Court" [1980] Criminal Law Review 293 at p391.)

22.5 In Urban Politics and the Criminal Courts Levin, reporting on his study of five criminal courts in America, noted that caseload was "usually assumed to be a major source of delay". But Levin contended that this had not been established by empirical study:

[O]ne might suspect that the larger the caseload, the longer the delay. But ... the relationship is not that simple. Table 38 [See Appendix VIII] shows that the court with the largest caseload - Chicago preliminary-hearing court - has the next to shortest delay. The District of Columbia district court has the smallest caseload, but it has quite a long delay (almost as long as that of the court with the longest delay!) (At p234.)

22.6 Some studies support the theory that the size of the caseload affects the extent of delay and Levin does acknowedge that there is some association between caseload and delay:

In Pittsburgh there was a large caseload and long delay; in Minneapolis, a moderate caseload and a very short delay, in the Chicago criminal division court, a small caseload and moderate delay.' All other factors being equal, we might find that the larger the caseload, the longer the delay. But continuances, motions and full-length trials usually are not distributed proportionately to caseload size. Instead, they are influenced by the behaviour of the defense attorneys, judges and prosecutors. Thus they tend to interact with caseload size in different and sometimes opposite ways, and the impact of caseload on delay is indirect and mediated through the behaviour of these court participants and has less of an impact than these other factors. (At pp234-235.)

23 Staffing of Courts. A national survey conducted in America found that in the opinion of 40 per cent of responding court staff the main cause of delay in courts was inadequate resources. (The National Manpower Survey on Courts reported in "Background Paper on Issues and Data Relating to Sources on Case Backlog and Delay in the State Courts" 1970 mimeographed, Courts Technical Assistance Project, American University, Washington DC at p15.)

24 Size of the Criminal Bar. In many jurisdictions the criminal bar is relatively small or at least monopolised in practice by a small number of lawyers. Katz and others reported that in many courts the defence of "nonindigent" defendants (simply meaning, presumably, those defendants who do not qualify for legal aid) is handled by the same few attorneys and delay results because those attorneys, able to appear in only one trial at a time, must ask for continuances (adjournments) for the others.

> *In Cleveland, for instance, twelve lawyers are counsel of record in about one-half of the pending felony cases in which a private attorney is retained. What this means to the entire docket is staggering; what it means to the clients who have retained these attorneys is an automatic delay of not less than twelve months ... Such monopolisation of the criminal docket, coupled with the archaic method for scheduling cases, ensures that the accompanying delay will affect the entire calendar of docketed cases, not just those in which the twelve attorneys are involved.* (Justice is the Crime at p76.)

25 Rules of Criminal Procedure. Perhaps the one part of criminal procedure most discussed in relation to court delays is the preliminary hearing (or committal proceedings). The preliminary hearing entails a court hearing to determine whether there is sufficient evidence to justify a trial. It is a screening process controlled by the court.

25.1 In England, all cases that are to be tried in the Crown Court must first be committed for trial by magistrates. As McConville and Baldwin have described, the function of the magistrates' court is not to investigate whether the accused is guilty of the charge but to determine whether there is sufficient evidence to warrant committing the accused for trial.

> *It might be expected ... that committal proceedings would provide an effective screening mechanism that would at least prevent the*

Crown Court from being clogged up by hopelessly weak cases. It is now clear, however, that adequate review of the prosecution evidence at committal proceedings is, save in a small minority of cases, little more than legal fiction. (Courts, Prosecution, and Conviction 1981 Oxford at pp77-78.)

25.2 There is also a paper procedure for committal in England similar to the "hand-up brief" procedure in Victoria. Baldwin and McConville comment that:

Committal proceedings do not provide anything approaching an effective screening procedure ... As the system is presently organised, committal proceedings are not used to test the prosecution's case, and all the indications are that neither prosecution nor defence scrutinise cases with sufficient care before requesting or giving consent to the paper procedure. (At p93.)

25.3 The ineffectual preliminary hearing contributes to two aspects of delay by

(1) requiring a hearing before trial (if any) and so automatically prolonging the time between arrest or charge and final disposition, and

(2) failing to properly "screen" cases it adds weak cases to the backlog already awaiting trial.

25.4 In response to criticisms about the length of committal proceedings the English Criminal Justice Act of 1967 introduced new procedures for committals in addition to the old full oral hearing where the accused could seek to challenge all or some of the items of the prosecution's evidence in the hope of having the charge dismissed. The new procedures were

* curtailed committal proceedings where the accused agrees to accept some or all of the evidence in the form of written statements, and

* committal without consideration of the evidence, under section 1 of the Criminal Justice Act 1967.

The latter procedure, called a "section 1 committal" can be used only if all the evidence before the court consists of written statements and the accused is legally represented. (Report of the Interdepartmental Committee (Chairman: The Right Honourable Lord Justice James) The Distribution of Criminal Business Between the Crown Court and Magistrates' Courts London HMSO 1975 Cmnd 6323.)

25.5 While a New Zealand Department of Justice study of the operation of these new procedures in England and Wales revealed that over 90 per cent of all committals were of the section 1 kind - that is on the papers alone and with no consideration by the magistrates of the evidence - the James Committee was told that this had resulted in more cases going to trial which could have been weeded out had there been some consideration of the evidence. (At para 232.)

25.6 Baldwin and McConville found that of their sample of 2406 cases sent for trial in the Birmingham Crown Court 99 per cent had been committed under the "section 1 procedure" and in only 18 cases had there been any evidence given orally. (Courts, Prosecution, and Conviction 1981 at p81.)

25.7 Addressing the question of why almost all cases were proceeding to trial under the section 1 procedure and therefore without any effective screening, Baldwin and McConville concluded that there are a number of factors:

In the first place, there is little doubt that many defence lawyers lack the necessary skill and experience to mount a proper challenge of the prosecution's case at committal - an observation acknowledged even by leading defence advocates themselves. For many busy practitioners, paper committals offer a possible escape route. But this situation is not helped by the fact that defence solicitors very commonly receive the committal papers for the first time on the day of the hearing, and the possibility of the defence making any thorough assessment of the evidence is virtually non-existent. It is true that defence solicitors could seek an adjournment where this happens, but many are reluctant to postpone the trial, particularly if the defendant is in custody. Finally, one must draw attention to the part played by magistrates at the committal hearing. A number of commentators have alleged that the advantages of full committals are frustrated by the timidity of magistrates who see their function merely as rubber-stamps for the prosecution and who, in any event, lack real confidence in their own ability to decide upon cases of importance. (At pp81-82.)

26 Collateral Attacks and Elongation of Main Proceedings. Fleming, attributes the "interminable delay" from which the American judicial process suffers to two kinds of activities; "those which divert the inquiry into a collateral issue, and those which slow down the progress of the inquiry itself. These activities may be termed sidetracking and mainlining". And both are tools of the defence lawyer, producing delay of the second kind. (The Price of Perfect Justice 1974 New York at p54.)

27 Sidetracking. Fleming points out that it almost invariably happens that the defendant is not anxious to litigate the issue of guilt promptly and so the right to a speedy trial (for instance under the California Penal Code No. 1382 which provides that unless good cause is shown a felony accusation must be dismissed if not brought to trial within 60 days) is not involved. Instead, Fleming argues, the accused (or the accused's legal representatives) will prefer

to "sidetrack": that is "divert the accusation from the pending issue to some other issue, any issue, and then keep the prosecution so occupied in litigating the side issue that the hearing of the accusation itself comes to a halt". (The Price of Perfect Justice 1974 at p54.)

27.1 Fleming proceeds to elaborate on the different methods used in America. It will be observed that the situation there differs quite markedly from that in Victoria:

> *The defendant has the choice of numerous switches to throw in order to divert the cause from the main track onto a siding:*
>
> *1. He may attack the court machinery that initiated the accusation against him and is scheduled to process his case. Such an attack may cover the legality of the process that brought him into court, the validity of any search or arrest warrants that were issued, the composition of the grand jury that returned the indictment, the validity of the indictment itself, the qualifications of the judge or judges assigned to the case, the competency of court-assigned defense counsel, and the composition of the prospective trial jury panel.*
>
> *2. He may attack the law enforcement machinery and challenge the standing and conduct of investigators, of police, or of jailers. Such an attack may be directed against the manner of arrest, the validity of a search connected with the arrest, the validity of an admission or confession ... the conduct or composition of a lineup, the treatment of defendant in custody and the sufficiency of his access to counsel.*
>
> *3. He may attack the prosecutors and complain of the prosecutors' refusal to disclose the names and addresses of informers, the prosecutors' denial of access to tangible evidence, their intimidation of potential defense witnesses, their failure to*

locate witnesses sought by the defense, or their refusal to suppress evidence unfavourable to the defendant.

4. He may attack the constitutionality of the law against murder, as for example, its definition, its degrees, its mode of trial, its punishment, and he may tender an issue that the present law against murder denies him the equal protection of the laws, or violates due process, or discriminates against him on racial or ethnic grounds.

5. He may attack the news media for unfairly publicizing or sensationalizing the accusation against him, he may claim that because of publicity it has become impossible for him to get a fair trial at that particular time and place.

6. If in pursuing these tactics the defendant meets an unfavourable ruling in the trial court, he can seek to overturn that ruling in the appellate courts. A defendant is not restricted in the number of attacks he may make, nor is he required to make them simultaneously. Rather he may dole them out serially. (The Price of Perfect Justice 1974 at pp55-6.)

27.2 Fleming also discusses in detail some of the sidetracking tactics, such as attack on the grand jury panel. In California felony accusations are begun either by a grand jury indictment or by an information filed on a magistrate's preliminary commitment. If a grand jury indicts the defendant, the defendant may attack the composition of the grand jury in the trial court. "The charge currently favoured for such an attack is racial discrimination contrary to the Fourteenth Amendment in the composition of the grand jury panel from which the grand jury was selected". (At p56.) If racial discrimination can be established that grand jury's proceedings become a nullity. Two United States Supreme Court cases in the 1950s established this:

Cassell v Texas in which the conviction of a black American for murder was set aside because the Supreme Court found that there had been unconstitutional discrimination against the defendant's race in the selection of the grand jury that indicted him. (Fleming The Price of Perfect Justice 1974 at p56 fn4.)

Hernandez v Texas in which the conviction of a person of Mexican descent for murder was set aside because the Supreme Court found that persons of Mexican descent had been systematically excluded from both the grand jury and the trial jury. (At p56 fn5.)

If the attack on the grounds of unconstitutional discrimination fails in the trial court, the defendant may then go to the appellate court.

27.3 Such attacks are not limited to the ground of racial discrimination: "any definable group to which a defendant belongs may be used as the basis for a claim of discrimination in the composition of a grand jury". Fleming explains that under this expanded concept of group discrimination the attack made by the defendant can be on the basis of "age, sex, education, wealth, and residential location". (At p57.)

27.4 The defendant will move for an evidentiary hearing in order to prove discrimination against the particular group by the selectors of the grand jury panel. Fleming illustrates what this can mean in practice. In Los Angeles County in 1973 the selectors of the grand jury panel were the 161 judges of the Superior Court, each of whom had to nominate two people for the panel. If granted an evidentiary hearing "the defendant has succeeded in putting the judges on trial rather than standing trial himself - and not merely one judge, but 161 judges." At the evidentiary hearing the 161 judges could be called as witnesses and examined about the factors they took into account in selecting their two nominees for the grand jury panel. As Fleming says "By the initiation of such a hearing progress of the original murder accusation can be brought to a standstill." (At p57.)

27.5 Another of the "sidetracks" used in America is attack on the holding of a trial because of unfavourable publicity surrounding it. According to Fleming, the impetus for this type of attack comes from the 1966 decision in Sheppard v Maxwell in which the United States Supreme Court set aside the defendant's conviction for the murder of his wife in 1954 on the ground that extraordinary pretrial and trial publicity during the 1954 trial prevented the defendant from receiving a fair trial consistent with the due process clause of the Fourteenth Amendment. In that the case the Supreme Court said

> *Where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity ... If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered.* (At p62 fn21.)

27.6 With this judicial view of prejudicial publicity prevailing, the accused "may routnely seek to postpone his trial or move it to another location". The accused can apply for an evidentiary hearing, and can proceed to the appellate courts. Fleming notes that

> *In authorizing such a procedure the California Supreme Court, somewhat optimistically, foresaw no significant delay in the trial of cases as a consequence of such review. What the court failed to foresee was the development of multiple and repetitive motions for change of venue, each with its own appendant appellate review.* (At p62 fn23.)

27.7 In concluding his discussion of "sidetracking" Fleming observes that:

> *As long as we entertain the present view that until defendant ceases to raise collateral issues it is unfair to force him to stand trial, we continue to permit the defendant to control the course of*

litigation and effectively sidetrack the prosecutor. (At p64.)

28 Mainlining. This kind of delaying tactic differs from sidetracking in that "the progress of the accusation continues on the main track" but as with sidetracking "its speed is reduced to a crawl". (At p64.)

28.1 For example, the selection of the trial jury can be drawn out. In America:

> *In many jurisdictions selection of a trial jury may consume weeks or even months of the court's time. Prospective jurors are examined exhaustively on their background, education, employment, personal history, personal beliefs, familiarity with the law, and experience as jurors in other cases. On occasion they may be subjected to rigorous cross-examination by counsel who wish to excuse them for cause without using up peremptory challenges to remove them. In California the selection of a trial jury in a criminal case often resembles a filibuster. In People v Finch selection of a jury took four to five weeks on each of two occasions.* (At p64 fn29.)

28.2 Fleming compares the situation in America with that in England:

> *This prodigal expenditure of time in jury selection [in America] contrasts sharply with the practice in England, where there is no interrogation of jurors and where selection of a jury, even in the most celebrated cases, usually takes no more than a few minutes.* (At p64.)

28.3 Then, after the empanelling of the jury, when evidence is adduced, the defence may challenge the admissibility of various items, requiring in many cases a voir dire. Issues not directly related to the main issue of the accused's

guilt or innocence may be seized upon by the defence and made the subject of protracted legal argument:

> *Subsidiary issues arising during the course of the trial may be extensively explored. For example, if the validity of a prior criminal conviction becomes an issue, a hearing may be held outside the presence of the jury to determine whether the defendant had been properly advised of and properly waived his right to counsel in the former proceeding.*
>
> *Other subsidiary issues may include treatment of the defendant while in custody, facilities available to him in custody, news media publicity and coverage of the cause, sequestration of the jury, sequestration of witnesses, statements by counsel inside and outside the courtroom, continuances for further preparation, continuances to interview witnesses, and the like.* (At p65.)

As a consequence of these protracted legal arguments criminal trials lasting for months are routine in America.

28.4 The accused has little to lose and much to gain from the delaying tactics of "sidetracking" and "mainlining". In the first place, something may turn up to improve the defendant's situation. A witness may recant or become unavailable, or there might be a change in the law. Secondly, the jury may be affected by the elongation of the trial in ways which benefit the accused. The members of the jury may become so accustomed to the particular facts of the case that they lose the sense of outrage that they might have felt initially. There is a theory that the prolongation of the trial suggests to some types of jurors that the prosecution case is not very powerful:

> *... if the trial of a relatively simple case can be spun into months, some jurors may begin to believe there is more to the case than meets the eye. If the issues are simple and straightforward, reasons a certain type of juror, the court would not have allowed the case to*

consume the time it has taken. Therefore, some mysterious factor must be at work, a factor which the juror does not understand but which is important. Once a juror has acquired this frame of mind he lays himself open to irrational suggestion of all sorts and becomes prime material with which to hang a jury. For the prosecution the dangers of overtrying a case, i.e. confusing the jury with a torrent of evidence are well known. For a defense with nothing meritorious to bring forward, overtrial may be the most effective tactic possible. (At p65.)

Thirdly, the prospect of a long, drawn-out trial may be the bargaining point from which the defendant secures the prosecution's acceptance of a plea of guilty to a lesser charge. Many prosecutors are acutely aware of the pressure of backlogged cases and they are more likely to prefer a plea to a lesser charge than a trial in which the defence's "mainlining" tactics will exacerbate the situation.

28.5 Fleming makes a telling point about the American legal system that is arguably applicable equally in Victoria:

Dilatory tactics by defense counsel are not seriously frowned on by the legal profession; rather, in the present climate of opinion they are routinely admired on the theory that counsel who employ them are putting up the best possible defense for their clients. (At p66.)

28.6 Only the judges can effectively curb the tendency of some defence counsel to delay or protract proceedings. Such dilatory tactics as already exist will continue to be employed, and new ones will be found, as long as the courts tolerate them.

29 Court Policy on Adjournments. Levin studied adjournments (or "continuances" as they are known in America) in the five criminal courts which

were the subject of Urban Politics and the Criminal Courts:

> *The effects of continuances, motions and full-length trials on delay seem to be interrelated and cumulative ... Continuances seem to be strongly associated with the degree of delay in all five courts: the greater the proportion of cases with continuances and the longer each average continuance, the longer the average delay for the caseload as a whole; the smaller the proportion, the shorter the delay. (Continuances contributed little to actual court time because they were granted almost automatically.) For instance, in the District of Columbia, increases in the proportions of continuances requested seem to have been associated with increases in delay (see Table 38) ... The specific contribution of continuances to delay depends on both the average number requested per case and the average length of each one.* (At pp235-236.)

29.1 In his book, The Price of Perfect Justice, Fleming relates in full a case history to demonstrate the "scandal" of the typically dilatory course of crirninal proceedings in America:

> *The bare statement that it takes so many months or so many years to bring a cause to judgment does not carry the impact on the reader that it should, for today's reader is so overwhelmed with statistical shock ... The most effective way to visualise the extent of this delay is to follow the chronology of a routine California case, People v Espanza, in which the defendant was caught in the act of burglary on 7 December 1968 ...*
>
> ***1968***
>
> *30 December Information filed charging sundry robberies, burglaries, rapes, kidnappings and sexual offences.,*

1969

6 January	*Defendant arraigned and pleaded not guilty.*
3 February	*Information amended to charge prior offences. Trial continued to 4 February.*
4 February	*Arraignment and plea continued to 10 February.*
10 February	*Arraignment and plea continued to 13 February.*
13 February	*Defendant arraigned and pleaded not guilty. Trial date remained 4 March.*
28 February	*On defendant's motion trial continued to 2 April.*
2 April	*On defendant's motion trial continued to 24 April.*
24 April	*On defendant's motion that his counsel was elsewhere engaged, trial continued to 1 May.*
1 May	*On defendant's motion trial continued to 9 May.*
9 May	*On defendant's motion that his counsel was elsewhere engaged, trial continued to 14 May.*
14 May	*On defendant's motion that counsel was elsewhere engaged, trial continued to 15 May.*
15 May	*On defendant's motion trial continued to 20 May.*
20 May	*Defendant pleaded guilty to three counts of the information. Probation and sentence set for 13 June.*
13 June	*Mentally disordered sex offender proceedings initiated, and proceedings continued to 10 July.*
10 July	*Defendant's motion to withdraw guilty plea granted, and not-guilty plea reinstated. Cause continued to 18 July for trial setting.*
18 July	*On motion of defendant, cause continued to 1 August for trial setting.*
1 August	*On motion of defendant, cause continued to 8 August for trial setting.*
8 August	*On motion of defendant, cause continued to 29 August.*
29 August	*Prosecution moves to vacate order reinstating defendant's not-guilty plea. On motion of defendant cause continued to 5 September.*

5 September	By stipulation cause continued to 1 October.
1 October	Prosecution's motion to vacate order reinstating not-guilty plea denied. Cause continued to 8 October for trial setting.
8 October	Trial set for 2 December.
13 November	Hearing on defendant's discovery motion; motion granted in part.
26 November	Defendant's motion to dismiss two kidnapping counts granted as to one. Trial date of 2 December vacated, and cause continued to 3 December for trial setting.
3 December	Cause set for trial on 21 January 1970.

1970

21 January	Defendant's motion to relieve deputy public defender is denied. Defendant's motion to suppress evidence continued to 22 January.
22 January	Cause continued to 23 January.
23 January	Hearing on motion to suppress evidence continued to 26 January.
26 January	Motion to suppress evidence granted in part. Hearing held on motion to dismiss lineup evidence. Later, motion is denied. Trial continued to 27 January.
27 January	Trial begins.
9 February	Jury returned verdicts of guilty.
4 March	Judgment and sentence.

In Espanza's prosecution fourteen months elapsed from filing of the accusation to entry of judgment. But California law contemplates that criminal causes will be brought to trial within two months ... Penal code section 1050 requires that

> *'all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time, and it shall be the duty of all courts and judicial officers and of all*

prosecuting attorneys to expedite such proceedings to the greatest degree that is consistent with the ends of justice ...'

[And] no fewer than twelve continuances of the proceedings were granted at defendant's request ... Yet California has a strong statutory policy against continuances in criminal cases.

'No continuances of a criminal trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance ... No continuance shall be granted for any longer time than it is affirmatively proved the ends of justice require.'

In the light of this statutory policy against continuances the reader may wonder why continuances are granted so readily by trial judges. The answer is found in the readiness with which appellate courts reverse judgments of conviction for refusals to grant continuances. It is axiomatic that a trial judge can never go wrong granting a further continuance, but if he denies a continuance it is possible that he may subsequently be reversed. (Fleming The Price of Perfect Justice 1974 at pp67-70.)

29.2 On the last point, Banfield and Anderson in "Continuances in Cook County Criminal Courts" found that judges' fear of reversal on appeal was a factor which operated to increase the number of continuances. They suggested that another factor in the liberal use of continuances is a general lack of concern for the costs incurred. Banfield and Anderson found that the pervading view was that "continuances are ordinary aspects of everyday life, harmless as long as nobody objects". [(1967-68) 35 The University of Chicago Law Review 259 at pp278-279.]

29.3 During their study, Banfield and Anderson noted that both judges and attorneys stressed that motions for continuance were dealt with informally. "Judges never require, as they are authorized to do, that motions for

continuances be accompanied by affidavit". (At p276.) Further:

> *The procedural simplicity of the continuance machinery is matched by the informality with which the grounds for continuance are treated ... Rather than inquire closely into the reasons, many judges say that they apply a standard policy of granting one or two continuances to either party on request; 'after that, they'd better have a good reason'. Other judges are willing to permit as many 'by agreement' continuances as the parties are willing to arrange; close scrutiny is called for, they contend, only when oneside is losing its witnesses or otherwise objects to further delay.* (At p277.)

29.4 Banfield and Anderson present empirical evidence for a number of theories. A summary follows:

* the proportion of guilty dispositions decreases as the number of court appearances increases;

* retained-attorney cases take longer than public defender cases;

* cases involving white dependants take longer than cases involving non-white defendants;

* the proportion of guilty dispositions of white defendants with retained counsel shows a disproportionate decline over time;

* bailed cases take longer than jailed;

* a lower proportion of continuances have their reason explained for retained counsel than for the public defender;

* defendants with prior records take longer to try than defendants with no prior record.

29.5 The authors considered why cases handled by retained counsel take longer. They felt compelled to conclude that the main factor distinguishing defendants with the Public Defender from defendants with retained counsel was money. They did not find that the defendants with the Public Defender had prior records significantly more often than those who had retained attorneys: 17 per cent of the Public Defender defendants and 15 per cent of the retained counsel defendants had prior criminal records.

29.6 Some of the factors related to the higher rates of continuances for retained counsel as opposed to Public Defenders were related to their different strategies and their different responsibilities. Public Defender attorneys are directly responsible to their superiors in the Public Defender's Office whereas private counsel are responsible to their client.

29.7 Fee collection was also suggested as a reason - private attorneys might be less inclined to proceed immediately when they have not been paid whereas Public Defender Attorneys are assured of payment in due course from the fund.

29.8 Geographical distance might also play a part in the greater number of continuances for private attorneys - the Public Defender has centralised operations whereas private attorneys are scattered all around the jurisdiction. This factor is more significant, of course, in those jurisdictions where there is a fused profession.

29.9 Aside from all these factors Banfield and Anderson considered that there was evidence of abuse of the system by retained counsel :

> *Perhaps the most convincing evidence that the high level continuance cases of retained lawyers involve dilatory tactics rather than harder work is that 21 per cent of the retained lawyer cases in*

which the client changes his plea from not guilty to guilty require more than nine court appearances. Only 6 per cent of the Public Defender's cases where the plea is changed to guilty require more than eight appearances ... A second factor suggestive of abuse on the part of retained lawyers is their witnesses. Fifty-five per cent of court appearances in cases involving retained lawyers were scheduled 'with subpoenas' by contrast with 45 per cent in the Public Defender's cases. (At pp283-4.)

The retained lawyers had many more appearances per case on average as the following table shows:

	No. of appearances with subpoena			
	1-3	4-6	7-9	10+
Type of Lawyer				
Retained Lawyer	108	67	20	18
Public Defender	146	25	3	2

29.10 Another indicator of abuse by retained counsel is the disproportionate frequency of unexplained continuances in their cases:

Clerks apparently record reasons for continuances only when the reason is important in some way to the administration of the case. Thus, over 80 per cent of the recorded reasons for continuances are related to formal motions such as those to vacate a bond forfeiture warrant, to obtain discovery, ... and the like ... There are however, a very large number of unexplained continuances, particularly in retained lawyer cases; some explanation is visible for only 30 per cent of the retained lawyer's continuances, while a reason is recorded in 56 per cent of the Public Defender's requests ... In any event, it is clear that private lawyers ask for more continuances not related to the administration of the case than do public defenders. That fact alone suggests, if not deliberate delay, at least an absence of dispatch on the part of retained lawyers ... (At pp283-4.)

30 Screening Procedure. Katz and others contend that "the screening procedure in a prosecutor's office becomes a critical stage in the criminal process". This occurs before the preliminary hearing and Katz and others point out that failure to screen lets "marginal cases" through to the court and clogs it up with cases that do not merit prosecution. A front-page article in the New York Times described the inadequate screening in one state:

> *In Philadelphia, cases that once get into the system tend to stay there ... Prosecutors ordinarily assigned to the preliminary stages are the least experienced, it is reported, and lack either the confidence or the authority to knock out the weakest cases early on.* (New York Times 8 March 1971 at p1 col 3 cited Katz and others Justice is the Crime 1972 at p105.)

30.1 In the American Bar Association Journal McIntyre and Lippman wrote that the "ultimate resolution of criminal cases resulting from prosecution screening is necessary for the maintenance of the criminal justice system. There are not enough prosecutors, defence attorneys, judges and jails to handle the massive felony docket". ("Prosecutors and Early Disposition of Felony Cases" (1970) 56 American Bar Association Journal 1154 at p1154.)

31 Legal Aid. An allegation heard frequently in Victoria and other jurisdictions in Australia and overseas is that legal aid has contributed to court delay. (Although see Cashman "Representation in Criminal Cases" in The Criminal Injustice System 1982 pp195-225 at pp199-202 substantially challenging this claim on the basis of a study.)

31.1 In a study of the legal aid system and its effects on the criminal justice system in Ontario Wilkins found some evidence to support the allegation against legal aid. Some of his results are completely contrary to the findings of Banfield and Anderson discussed above (see para 29.9).

31.2 Among Wilkins' findings the following are of particular interest:

* there is a highly significant difference between cases represented by lawyers and those unrepresented

* there is a highly significant difference in the number of court appearances made by privately retained and legal aid lawyers; and this is due to two factors -

  (a) that privately retained lawyers are more likely to dispose of their cases within three appearances; and

  (b) that 22 per cent of cases handled by legal aid lawyers used seven to nine appearances to attain final disposition.

31.3 In relation to the last finding Wilkins said:

> *It was found that these were not cases in which there was a relatively large number of counts charged against the client. It was not a phenomenon produced by a relatively small number of lawyers. Although these lawyers do, in fact, appear more often, it is partly to be explained by a larger number of appearances in which these cases were represented by duty counsel, and to a much larger degree by the number of appearances in which the accused was not represented by anyone.* (Legal Aid in the Criminal Courts 1975 University of Toronto Press Toronto at p111.)

32 Need to Look Beyond Conventional "Causes" of Delay. The more sociologically-based research and writing has tended to repudiate the conventional wisdom on court delay. Essentially the conventional wisdom focused on the workload and resource factors, and the administrative and procedural factors which are the subject of the foregoing part of this Report. By the 1970s the traditional explanations were being rejected. For example,

Levin, in his book Urban Politics and the Criminal Courts, made the following comments:

> *[O]ur study of the criminal courts finds that the conventional explanations and analyses fall short of the mark. Delay is typically described as an aberration in the court system, caused by large caseloads thrust upon mismanaged and inefficient courts. The solutions put forth almost always stress better administration.* (1977 The University of Chicago Press Chicago at p192.)

32.1 In a similar vein, Thomas Church and others in Pretrial Delay noted that:

> *Most previous attempts to address the problem of delay emphasize those visible court features which are likely to be found in organization charts, flow charts of procedure, budgets, or periodic reports. The failure of most programs to slay, or even to locate the 'dragon of delay' [the metaphor is from Macklin Fleming's article entitled 'The Law's Delay: The Dragon Slain Friday Breathes Fire Again Monday' Public Interest 32 (1973): 13-33] in these areas suggests that the beast may lie elsewhere.* (At pp45-6.)

32.2 A brief survey of two of the major trends in the history of American criminal court studies may help to explain the growing disenchantment with the conventional analyses of court delay and the development of the new approaches. Nardulli describes the "Crime Survey Tradition" and the "Topical Tradition" in his book The Courtroom Elite : An Organizational Perspective on Criminal Justice. (1978 Cambridge Massachussetts.)

33 Crime Survey Tradition. Many commentators trace the development of American research on the criminal justice system back to the early 1920s with the Cleveland crime survey directed by Roscoe Pound and

Felix Frankfurter. It was followed by similar surveys in Missouri, New York, Illinois and numerous other jurisdictions. Several of these surveys were initiated in response to "a scandal involving a local justice official". The Cleveland crime survey was a reaction to a case in which the chief judge of the municipal court was charged with murder. The Illinois survey was undertaken in response to the assassination of an assistant state's attorney in the presence of several well-known gangsters.

33.1 Nardulli argues that the real impetus for the surveys was the widespread dissatisfaction with the operation of the local justice systems. Several factors were involved: "the 'crime wave' which allegedly swept the country during the post-World War I era, the overly politicized nature of local criminal justice systems, reputed ties between organized crime and criminal justice officials, and dissatisfaction with the enforcement of Prohibition laws. One final factor that had a significant influence upon the crime surveys was the predominance of the municipal reform movement during this period." (The Courtroom Elite : An Organizational Perspective on Criminal Justice 1978 at p4.)

33.2 Nardulli calls this approach the "crime survey tradition". The research conducted was extensive, the real focus being upon crime and how it could be deterred and controlled. The surveys included reports on prosecution and judicial administration. Insofar as the reports dealt with criminal courts the researchers were struck by the problem of "inefficiency" Nardulli wrote:

> *[E]fficiency was conceptualized in terms of disposition rates and delays. Systems that eliminated (failed to convict) a large proportion of cases were less efficient than those with higher conviction rates; systems with longer average processing times were considered less efficient than those with shorter average processing times.* (At p6.)

33.3 The factors believed to be responsible for inefficiency were personnel, administration of the court system, rules of criminal procedure and "politics". This last factor referred to the presence of politics in the appointment of judges, prosecutors and almost all other personnel down to court clerks.

34 Topical Tradition. A second major stage in the evolution of criminal court analysis was what Nardulli calls the "topical tradition". There was a spate of studies during the 1950s and 1960s which focused upon individual segments of the criminal process - bail, plea bargaining, sentencing and so on.

34.1 Interest in criminal justice research was renewed owing to the "heightened society". Other significant manifestations of this heightened consciousness included the "revolution in criminal procedure initiated by the Warren Court", the civil rights movement and concern for the welfare of the impoverished. (At p42.)

34.2 According to Nardulli the major concern of the topical researchers was "the divergence between legal theory and reality within the criminal justice system" (that is the extent to which legally irrelevant factors affected the handling of criminal cases). (At p42.) Nardulli attributes the failings of both the crime survey tradition and the topical tradition to their failure to recognize the unique institutional characteristics of criminal courts. (At p56.)

35 The New Approaches : Organizational Analysis. The recent writings on courts, which seem to have grown out of a general feeling that the traditional types of analysis were deficient, all take some form of organizational or functional systems approach. This approach attempts to integrate into the analysis the unique institutional characteristics of the criminal courts.

35.1 Nardulli acknowledges the fact that the works that are classified as organizationally oriented studies of criminal courts constitute in fact "a rather disparate body of literature". He feels justified in characterizing them as the organizational tradition, however, because they all contend that "factors emanating from the collective efforts of judges, prosecutors, and defense counsel (the courtroom elite) to pursue common interests have important consequences for the processing of criminal cases". (At p66.)

35.2 The writers in the organizational tradition include Eisenstein and Jacob (Felony Justice : An Organizational Analysis of Criminal Courts 1977 Boston) Feeley ("Two Models of the Criminal Justice System : An Organizational Perspective" (1972) 7 Law and Society Review 407-426) and Mohr ("Organizations, Decisions and Courts" (1976) 10 Law and Society Review 621-42). Their analyses advance our understanding of the criminal justice system in the words of Nardulli because they take the view that the process is "an integrated whole tied together by mutual interests and a complex web of interrelationships". (At p66.)

35.3 The organizational tradition is of particular interest in relation to the study of court delays because (according to Nardulli) the common interests of the courtroom elite can be defined as the shared desire to process cases expeditiously. In support of this claim he cites Feeley's discussion (pp418-419) and Blumberg's emphasis on efficiency in Criminal Justice (1967 Chicago at p61 and elsewhere).

35.4 Nardulli's contention (that the basic premise underlying the organizational approach is that it is in the interests of each member of the courtroom elite to process cases expeditiously) might at first glance detract from the utility of the organizational approach in the search for reasons and remedies for court delay. Nardulli holds that the powerful participants in the courtroom are all aiming to dispose of cases as expeditiously as possible and that this is the basic premise in an organizational analysis. If that is so, it is

hard to see how an organizational analysis will reveal causes of delay in the behaviour of judges, prosecutors or defence counsel.

35.5 However, other writers in this tradition, while agreeing that the courtroom elite have shared goals, do not base their analyses on the premise that the first shared goal is to dispose of cases as expeditiously as possible (see for example Eisenstein and Jacob Felony Justice 1977 at p25, Table 2.1 reproduced at para 42). Another point that can be made here is that the courtroom elite can be seen to have a more pressing interest than disposing of cases and that is to dispose of the day's work, in the court hours. As there are normally a number of cases listed for the day the disposal of them does not necessarily entail a final disposition of them all. It is sufficient if the cases are adjourned for whatever reason to a date in the future. This action will clear the docket for the day but only add to the backlog.

36 Concepts in the Organizational Analysis. Essential to the organizational/functional systems approach are the concepts of work-groups and models of organizational analysis.

37 Work-groups are not hard to identify in this context - the participants in the courtroom constitute a work-group. Eisenstein and Jacob list seven characteristics commonly found in organized work-groups:

* they exhibit authority relationships

* they display influence relationships, which modify the authority relationships

* they are held together by common goals

* they have specialized roles

* they use a variety of work techniques

* they engage in a variety of tasks

* they have different degrees of stability and familiarity

(Felony Justice 1977 at p20.)

38 Organizational analysis actually began more than a decade before its impact was felt in relation to court studies in the 1970s. In their book subtitled An Organizational Analysis of Criminal Courts Eisenstein and Jacob attribute their understanding of organizations to the works of, among others, Simon (Administrative Behaviour), Blau and Scott (Formal Organizations: A Comparative Approach), and Etzioni (A Comparative Analysis of Complex Organizations).

38.1 Feeley considered the two models of organizational analysis originally developed by Etzioni:

* "rational goal" model and

* "functional systems" model.

Applying them to the criminal justice system Feeley found that the rational goal model fitted the traditional models of the criminal justice system, because the rational goal model implies:

> *An elaborate apparatus which processes arrests according to highly defined rules and procedures undertaken by 'experts' who perform the functions ascribed to them by highly defined formal roles, under a rigorous division of labour, and who are subject to scrutiny in a systematic and hierarchical pattern.* ("Two Models of the Criminal Justice System : An Organizational Perspective" (1973) 7 Law and Society Review 410 at p413.)

38.2 On the other hand the functional systems model conformed to the currently favoured approach to the analysis of the criminal justice system:

> *The functional systems model addresses the problem of identifying the group interests: the 'rules' the organization members are likely to follow and 'folkways', or informal 'rules of the game' within the organization; the goals they pursue are likely to be personal or subgroup goals; and the roles they assume are likely to be defined by the functional adaptation of these two factors.* (At p413.)

38.3 Baldwin and McConville acknowedge the vital contribution that the writers of organizational analyses have made:

> *Although it may not be possible to predict the way in which behaviour will be at odds with the organizational goals, the functional systems model does at least indicate that a correspondence between actual behaviour and formal goals is unlikely, and that it is more important to explain the activities of individuals and groups by examining their working philosophies and the environment in which they conduct their business.* (Courts, Prosecution, and Conviction 1981 Oxford at p187.)

39 Nimmer is one of the writers who advocated examination of the working philosophies of the participants. He wrote that the "dragon of delay" may lurk in what he called the "local discretionary system".

39.1 The authors of Pretrial Delay endorse Nimmer's suggestion. They define the local discretionary system as the informal set of incentives and relationships of court system participants. (Church and others at p46.) Their point is that the criminal law, unable to regulate every situation in the process, leaves many decisions to the discretion of the individual participants - for example police, prosecution lawyers, and defence lawyers. Over time,

discretionary systems, each peculiar to its own jurisdiction, have developed:

> *Without discretion the system would quickly choke on the number of people it would have to accommodate. Discretion is a means of rationing the limited amount of services that the system can provide. Thus, it is discretaion, the high demands of the system, and the constraints on the system's capacity that combine to give the system its distinctive character.* (Crime Control Planning Board An Analysis of Minnesota's Criminal Justice System 1976 St.Paul Minnesota at p2.)

39.2 However, Baldwin and McConville find accounts such as the one above deficient:

> *We would contend that it is not satisfactory to argue, as several American writers come dangerously close to arguing, that the reliance on guilty pleas arises because the legal rules which predicate adversary trial are twisted or disregarded in the interests of courtroom personnel. It is in our view going too far to say ... that deviations from the rules merely reflect the limited resources available to deal with intolerably high case-loads. Some account must be taken of the legal rules themselves.* (Courts, Prosecution, and Conviction at p16.)

39.3 They refer to McBarnet's "important series of articles" ("Pre-trial Procedures and the Construction of Conviction" in Carlen (ed) The Sociology of Law 1976 Keele pp172-201; "False Dichotomies in Criminal Justice Research" in Baldwin and Bottomley (ed) Criminal Justice: Selected Readings 1978 London pp23-40; "The Police, the Courts and the Right to Silence" a paper presented to the Socio-legal Conference on Judicial Reasoning and Procedure, 1978 University of Oxford; and "Arrest; The Legal Context of Policing" in Holdaway (ed) The British Police 1973 London pp24-40). McBarnet argues in this body of work that it is wrong to see the operation of the law (the "law in

action") as a subversion of the substance of the law (the "law in books"). ("False Dichotomies" at p31.)

39.4 McBarnet believes that the researchers who focus on the "law in action" are mistakenly assuming that the discretionary acts of police officers (and others in the criminal justice system) are "mere accommodations to the rules or ... breaches of them". (McConville and Baldwin Courts, Prosecution, and Conviction at p16.) "Analysis of the 'law in the books' on police behaviour does not tell us what the police do but a good deal about what the police are legally allowed and legally expected to do". (McBarnet "Arrest" at p28.)

39.5 Her point is that the law in books does not embody the principles of justice and fairness or even the limits of legality as is so readily assumed. The law does not incorporate its own rhetoric she says. Deviations from the idealized path of criminal procedure are far from being solely attributable to the will and vagaries of human behaviour. The law itself, in statutes and in cases deserves more attention.

39.6 The (mainly American) organizational analyses of the criminal process are lacking in this regard - they do not accord very much importance to the content of the law and its accompanying rules. However, the fact remains that the criminal law and rules of procedure do not provide an exhaustive set of rules to cover every conceivable situation and the organizational or functional systems analyses do at least provide a framework in which to study and explain how the system works in these grey areas. In the words of Baldwin and McConville:

> *the adversarial model of criminal procedure does not describe actual behaviour of the various participants within it; and ... the model is ambiguous in its goals and ambivalent in its prescriptions and does not comprise a set of responsibilities.* (Courts, Prosecution, and Conviction at pp185-186.)

39.7 Necessarily for its administration there are points in the criminal process at which decisions are entirely discretionary (whether to charge, what charges to make and so on). The criminal process is therefore flexible to that extent. Ideally, the discretion afforded to the various decision makers at the different stages in the process is exercised in order to enable the criminal justice system to adapt and meet the demand of justice (as perceived by society) within the constraints of limited resources.

40 Exercise of Discretion. It has been argued that in the area of discretion and flexibility the local discretionary system of "legal culture" develops with the result that the participants are not so much aware of the fact that they have discretion as accustomed to the normal and expected practice.

40.1 The "local legal culture" should not be thought of as affecting only lawyers in the courtroom. Police behaviour too is very much governed by the local culture. In their discussion of police reports to fiscal officers (Scottish prosecutors) Moody and Tombs provide an illustration of the process by which discretion and consideration of individual cases are forced out by the sheer volume of work and by the prevailing practices. The role of the police as reporters in Scotland is a crucial one. The fiscal officers generally do not speak to the reporting police officer before "marking" (that is deciding whether to prosecute an alleged offender, and, if so, upon what charges). The fiscals rely solely on the police report in making their decisions about prosecution. (Prosecution in the Public Interest 1982 Edinburgh at p45.)

40.2 Moody and Tombs note that research on the creation of written records has shown that "in encapsulating an actual event on paper ambiguities and inconsistencies are usually lost" and this is particularly so where the writer is attempting to contain his description within a standardised format. They quote Friedson:

in everyday life delineations are not made; vague stereotypes seem to be used. Control agencies in our society, however, in defining and classifying become responsible for drawing clearer lines than in fact exist in everyday life. ("The Production of Deviant Populations" in Rubington and Weinberg (eds) Deviance: The Interactionist Perspective 1973 New York at p125 quoted in Prosecution in the Public Interest at p45.)

40.3 The police reports tended to focus on the offence and the ingredients necessary for proving it. "The language is stereotyped and the thrust of the presentation is towards minimising uncertainty and maximising the strength of the case for the prosecution." (Moody and Tombs, Prosecution in the Public Interest at p45.)

40.4 The presentation of police reports in turn shapes the decision making of the fiscal officers. Other aspects of the system which also shape or narrow their discretion include the volume of work and the number of staff. Between 1970 and 1980, according to figures supplied by the Crown Office, the number of reports received by prosecutors almost doubled and in the same period the professional staff of the prosecution service increased by more than 100 percent. In Glasgow and other large fiscal offices more than 1,000 police reports are dealt with each week. These factors lead to the "conveyor-belt" style of prosecution. Furthermore, it is suggested that it is in the nature of large bureaucratic organizations to stifle the exercise of individual discretion:

The inevitable pressure towards uniformity and streamlining which such large numbers create is reinforced by the nature of modern bureaucratic organizations ... Individual exercise of discretion is regarded as both dangerous and an inefficient way of spreading resources and therefore something which should be kept under control. Members of organizations must be able to account for their actions within a particular bureaucratic framework and those explanations must square with the requirements of efficient

processing. (Moody and Tombs at p45 citing King The Framework of Criminal Justice 1981 London at p104.)

40.5 Many of the discretionary decisions taken in the criminal justice process would not at first sight appear to have any bearing on delays in the courts, but the large numbers of alleged offences reported or investigated by the police exert great pressure on the system - a pressure which discourages the exercise of discretion and encourages streamlining. Moody and Tombs refer to this pressure and cite Blumberg for the idea that "there is a tendency for the process itself to take over, encouraging a constant flow of cases and leading ultimately to a conveyor-belt system of justice". (Prosecution in the Public Interest at p48.)

40.6 The local discretionary system controls the working environment of the criminal justice system and, on this view, the working of the system is largely dictated by the compromises worked out between the police, the lawyers on either side and the judge. These compromises do not invariably represent the best interests of justice, or at least might not give the appearance of being in the best interests of justice. However, the police, prosecution and defence counsel and judge have to work together. Without give and take the system could become unworkable, if for no other reason than that a high crime rate would completely clog the courts. Moreover "while the discretionary power in the court system is almost entirely vested in the courtroom elite, [by which the writer means prosecutor, defence counsel and judge] it is distributed among the various members in such a manner that none can dominate criminal court operations". (Nardulli The Courtroom Elite: An Organizational Perspective on Criminal Justice 1978 at p70.)

41 Public Scrutiny of the Exercise of Discretion. One of the institutional features of the criminal courts which this line of study recognises is that proceedings take place in a closed atmosphere. "The low visibility of the entire court process to the public and even to other public officials is

characteristic ... the court participants (judges, prosecutors and defense attorneys) are allowed to pursue their own preferences almost totally unimpeded by the police, the victim, the defendant, or society as a whole". (Levin Urban Politics and the Criminal Courts 1977 Chicago at pp64-65.)

41.1 Eisenstein and Jacob recognize the difficulties inherent in any attempts to incorporate public scrutiny into the system.

> *Courtroom workgroups have a job to do. Like most people pressed for time, their members do not often pause to philosophize about their ultimate purpose or goals. It is difficult enough just to keep going. Although they may not realize it, all courtroom workgroups share values and goals. These shared perspectives undermine the apparent conflicts generated by the formal roles of workgroup members - the prosecutors' push towards convictions, the defense attorneys' quest for acquittals, and judges' inclination toward neutrality.* (Eisenstein and Jacob Felony Justice : An Organizational Analysis of Criminal Courts 1977 Boston at pp24-25.)

42 Eisenstein and Jacob discussed, in some detail, the goals of courtroom workgroups. They isolated four goals, shown in the following table.

TABLE 2.1

GOALS OF COURTROOM WORKGROUPS

	Origins of Goal	
Function of Goal	External	Internal
Expressive	*Doing Justice*	*Maintaining Group Cohesion*
Instrumental	*Disposing of Case Load*	*Reducing Uncertainty*

(Felony Justice 1977 at p25.)

Eisenstein and Jacob saw the interaction of two dimensions - the functions of goals and the origins of goals. In relation to the functions "expressive goals" are those which serve symbolic functions and give meaning to activity whereas "instrumental goals" are the practical goals, serving material functions and helping to "get things done". The origins can be divided into external and internal. "Externally oriented goals are imposed by the workgroup's environment. Internal goals are produced by the need of the members to share perspectives that sustain the organization itself". (At p25.)

42.1 It can be seen from the table that Eisenstein and Jacob claimed that the most important of the externally imposed instrumental goals was "disposing of case load". The externally inspired expressive goal was "doing justice".

42.2 More immediate to the daily work of the participants in the courtroom, however, are the internally oriented goals which Eisenstein and Jacob defined to be the goals produced by the members of the courtroom workgroup in order to sustain the organization itself. The internal instrumental goal according to Eisenstein and Jacob was to reduce uncertainty.

42.3 The external instrumental goal (caseload disposition) and the internal instrumental goal (reduction of uncertainty) went "hand in hand" they claimed. One might wonder on this analysis how the problem of court delay ever arose. Other writers who used versions of organizational or functional systems analysis however do not agree with Eisenstein and Jacob that the courtroom workgroup's internal goals go hand in hand with efficient caseload disposition. Eisenstein and Jacob may have pitched the shared goals of the courtroom participants too high - overlooking their individual goals and orientations.

42.4 Few writers would contend that the expeditious disposal of cases is the top priority for any of the participants apart from the judge. Furthermore,

as is pointed out in Pretrial Delay:

> *An important part of delay may be produced by an informal court system in which the benefits of delay to some participants are great, and the costs of delay to the other participants are insufficient to justify the disruption, conflict, and possible retaliation necessary to reduce it.* (Church and others Pretrial Delay 1978 at pp47-48.)

42.5 It has been argued then that there is a lack of commitment in some of the members of the courtroom workgroup to the goal of expeditious processing of cases. Levin goes further and claims that some participants actually employ delaying tactics in the pursuit of their personal goals. These personal goals take precedence over goals shared by the courtroom workgroup and over goals imposed externally.

> *[M]y analysis of criminal court delay in [five different courts] ... found that delay tends to be associated primarily with the voluntary behaviour of the judges, defense attorneys, and prosecutors ... For instance, defense attorneys often consciously take actions associated with delay as an indirect means of achieving their own goals, even at the expense of the defendant's goals. Some of the judges' behaviour is also associated with long delay, especially their tolerance of these actions by the defense attorney ... Thus, delay does not seem to be an external phenomenon thrust upon unwilling court participants.* (Levin Urban Politics and the Criminal Courts 1977, Chicago at p192.)

43 "Attainment of Justice" as Goal. Returning to Eisenstein and Jacob's table of goals (para 157) the expressive goal of courtroom workgroups as postulated by society at large is "doing justice". (See para 42.) Baldwin and McConville express the same idea: "the declared goal [of the criminal justice system] is the rather vague one of the attainment of 'justice' according to the

requirements encapsulated in the phrase 'due proces of law'". They point out that while nearly everyone in American society values justice:

> *The specific content of the term ... is ambiguous. For some, justice is done when criminals are caught and severely punished regardless of procedure. For others, adherence to the principles of due process and equal treatment produces justice. The ambiguity and disagreement contained in the notion of justice in society are mirrored in the varying perspectives of workgroup members.* (Courts, Prosecution, and Conviction 1981 Oxford at p9.)

43.1 It is at this point in the analysis that the different incentives of each of the participants come into view and causes of delay are revealed. Lawyers might be bound to the goal of doing justice by their professional training. (See Eisenstein and Jacob Felony Justice at p26.) They may also be ideologically committed to the notion that their duty is to the court, but in practice they do not feel prevented from conniving at failings in the system, including opportunities to delay/adjourn proceedings which will help their interests.

43.2 The perspectives of different participants (with particular emphasis on defence counsel) will be examined to uncover some of the causes of delay in the United States and the United Kingdom. Much has been written about defence counsel in the United States. It is not suggested that the practices described there are found in Victoria. However comments made about defence counsel in America go some way towards explaining not only the nature of the problem there but also the rationale behind some of the remedies tried there. As differences are apparent between the behaviour of defence counsel in America and Victoria, the remedies employed there, aimed at changing the behaviour of counsel, may not be appropriate here.

44 Defence Counsel in the United States of America. Levin disabuses readers of any idealized view of defence counsel in America:

Neither the public defense attorneys ... nor the private attorneys 'represent' the client's interests primarily; both try mainly to serve their own interests first. The private attorney's primary needs revolve around his fee and time; the public attorney's center on processing his caseload and maintaining and improving his relations with his peers, especially the judges. (Urban Politics and the Criminal Courts 1977 at p77.)

44.1 The private defence attorney, in particular, seems to be a cause of delay. Levin describes the strategies employed in the pursuit of the defence attorney's main goals which centre around fees and counsel's time (which equals money too). Levin disputes the popular conception that defence counsel aim to avoid a conviction or severe punishment for their clients. The fact is that trying to avoid conviction or a severe sentence is time-consuming, especially when a trial is involved. Instead, according to Levin, the typical American private defence attorney will employ one or more of four strategies in pursuit of personal goals:

The private defense attorney's first strategy is not to allow a case to be terminated until he has received his fee, or at least a substantial part of it. Delaying the case through continuances is his major tactic ...

Second, to maximise the size of his fee, and perhaps more importantly to minimize the time devoted to the case, the private defense attorney 'boosts' the effort he claims to be making in the client's behalf. In Pittsburgh sometimes he may report extra-legal efforts, such as intervening with some officials. Delaying the case through continuances gives the appearance that efforts are being made ... The defendant observes part of the alleged effort - the passage of time; and the attorney boosts the other part - the actions he is allegedly making on the client's behalf.

The defense attorney also tries to minimize his time by avoiding full-length trials by trying to persuade the defendant to plead guilty ...

The ... third strategy is to mollify the defendant and minimize his hostility toward him in order to insure that he actually receives his fee ... the simple passage of time is one of the most important, and sometimes one of the few, ways of minimizing a defendant's hostility and getting him to agree to his attorney's suggestions.

Obtaining a reduction in the charges against a defendant also helps the attorney ... The reduction appears advantageous to most defendants, yet usually the defense attorney does not have to devote much time to obtaining it. (At pp78-79.)

It should be reiterated that this is the American experience (and one writer's view of it) and does not necessarily have any parallels in Australia.

45 Police Activity. The police play an essential part in the criminal justice system. Their work detecting and preventing crime and then bringing suspects to justice provides the business for the criminal courts. In some respects the policy may be considered to have contributed to delays in the system. If they bring too many people to answer charges, the courts cannot keep up and backlogs develop. Of course if, in general, the police are bringing people who are reasonably suspected, against whom there is at least, say, a prima facie case, and the crime of which they are suspected is not of a trivial nature, then the courts must be made capable of dealing with the load. On the other hand, if those charged with offences are not reasonably suspected, if there is insufficient evidence against them or if the alleged offence is of a petty nature then the police practices may require changes.

45.1 In their book, Courts, Prosecution, and Conviction Baldwin and McConville made some observations about the police and their activities in

England, vis a vis court delays. They had embarked upon research of the prosecution system in England having noted the relative dearth of information there:

> *Understanding of the way in which the prosecution process operates in England is in its infancy. In the United States, by contrast, generations of lawyers and social scientists have been active in enquiring into, and constructing theories about, all aspects of the criminal system.* (At p1.)

45.2 Baldwin and McConville's research had very broad aims:

* to begin to understand how the prosecution system works

* to uncover the underlying principles

* to test the validity of different theoretical perspectives.

45.3 Delays are discussed in the context of the "protective mechanisms" in the prosecution system. Describing these protective mechanisms the authors explain that:

> *English legal and administrative procedures are specifically designed to guard against two broad errors; the conviction of any who are possibly innocent, and the placing on trial of those against whom there is no real evidence.* (At p73.)

45.4 In relation to the second issue (that is, guarding against the placing on trial of those against whom there is no real evidence) the police play a very significant role. In England:

Before charging a suspect, the police must be satisfied that there is sufficient evidence against him, though they have considerable latitude in the interpretation of this requirement. Usually the prosecution evidence will be scrutinized internally or by a prosecuting solicitor before or after charges are laid, and the defence has a similar opportunity to test the evidence after charges have been laid. In cases destined to be tried in the Crown Court there is a further check - at committal proceedings the defence may submit that there is no case for the defendant to answer on the evidence adduced by the prosecution and request the magistrates to make a decision. Finally, before a case comes on for trial at the Crown Court, prosecuting counsel may himself determine that there is insufficient evidence upon which to proceed and take steps to terminate the prosecution. If for any reason these mechanisms function imperfectly (or fail to operate at all), there is a risk that a defendant may be sent for trial upon insufficient evidence. If this happens, an innocent person may needlessly be put to the trouble, expense, and anxiety of a court appearance the outcome of which should never have been in doubt. (At pp72-73.)

45.5 One of the important findings of the research was that the police in England have a central role in the prosecution process - much more so than the police in America. The police take "most of the key decisions". (At p189.) Baldwin and McConville felt that gaining an understanding of the police work in England was a major factor in understanding the operation of the whole system. They found that, in practice, it was the task of the police not only to discover whether and by whom a crime had been committed but also to decide whether to institute a charge and for what offence.

45.6 The conclusion that Baldwin and McConville reached was that the dominant role of the police, both in the investigation of crime and in the decision to prosecute, "may involve an overlap of functions that ought to be independent and it may produce conflicts and tensions". They expanded:

The point is not that the police are slapdash in conducting their investigations nor even that individual officers develop a psychological commitment to the prosecution which blunts their judgment and blinds them to alternative and no less credible hypotheses. Rather it is the responsibility for prosecution that requires the police to present the strongest possible case, and encourage all those concerned with the prosecution to reinforce the picture presented and to ignore doubts they may entertain. (At p191.)

45.7 The preliminary hearing or committal proceeding, of course, provides a "protective mechanism" to screen those cases which would be tried in the Crown Court. For the cases which can be heard in the Magistrates' Courts, however, there may be nothing after the police decision to prosecute which will prevent the case being added to the Magistrates' Court list and proceeding to a hearing. And even when there is a committal:

the main problem is not that the weak case will never be identified, the hopeless hived-off, the ill-conceived weeded out. The problem is that identification and final disposition are unnecessarily delayed, that thin cases are needlessly protracted ... weak cases ought not to be committed for trial in the first place ... The ultimate de facto responsibility for the present unsatisfactory situation lies, in consequence with the police who are unable or unwilling to pursue only those cases which have some real prospect of ending in conviction. (At p93.)

46 Role of the Judge. Judges each control their own court. The pace of litigation in a court is, to a large extent, determined by the judge. If the judge entertains all applications and arguments of counsel and tolerates all dilatory practices the pace in that court will in fact be set by counsel.

46.1 Martin Levin in his book Urban Politics and the Criminal Courts discussed the results of his comparative study of five urban courts. In relation to judges he made the following comments:

> *Although most of the actions associated with delay are initiated by other participants, they usually could not persist if the judges chose to oppose them because little occurs in the courtroom without their tolerance. Judicial behaviour indirectly and directly influences the number of continuances, full-length trials and motions.* (1977 Chicago at p241.)

46.2 Of the five courts studied, Levin found that in those with long or moderate delay the judges habitually tolerated, or at least failed to discourage, almost all aspects of the defence attorneys' behaviour which could be directly blamed for delay. These judges "almost never" forcefully interfered with the attorneys' pursuit of their goals and this was so even though the judges were aware that the behaviour of the defence attorneys meant delaying or protracting proceedings and that their aims were at variance with the goals of the court and possibly the interests of the defendant. (At p241.)

46.3 During Levin's study several reasons were suggested for the judges' tolerance of delaying tactics:

> *Judges and others ... suggested that the judges co-operated so frequently with [for instance] continuance requests partly because they were concerned with the risk of a reversal or appeal on the ground that the defense had insufficient time for preparation.*
>
> ...
>
> *[Also] the judges ... seem to sympathize with their professional brethren's problems of fee collection and tolerate practices that will facilitate payment ...*

Similarly, Banfield and Anderson suggest that in the Chicago criminal division 'judges may allow lawyers some latitude [with continuances] as a matter of professional courtesy.'

Second, the judges seem to tolerate these defense practices because, given their multiple goals and the constraints within which they operate, they feel that co-operation is the lesser evil ... (At p242.)

46.4 Levin noted a third reason which seemed to account, in part, for the tolerance of judges in one of the courts studied:

Among Pittsburgh's pragmatically oriented judges there is a third factor. They ... seemed to be somewhat tolerant of delay because of its effects on defendants. Many Pittsburgh judges felt that, since most defendants probably were guilty, delay was not undeserved: For those who were ultimately incarcerated, the initial delay was thereby deducted from their sentences; for those who were acquitted or given probation, delay gave them 'the taste of jail' that they deserved. (At p243.)

46.5 So, despite the fact that the most immediate organizational pressure felt by most judges is the disposal of their caseloads, the judges have to work with counsel:

Like other individuals involved in daily face-to-face relations, the judges and the defense attorneys actively stress 'getting along with each other' and minimizing conflict. For this reason and others, even when the defense attorneys' actions increase delay, the judges ... tend to accommodate them as much as possible. (At p228.)

PART III

OVERSEAS REMEDIES FOR DELAYS IN COURTS

47 Overview. In attempting to solve delay in the criminal process the overriding concern must be to ensure that no right of the accused is abrogated. Fairness must be guaranteed, and a certain degree of efficiency might have to be sacrificed in that cause. However, insofar as delays may cause injustice, their elimination must be achieved and if, beyond that point, greater efficiency can be reached without any loss of the safeguards which protect the accused, then that should be the aim.

48 Approaches. From a survey of the developments in response to the problem of delays three approaches can be isolated. The most obvious approach is to focus on the traditional criminal court process and attempt to streamline it: for example, by "getting rid of unnecessary complications and abolishing or modifying rules which ... (have) ceased to be appropriate ..." (Criminal Law Revision Committee 9th report Evidence: Written statements, formal admissions and notices of alibi London HMSO 1966 Cmnd 3145 at para 5.)

48.1 The second approach is to look beyond the traditional process and to create instead new procedures and tribunals for particular types of cases. This form of action arises from a belief that some types of criminal case do not merit a full court hearing and might benefit in fact from a special type of hearing with procedures relevant to the particular type of case. (Judith A. Osborne, Delay in the Administration of Criminal Justice: Commonwealth Developments and Experience 1980 Commonwealth Secretariat London at p141.)

48.2 The third approach is to focus not so much on the process (whether traditional or new) as on the content - that is to sift out those cases in which

the conduct is not regarded as criminal at all, perhaps owing to changed attitudes in society. Behind this approach is a questioning of the appropriateness of the criminal procedure for certain types of behaviour.

48.3 The first of the three approaches mentioned in the preceding paragraphs relates to attempts to streamline the process. This was one of the aims of the American Bar Association when it undertook its Project on Minimum Standards for Criminal Justice. Among the various sets of standards formulated as a result of this project were Standards Relating to Speedy Trial which will be discussed later. (At paras 49-51.14.) A short examination will be made here of the entire project in order to describe the larger context in which the speedy trial standards were seen to play an important role.

CRIMINAL JUSTICE STANDARDS

49 Standards in the United States. The American Bar Association (the "ABA") formulated "Standards relating to Speedy Trial" as part of its Project on Minimum Standards for the Administration of Criminal Justice. A short examination will be made here of the whole project in order to describe the context of the speedy trial standards.

49.1 The project was suggested by the Institute of Judicial Administration at the New York University Law School to the American Bar Association in 1963. A pilot study of the problems in the field of criminal justice was conducted in 1964 by a committee chaired by Chief Judge J. Edward Lumbard of the United States Court of Appeals for the Second Circuit. Following the pilot study Committee's report the ABA authorised a three year project and a budget of $750,000.

> *The scope of the Project's concern has been the entire spectrum of the administration of criminal justice, including the functions performed by law enforcement officers, by prosecutors and by defence counsel, and the procedures to be followed in the pre-trial, trial, sentencing and review stages. In order to cover this broad area, the administration of criminal justice was initially divided into five sub-areas, and a separate Advisory Committee was appointed to make the necessary studies and to draft the standards for the topics of major concern within each of those areas. The titles of those Committees indicate their scope: Police Function, Pretrial Proceedings, Prosecution and Defence Functions, Criminal Trial and Sentencing and Review.* (American Bar Association Standards Relating to Speedy Trial: Approved Draft 1968 Chicago at pvi.)

49.2 The Standards were developed over a ten year period and cover the whole of the criminal process from arrest to post conviction procedures in 18 volumes:

* the urban police function

* electric surveillance

* the prosecution function

* the defence function

* providing defence services

* the function of the trial judge

* fair trial and free press

* pretrial release

* discovery and procedure before trial

* speedy trial

* joinder and severance

* pleas of guilty

* trial by jury

* sentencing alternatives and procedures

* probation

* appellate review of sentences

* criminal appeals

* post-conviction remedies

49.3 Another project on "standards" was funded by the Law Enforcement Assistance Administration to the tune of $1.75 million. The National Advisory Commission on Criminal Justice Standards and Goals (the "NAC") was appointed in 1971 to formulate standards and goals for crime reduction and prevention at the state and local levels. Various "Task Forces" were established:

* Police Task Force
* Courts Task Force
* Corrections Task Force
* Community Crime Prevention Task Force

Also several "Advisory Task Forces" were set up:

* Civil Disorders Advisory Task Force
* Community Involvement Advisory Task Force
* Drug Abuse Advisory Task Force
* Education, Training and Manpower Development Advisory Task Force
* Information Systems and Statistics Advisory Task Force
* Juvenile Delinquency Advisory Task Force
* Organized Crime Advisory Task Force
* Research and Development Advisory Task Force

Six volumes of standards and goals were produced in 1973.

49.4 Between them the ABA and the NAC provided standards for 476 different situations in the criminal process. However, on only 16 of these did they differ substantially.

49.5 Motivating these bodies (and those which have followed) to formulate standards was the belief that "existing or hypothetical 'best' practices, modes of professional conduct and statutory schemes [could] be distilled into a set of general guidelines for use in upgrading the quality of criminal justice in each jurisdiction". (How to Diagnose What's Wrong with the Criminal Justice System In Your State And What To Do About It; The Role Of The Updated Comparative Analysis 1977 Washington at p6.)

49.6 Following the ABA and NAC Standards other bodies began to produce sets of criminal justice standards, guidelines and models, for instance: Uniform Rules of Criminal Procedure, Federal Rules of Criminal Procedure, American Law Institute Model Code of Pre-Arraignment Procedure, National District Attorneys Association Standards and Goals for Prosecuting Attorneys and National Legal Aid and Defenders Association Standards.

50 Effecting a Speedy Trial - USA. The task of formulating standards relating to "speedy trial" was assigned to the ABA's Advisory Committee on the Criminal Trial, even though it was perceived to be a matter only indirectly related to the criminal trial itself. (Standards Relating to Speedy Trial at pviii.) Speedy trial standards were treated as a matter of high priority because of the great public concern that justice was not being speedily done.

50.1 In 1968 the Approved Draft of the Standards Relating to Speedy Trial was published. As is pointed out in the introduction, these standards were not designed to speed up the criminal process:

> *The emphasis in these standards is not upon techniques for improving the efficiency of the criminal process. Rather, the concern here is with how the interest of defendants and the public in prompt trial should be defined and protected.* (Standards Relating to Speedy Trial Approved Draft p.2)

Some of the other standards, such as the omnibus hearing standards (discussed later in this Report) were intended to have the effect of speeding up the criminal process.

50.2 Prior to the ABA's Standards and the Second Circuit Rules (made in 1971) the only guarantee for an accused person that the case against him would be dealt with expeditiously in the federal system was that embodied in the sixth amendment to the Constitution:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour and to have the assistance of counsel for his defense.* (Emphasis added.)

Congress enacted the Federal Speedy Trial Act of 1974 (Public Law 93-619 88 Stat 2076) to facilitate speedy trials.

50.3 In many states there were statutes imposing time limits for the commencement of trial following the arrest on committal but there was great variation among them and uncertainty as to the operation and effect of these statutes. (ABA Project on Standards for Criminal Justice, Standards Relating to Speedy Trial Approved Draft 1968 at p2; and see this Report paras 54-54.4 for the current position.)

50.4 In 1946 the Federal Rule of Criminal Procedure 48(b), founded on the sixth amendment right to speedy trial was promulgated. It provided that:

> *If there is unnecessary delay in prosecuting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the District Court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.*

There were very few cases which relied on Rule 48(b).

50.5 From the early 1960s however the Supreme Court was called upon with increasing frequency to interpret the sixth amendment and to make appropriate rulings.

50.6 The Supreme Court's interpretation of the speedy trial clause differs significantly from its interpretation of other constitutional provisions, in that it requires a showing of actual prejudice to the particular accused before a delay is found unconstitutional.

50.7 In his article "Speedy Trial - Major Surgery for a National Ill" [(1972) 24 Alabama Law Review 265] Goodbold pointed out that by requiring a demonstration of prejudice to the particular accused as a prerequisite for a determination that a delay is unconstitutional, any attempt to expedite criminal procedure through the constitutional ruling process is badly hampered. (At p274.)

50.8 Goodbold listed some of the problems arising from the resort to constitutional appeal as a means of ensuring both the individual's guarantee of speedy trial and also the general expedition of the criminal process:

(1) *The remedy for violation (dismissal barring reprosecution) ran headlong into the general interests of society.*

(2) *The requirement of prejudice to the defendant was difficult if not impossible in some cases to prove under normal evidentiary standards.*

(3) *The requirement that the defendant demand a speedy trial (the 'demand rule'), while firmly established, was fundamentally inconsistent with the limitations on waiver of other constitutional guarantees. To blunt its impact a growing body of exceptions was being created.*

(4) *The requirements of (i) a demand by the defendant for a speedy trial and (ii) prejudice to the defendant prevented the courts from addressing themselves to the reasons for delay and from searching for ways in which to combat it.*

(5) *The framework of constitutional decision on the right of a particular defendant and whether it had been denied was not adapted to giving effect to 'the larger public interest in the prompt disposition of criminal cases which may transcend the interest of the particular prosecutor, defence counsel and defendant'.* (Advisory Committee Note to Proposed Amendment to Federal Rules of Criminal Procedure 50)

Goodbold expanded on this point:

(6) *There were sometimes direct conflicts between the accused's valid interest in a speedy trial and a valid interest of the government or society in an otherewise legitimate delay and there were similar collisions between the accused's interest in a speedy trial and any failure of the government to supply the resources and manpower to expeditiously move the process it has set in motion.*

Emphasis is placed upon the accused as the agency responsible for pressing to trial, although he has no responsibility for the efficient administration of the judicial system and his desires about his case have no necessary relation to the system's effective operation. This emphasis minimises prosecutorial responsibility and even encourages its avoidance. Because of the severity of the remedy for unconstitutional delay, constitutional decision is an unsatisfactory supervisory means for requiring agencies of the government to discharge their responsibilities for promoting speedy trials. Length of allowable delay is probably the guideline which the prosecution needs most. Constitutional decision, however, attaches subsidiary importance to length of delay and is not adapted to establishing elapsed time standards, which may vary depending on the circumstances of different jurisdictions. (At pp288-9.)

51 The ABA Speedy Trial Standards. The Standards Relating to Speedy Trial are divided into four parts:

I *The Trial Calendar*
II *Determining What is a Speedy Trial*
III *Special Procedures: Person Serving Term of Imprisonment*
IV *Consequences of Denial of Speedy Trial*

(The Standards appear in full at Appendix I.)

51.1 To begin with the last: the Advisory Committee said that outright dismissal should be the consequence of failure to provide speedy trial:

If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offence, subject only to the running of the statute of limitations, the right to speedy trial is largely meaningless. (Commentary to Standard 4.1.)

51.2 The accused or counsel for the accused must move for discharge prior to trial or guilty plea. If this is not done the presumption arises that the accused has waived the right to speedy trial. (Standard 4.1.)

51.3 The Standards also provide that if a shorter time limit is applied to defendants held in custody then the defendant should be released from custody at the expiration of that shorter time and placed on his/her own recognisance so that prosecution is not barred until the expiration of the longer time period applicable to bailed defendants. Defendants placed on their own recognisance for this reason might be required to comply with certain conditions such as checking in with the police or court at regular intervals. (Commentary to Standard 4.2 at p42.)

51.4 In the second section "Determining What is a Speedy Trial" the first Standard provides that:

> *A defendant's right to speedy trial should be expressed by rule or statute in terms of days or months running from a specified event. Certain periods of necessary delays should be excluded in computing the time for trial, and these should be specifically identified by rule of statute insofar as is practicable.*

51.5 The Advisory Committee did not attempt to make any specific recommendations as to speedy trial limits in terms of days or months. The Committee recognised that with different conditions existing in each jurisdiction it would not be realistic to prescribe one set of time limits. In contrast to this attitude, the President's Crime Commission in 1967 proposed that four months be set as the limit for the period from arrest to trial in felony cases - (President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967) at p155) and the NAC recommended trial within 60 days of arrest (Courts 1973 at ppxx-xxi.)

51.6 Standard 2.1 calls for each jurisdiction to identify specifically the types of delays which would merit extension of the period (the delays which, in other words, could be excluded from the computation of the time period). The need for specific listing of such delays was noted after comparison of the various state laws. Although a few states had enumerated the excuses which would qualify for extension of the period, most jurisdictions had merely provided for additional time showing of "good cause" and this had given appellate courts the difficult task of determining what sorts of events in fact justified extension of the statutory limits. (At p15.)

51.7 Obviously the point at which the period commences is central to the whole scheme. Standards 2.2 and 2.3 deal with this aspect. Time commences running, without demand by the defendant, from the date the charge is filed, unless the defendant has been continually held in custody or on bail recognisance until that date to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, in which case time begins to run from the date the defendant was held to answer. (Standard 2.2.)

51.8 Certain periods of time (delays) are excluded such as those delays resulting from the continuances granted at the request of the defendant or defendant's counsel or those delays resulting from the absence of the defendant. (Standard 2.3(c) and Standard 2.3(3) respectively.)

51.9 The section on calendar control (part 1) embraces a number of principles:

> *The right of the accused person to a speedy trial, the public's interest in prompt disposition of criminal cases, the priority that ought to be given to criminal trials over civil, and the priority that ought to be given to trials of accused persons (i) in custody, or (ii) whose pretrial liberty is reasonably believed to present unusual risks* (Standard 1.1.)

51.10 Under Standard 1.2 the control of the court calendar is vested in the court and the prosecuting attorney is required to file periodic reports on the cases for which trial has not been requested. The Advisory Committee noted that if a prosecutor does not take steps to dispose of an old case, the charges might remain hanging over the accused's head for a very long time. By requiring periodic reports as a public record the prosecutor is made publicly accountable.

51.11 The interest of the public in the prompt disposition of criminal cases is reiterated in relation to the court's consideration of requests for continuances (adjournments). The Advisory Committee noted that in many courts the granting of continuances was a routine matter. Standard 1.3 was explicitly aimed at charging the court with the responsibility of determining the merit of each request:

> *1.3 Continuances*
>
> *The court should grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecution or defence but also the public interest in prompt disposition of the case.*

51.12 The Advisory Committee commented that it was implicit in this standard that the need for prompt disposition of criminal cases transcends the desires of the immediate participants. (At p13.)

51.13 The Advisory Committee intended that the spirit of Standard 1.3 should apply not only to continuance requests, but also the other procedures which are used by counsel to delay proceedings. One example is the procedure available in some states whereby the prosecutor can enter a nolle prosequi with leave of court, allowing the prosecutor to restore the case to the calendar at any time. [See Klopfer v North Carolina 87 Sup. Court 988 (1967).]

51.14 In favour of the ABA's Standards Relating to Speedy Trials and the Second Circuit Rules, Goodbold commented that they tackled directly some of the problems of the constitutional challenge. Of great importance is the removal of the focus of responsibility from the defendant to the court and public prosecutor. In this vein, the necessity for demand by the accused is eliminated, except in the procedural sense of moving for discharge before trial or plea of guilty. Also, the ABA Standards provide for and the Second Circuit Rules both provide for and fix, definite time periods. The necessity for the existence and proof of individual prejudice is thus eliminated. (Goodbold "Speedy Trial - Major Surgery for a National Ill" (1972) 24 Alabama Law Review 265 at p293.)

52 The NAC Standards. The National Advisory Commission on Criminal Justice Standards and Goals (the "NAC") provided a "Time Frame for Prompt Processing of Criminal Cases". (Standard 4.1.)

52.1 In a number of respects the NAC's views differed from the ABA's in this area of time limits. While the ABA's Standards Relating to Speedy Trial sought to define and protect the interests of both the public and defendants in prompt trial, the NAC felt that the relevant issue was "prompt processing of cases for the good of the community" and for that reason the NAC Standards did not purport to define a right of defendants. (National Advisory Commission Courts 1973 at p68.)

52.2 The NAC, unlike the ABA, did not address the issue of the consequence of failure to meet the time limits. It did advert to the possibility that automatic dismissal would appropriately remedy failure to provide speedy trial from the defendant's point of view. The NAC was more concerned with increasing the ability of the system to accommodate its caseload.

52.3 The time limits set by the NAC were intended as a guide for the

average case. They were not designed to impose "outside limits". (NAC Courts at p68.) Other specific time limits for different parts of the process of felony prosecution were provided. The Table on the following page presents these time limit recommendations. Together the recommendations form a guide to achieving trial in felony cases within 60 days of arrest.

53 The Federal Speedy Trial Act 1974. This Act came into full operation on 1 July 1980 and applies to defendants in federal criminal prosecutions. The time limit is 100 days from arrest or summons to trial. [18 U.S.C. 3161(b)(c)(Supp.111 1979).] There are certain delays exempted (see below) but the general thrust of the Act is to require trial within 100 days. The main sanction is dismissal of the prosecution - although there is provision for both dismissal with and without prejudice. (18 U.S.C. 3162) Other sanctions are provided: fines for purposeful and unjustifiable delay may be imposed against prosecution or defence counsel - up to 25 per cent of their fees [18 U.S.C. 3162(b)(4)(A)], and censure, suspension or dismissal from practice may be ordered against counsel [18 U.S.C. 3162 (b)(4)(D)(E)].

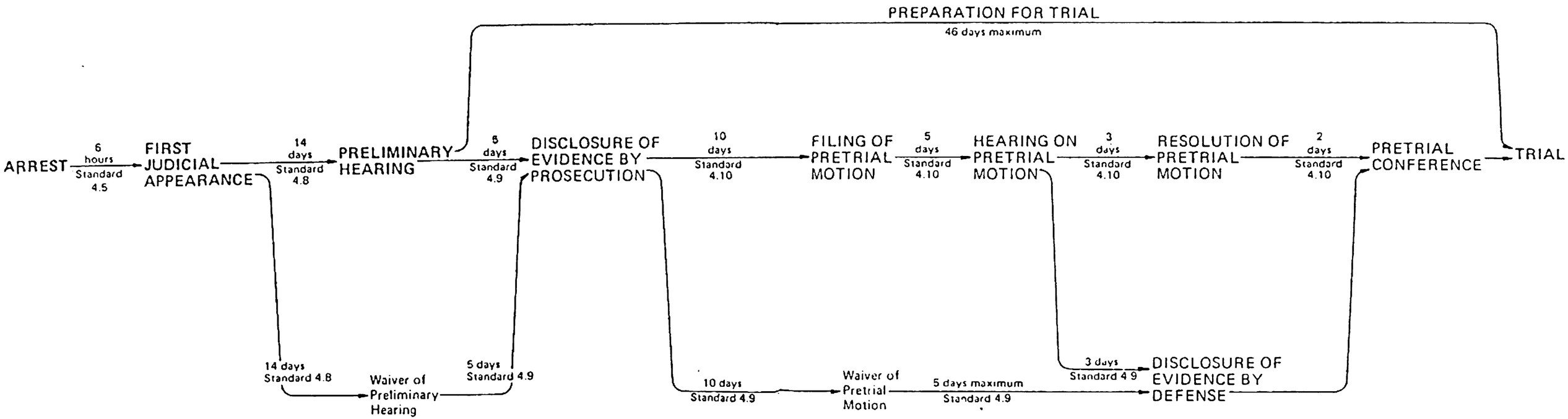
53.1 While the Act requires prosecution within 100 days of arrest or summons, defendants cannot be tried against their will within 30 days of first appearance. [18 U.S.C. 3161 (c)(2).]

53.2 The periods excluded from the time calculation include delays resulting from:

* physical or mental examinations of the defendant [3161(h)(1)(a)]

* deferred prosecution granted to allow the defendant to demonstrate his/her good behaviour [3161 (h)(2)]

* absence or unavailability of defendants or witnesses [3161 (h)(3)(a)]


PREPARATION FOR TRIAL
46 days maximum
ARREST
6 hours
Standard 4.5
FIRST JUDICIAL APPEARANCE
14 days
Standard 4.8
PRELIMINARY HEARING
5 days
Standard 4.9
DISCLOSURE OF EVIDENCE BY PROSECUTION
10 days
Standard 4.10
FILING OF PRETRIAL MOTION
5 days
Standard 4.10
HEARING ON PRETRIAL MOTION
3 days
Standard 4.10
RESOLUTION OF PRETRIAL MOTION
2 days
Standard 4.10
PRETRIAL CONFERENCE
TRIAL
14 days
Standard 4.8
Waiver of Preliminary Hearing
5 days
Standard 4.9
10 days
Standard 4.9
Waiver of Pretrial Motion
5 days maximum
Standard 4.9
3 days
Standard 4.9
DISCLOSURE OF EVIDENCE BY DEFENSE

* trials on other charges [3161 (h)(1)(d)]

* transfers from other courts [3161 (h)(1)(g)]

* pretrial motions [3161 (h)(1)(f)]

* interlocutory appeals [3161 (h)(i)(e)]

The full text of this sub-section [18 U.S.C. 3161(h)] appears in Appendix II.

53.3 The Act also contains a clause empowering the court to grant a continuance if the ends of justice "outweigh the best interests of the public and the defendant in a speedy trial". [3161 (h)(8).] Factors which a judge ought to consider are listed:

> *(i) Whether the failure to grant such a continuance in the proceedings would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.*
>
> *(ii) Whether the case is so unusual or so complex due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pre-trial proceedings or for the trial itself within the time limits established by this section.*
>
> *(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at such a time that it is unreasonable to expect return and filing of the indictment within the period specified in s.3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.*
>
> *(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall*

within clause (ii), would deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

53.4 The period of a continuance granted under this provision is only excludable from the time calculation if the court "sets forth, in the record of the case ... its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial" [3161(h)(8)]. The Act also specifically provides that neither court backlog nor failure by the prosecution to be adequately prepared will justify a continuance under this provision. No "ends of justice" continuance

> *shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.* [18 U.S.C. 3161(h)(8)(Supp.III 1979).]

53.5 In his article "legislatively Mandated Speedy Trials" Misner notes that as yet the case law on this legislation has not developed. He believes that dismissal with prejudice will be seen by the courts as the "usual" remedy. Other issues which are likely to arise, but which have not yet been considered by the courts, include interpretative questions relating to joinder of offences, and conflict between the defendant's wish to retain a particular counsel and that counsel's unavailability. [(1984) 8 Criminal Law Journal 17 at p24.]

54 Speedy Trial Legislation in State Jurisdictions. Most States have constitutional protections against delay similar to the federal constitutional right to a speedy trial. Misner provides the example of the Arizona Constitution art. III, 24: "In all criminal prosecutions the accused shall have the

right ... to have a speedy trial ..."

54.1 The majority of States with speedy trial legislation have statutes similar to the federal Speedy Trial Act. They usually require the trial of the defendant within a set period of time. Misner calculates that in general they range from from 120 to 180 days. Among these States are Alaska (150 days), Arizona (150 days), Colorado (6 months), Florida (180 days), Montana (180 days) and Pennsylvania (180 days). Some of the States which have time limits of a different order include Arkansas (18 months), California (60 days), Iowa (one year), Massachusetts (one year), North Carolina (90 days), and Virginia (9 months).

54.2 A majority of States provide for dismissal of charges against the defendant if the statutory time limits are violated. Misner cites two examples - Colorado's Revised Statutes 16-14-104 (1963) and Kansas' Statutes Annotated 22-3402(i)(2)(1981). There are however States in which the trial court may choose to dismiss the charges without prejudice to their being re-filed; for example, Nevada's Revised Statutes 178.556 (1967). In California the charges may only be absolutely dismissed after a previous dismissal without prejudice following violation of the speedy trial law there (Cal. Penal Code 1387).

54.3 The States which do not conform to the federal law include New York where the duty of the Prosecutor is simply to be prepared to go to trial within the statutory time limits. If it is only the case backlog which prevents the trial from starting within the time limit the defendant is not entitled to relief. [New York Criminal Procedure 30.30(1).]

54.4 Most States exclude periods of delay resulting from "legitimate reasons" and an examination of the Statutes reveals provisions similar to those in the federal Act. (See further Misner 1984 at pp24-25.)

55 Evaluation of Speedy Trial Legislation in the United States. There are drawbacks to the imposition of time limits. Each case is different and fixed time limits for the different stages of a prosecution must either be very generous to allow for difficulties and complications in the preparation and prosecution of a matter (in which case the point of fixed time limits is lost) or the time limits must arbitrarily restrict the time available (and thereby hamper the proper and necessary preparation of many cases).

55.1 Levin had speculated that "such formalistic remedies in themselves would probably be ineffective ... since they would no doubt be countered by system-maintaining adaptations". (Urban Politics and the Criminal Courts 1977 Chicago at p210.)

55.2 The National Institute of Law Enforcement and Criminal Justice published Speedy Trial: Selected Bibliography in 1978. The wide range of opinions on the efficacy of speedy trial legislation is evident in the books and articles listed and the compilers' comments in the Introduction:

> *Many hail the [federal Speedy Trial] Act as a necessarily forceful step in the elimination of court delay, congestion and backlog and applaud the Act's goals of reducing crime and the danger of recidivism. Others argue that the Act will have the effect of compounding court problems unless adequate funding is provided for expanded court services to accomplish the speedy trial goals. The debates on the state speedy trial provisions are similar ...*
>
> *Although law enforcement offices, defense attorneys, prosecutors and judges at all levels of the criminal justice system have addressed the issue of speedy trial, no clear majority opinion emerges.* (At p1.)

55.3 The Royal Commission on Criminal Procedure (chaired by Sir Cyril

Philips) reported in 1981 that it had been able to visit San Diego, California and observe speedy trial legislation in practice. The Commission went on to describe some of the drawbacks:

> *At the federal level it has required the introduction of expensive and complex mechanisms to monitor the progress of cases and the development of an elaborate set of reasons for allowing the time limit to be waived. In the state system, the waiver of the limit seems to be the rule rather than the exception.* (Report London HMSO 1981 Cmnd 8092 at para 8.33.)

56 Time Limits in the United Kingdom. The Courts Act 1971 introduced an eight week limit for the period from committal to trial and provided that trial could only be commenced after the expiration of the eight weeks with the consent of a judge. However, it did not produce any thorough going change. The Royal Commission on Criminal Procedure found that this consent was "invariably forthcoming". (Report Cmnd 8092 1981 at para 8.33.)

56.1 The Commission considered the desirability of introducing other fixed time limits in addition to the existing eight week limit for committal to trial. Having visited San Diego to observe the operation of the Federal Speedy Trial Act and having received representations relating to the operation of similar provisions in the Netherlands and Scotland, the Commission did not recommend the introduction of any other fixed time limits.

> *Proposals for fixed time limits appear to be based on an assumption that delays arise from lack of action by individuals at various points in the process which a fixed limit would prevent. The operation of such time limits as we have been able to examine suggests, however, that the imposition of a time limit of itself achieves little ...*
> *We discovered on our visit to San Diego, California, that the operation of time limits has had only limited success in diminishing delays ...*

[See para 55.3 of this Report for the Commission's comments on the Federal Speedy Trial Act (US).]

The Commission found that:

> *In the Netherlands the limit can be extended by commencing the trial and seeking an adjournment and this seems to be a routine procedure. There is also a limit in Scotland but it applies to time spent in custody rather than awaiting trial as such. It has been represented to us that this achieves priority for custody cases but at the expense of those where the accused is on bail. Further, if the limit looks like being overrun, the accused can be released on bail to enable the trial to continue, even though bail was previously considered undesirable.* (Report at para 8.33.)

56.2 The Commission was in favour of precedence being given to cases in which the accused was on remand, but was opposed to the employment of fixed time limits to enforce this. The Commission recognised that, for the provision of fixed time limits to have any real effect, breach would have to result in the absolute barring of prosecution of the charges involved. The Commission was of the opinion that the undesirable consequences of the threat (or promise from the defendant's point of view) of complete discharge outweighed the desirable.

> *If (absolute discharge) were (the result of breach) the Crown Prosecutor might have to decide which of the cases coming up to the limit should be dropped in order to ensure that the most important were tried. And defendants might deliberately adopt delaying tactics in the hope of avoiding trial. We consider this possible consequence highly undesirable.* (At para 8.34.)

56.3 The Commission concluded that the imposition of time limits did not automatically attract adequate resources with which to deal with the volume of cases demanding attention before the new deadlines. In the absence of the

needed resources adjustments are made in the system by the different participants to circumvent the new requirements. "While we favour a greater element of discipline in the system than exists at present ... we do not recommend that any other fixed time limits should be introduced". (Para 8.35.)

FINDINGS

EFFECTING A SPEEDY TRIAL - VICTORIA

57 The Committee observed in its Preliminary Report on Delays in Courts that the lack of time frames in the criminal justice system governing the progression of cases was one of the two most pressing issues revealed by its inquiry. (Preliminary Report 1984 para 311, at p173.) The Crimes (Procedure) Act 1983, section 3, amending the Crimes Act 1958, went some way toward rectifying this problem. The new provision states:

> *"... where in respect of any indictable offence a person has been committed or remanded to the Supreme Court or County Court for trial or directed to be tried at the Supreme Court or County Court*
> ...
> *(a) a presentment ... shall be made;*
> *(b) an indictment shall be laid;*
> *(c) an information shall be laid; or*
> *(d) a notice of trial or of intention to prefer a presentment shall be given to the person by or on behalf of the Director of Public Prosecutions or a Prosecutor for the Queen -*
> *in respect of the offence within the period prescribed by the regulations made under this Act."*

57.1 Subsequently the Crimes (Procedure) Regulations 1984 (SR No 346) were made by the Governor in Council, coming into effect on 11 September 1984, prescribing the time limits pursuant to the amended section 353 of the Crimes Act. The Regulations provide that the presentment shall be filed within nine months of committal and trial shall take place within eighteen months of committal.

57.2 The Committee recognises that the passing of the Act and introduction of the Regulations is a positive step designed to assist in alleviating delays in the courts. The Committee acknowledges that the work in

this area of the government and others has done much to create a new atmosphere amongst members of the legal profession generally. Currently the prevailing attitude among the legal profession is one of determination to reduce delay. However, the Committee considers there are potential problems under the new legislation;

* there is no indication to judges of what grounds or circumstances justify an extension of time

* there appear to be no sanctions to discipline lawyers for deliberate or negligent failure to conform with the time limits

* when time limits are not met, judges are confronted with the choice of discharging an accused or granting an extension; they may be reluctant to do either

The Committee notes further:

* there is a need to redraft the legislation in accordance with the Committee's recommendations on non-gender specific language (Report on the Interpretation Bill 1982 1983 Government Printer Melbourne Recommendations 32-35 at pp146-147, 152; also pp137 ff, 200-208.)

* there is a need to ensure that personnel and other resources are sufficient to enable the Office of the Director of Public Prosecutions to comply with the time limits.

* there is a need to monitor the operation of time limits on a regular basis to ensure that the system is working well

* imposition of time limits may be necessary at other stages of the process, as exist in the United States

57.3 FINDING 1

The United States' experience has been that the speedy trial system soes not work well where no clear indication is given in speedy trial legislation of the grounds on which extensions will be granted. This creates difficulties for judges, counsel and accused persons. In the light of this, the Committee believes it is preferable for the Crimes Act to give some indication of Parliament's intention as to the operation of the provisions. The inclusion in the legislation of the requirement that an extension be granted "in exceptional circumstances only" would go some way toward clarification. It may later prove necessary to set out grounds more specifically; on the other hand it may be that the judiciary builds up acceptable guidelines defining "exceptional circumstances" without more specific legislation.

57.4 FINDING 2

In view of the currently prevailing atmosphere of good will and co-operation in relation to the problems of delays in the courts and efforts made by the government and others to overcome them, the Committee is reluctant to suggest that any need exists for sanctions against recalcitrant lawyers. However, the Committee is aware that although the greater majority of counsel may be working well with the new provisions, the occasion may arise when those standards are not met. In the event of such a failure it may be that the Attorney-General sees a need for the introduction of clear provisions in the Crimes Act outlining sanctions. The Committee believes that, at that time, it would be fruitful for the Attorney-General to consult with the Director of Public Prosecutions, representatives of the Law Institute and of the Bar Council on the sanctions to be devised. The United States federal Speedy Trial Act provides a guide. (See paras 53-53.5.) Where deliberate or unjustifiable delay is found, the United States Act provides for:

* fines against prosecution or defence counsel up to 25 per cent of their fees

* censure

* suspension from practice

* dismissal from practice

57.5 FINDING 3

The Committee's research shows that in American jurisdictions the consequences of failure to meet time limits varies, in relation to the trial itself. The American Bar Association ("the ABA") standards seek to define and protect the interests of both the public and defendants in speedy hearings. In the defendant's interests, the ABA considers outright dismissal should be the consequences of failure to provide a speedy trial upon an application by the accused or defence counsel prior to discharge or plea of guilty. If no such application is made, the presumption would arise that the accused has waived the right to a speedy trial. (Standard 4.1.) The ABA expressed the view that if, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offence "the right to speedy trial is largely meaningless". (Commentary, Standard 4.1, see para 51.1.) The federal Speedy Trial Act provides for dismissal of the prosecution with or without prejudice.* Most state jurisdictions with speedy trial legislation provide for dismissal with prejudice if time limits are violated. (See para 54.2.)

57.6 The Committee would prefer the recently introducted time limits in Victoria to operate to the optimum degree without the need for considering such provisions. However, should they prove necessary, the Committee is of the view that where a judge finds that there are no exceptional circumstances

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* Although Misner believes that dismissal with prejudice will be seen by the courts as the "usual" remedy. ("Legislatively Mandated Speedy Trials" (1984) 8 Criminal Law Journal 17 at p24.)

to warrant an extension of time and the responsibility for the delay lies with the prosecution, discharge "with prejudice" ought to be an available option. Such discharge would operate to bar any future prosecution for the offence or any lesser offence pertaining to the same set of facts. If such a provision were incorporated, then where an accused is discharged, the judge should be required to enter into the court record a clear statement of the exceptional circumstances leading to discharge. Where the defence is responsible for the delay different considerations apply. In the Committee's view it could be appropriate in these cases to impose sanctions on the defendant's legal representatives without prejudice to the defendant.

57.7 FINDING 4

The Committee welcomes the steps taken by the government in accordance with the Preliminary Report on Delays in Courts to ensure that additional staff and resources are provided to the Director of Public Prosecutions to assist the work necessary to cut down delays. The Committee believes that close oversight should be maintained to ensure that staff and resources are sufficient to enable time limits to be met, and continue to be met.

57.8 FINDING 5

The Committee's overseas research shows that speedy trial legislation has been introduced with good intentions, and those intentions have been met in the initial period or for some time following that introduction. However, it is clear that if the new system is left without constant attention being paid to its operations, delays may gradually begin to rebuild, despite sincere efforts to conform to time frames. The Committee therefore believes it is essential to closely monitor the speedy trial process to ensure that it is working well. This should be done under the auspices of the Law Department in arrangement with the Law Foundation of Victoria or on a consultancy basis.

57.9 FINDING 6

The Committee believes that consideration should be given to the imposition of time limits at other stages in the criminal justice process as exists in the United States. Recognising that there may be dangers in having time frames for some parts of the process but not others (the delays in the regulated parts of the process may be reduced while delays increase in other parts) the monitoring of time limits as advised at Finding 5 may indicate the need to introduce time limits at other stages.

57.10 FINDING 7

The Committee believes that consideration should be given to enacting a legislative provision to control the use of adjournments in criminal cases. The ABA Advisory Committee's Standard 1.3 provides a guide. (See para 51.11.) The provision should require the showing of good cause before an adjournment is granted and limit adjournments to only such time as is considered necessary.

PRE-TRIAL PROCEDURE

58 Introduction. There are three main types of pre-trial procedures:

1 discovery

2 pre-trial hearing or conference

3 preliminary inquiry or committal

58.1 Discovery. Traditionally, there has been no formal discovery procedure in the criminal process. However, the civil procedure systems of all Anglo-American jurisdictions have long provided for pre-trial discovery of an opponent's case. (Law Reform Commission of Canada Study Report, Discovery in Criminal Cases 1974 Ottawa at p1.)

58.2 In civil law:

> *Discovery refers to a process involving the exchange of information by parties to litigation. In a general sense it refers to a range of procedural devices utilised by one party to obtain access to relevant documents, facts and material in the possession of the other. Its specific technical usage describes a pre-trial process in civil litigation which allows parties to obtain from each other information about the existence and contents of relevant documents. The process was developed to overcome the old common law insistence that surprise was an integral aspect of adversary procedure. It seeks to ensure that a civil trial achieves a just decision on the merits, rather than an adjudication on the cunning or the prowess of the parties and their lawyers.* (Lane "Fair trial and adversary system; withholding of exculpatory evidence by prosecutors" in Basten, Richardson, Ronalds and Zdenkowski (eds) The Criminal Injustice System 1982 Sydney pp174-192 at pp186-187.)

58.3 One argument for introducing discovery into criminal procedure is that it would promote agreement between the parties on particular facts at issue thus eliminating the necessity for proof. The opportunity for prosecution and defence to co-operate is provided by disclosure/discovery procedures. If the defence does not dispute certain facts then witnesses or evidence to establish them is not required to be brought before the court. Furthermore, it is argued that discovery would reduce surprise and in some cases would lead to an earlier plea of guilty.

58.4 The pre-trial conference has a different form and function. It usually takes place before a judge, although, generally more informally than at the trial. The matters dealt with at the conference tend to be the legal and procedural ones which could only otherwise be raised at the trial and would prolong it unnecessarily. Such matters include:

* special pleas
* res judicata and issue estoppel
* severance of trial,
* venue
* joinder of counts
* alternative charges
* amending of defective indictments
* particulars
* fitness to stand trial
* issues of admissibility of evidence

* statutory vires

* jurisdiction of the trial court

(Law Reform Commission of Canada Report on Criminal Procedure - Part 1 Miscellaneous Amendments 1978 Ottawa at p4.)

58.5 Committal Proceedings/Preliminary Inquiries are intended to establish whether there is a prima facie case against the accused. Theoretically, they are to protect a person accused of a crime from an unnecessary trial.

58.6 In the following section development overseas relating to procedures for discovery will be discussed. In many cases the developments involve pre-trial conferences or hearings which must be distinguished from the preliminary inquiry. The preliminary inquiry (or committal proceeding) will be discussed in paragraphs 83-90.1.

DISCOVERY AND PRE-TRIAL PROCEDURE
UNITED STATES - OMNIBUS HEARINGS

59 Outline of Procedure. In the United States, one particular reform of pretrial procedure which attracted much interest was the "Omnibus Hearing".

59.1 A proposal of the American Bar Association's Advisory Committee on Pretrial Proceedings, the Omnibus Hearing was actually only the focal point of its larger plan for the improvement of the whole procedure prior to trial (called for convenience the omnibus procedure). Part V of the Standards Relating to Discovery and Procedure Before Trial set out the recommendations for pretrial procedure generally. The ABA hoped that legislation would be enacted in conformity with the standards across the United States.

59.2 In brief the Committee's recommendations under Standard 5.1 were that:

(1) pretrial procedure be made more organised and effective by division into three stages with distinct objectives:

(i) an exploratory stage "initiated by counsel and conducted without court supervision"

(ii) an omnibus stage "supervised by the trial court and entailing court appearances as necessary" and

(iii) a trial planning stage "entailing pretrial conferences as necessary"

(2) effective judicial control over the criminal calendar be established and a requirement laid down that criminal charges must be brought to trial or otherwise disposed of within a specified time. (Standard 5.1.)

59.3 The entire process (informal discovery conference, omnibus hearing and pretrial planning conference) was a substantial revision of the existing pretrial procedures in criminal cases. There was either a preliminary inquiry (at which the accused could contest committal for trial) or a grand jury (which meant the bypassing of a preliminary inquiry). The new procedure, for convenience called the omnibus procedure (as distinct from the omnibus hearing which was the central part of the procedure), had at least ten specific aims - enumerated in Appendix B of the Standards. (At pp135-6.)

59.4 The purpose of the project will be to:

* eliminate written motion practice, except where necessary

* provide a check list, suggesting to defense counsel the various procedures and tools available to them

* secure discovery by the Prosecutor and the Defense within the Constitutional limits permitted.

* encourage voluntary discovery by the Prosecutor of its basic case

* rule upon and supervise additional discovery requested by the parties

* expose and dispose of latent constitutional issues

* provide a period of time prior to the Omnibus Hearing for disclosure, exploration and plea discussion between counsel

* allow the defendant discovery so that an informed decision may be made as to plea of guilty, if such is the defendant's decision

* use the Omnibus Hearing as far as possible, for those cases where either -

  (a) sufficient information has not been secured for an informed plea, or

  (b) the case will probably go to trial

* postpone for formal hearing those matters which will require, of necessity, preparation of written documents, affidavits, memorandum and/or the calling of witnesses

59.5 The underlying notion was that discovery ought to be extensive and should take place informally at an early stage. Additionally both discovery and discussion about the issues and plea ought to take place at an early stage - ideally a few weeks after arraignment. The first stage of the new procedure was therefore an informal conference of counsel with the goals of

* full discovery of the facts

* consideration of a guilty plea

* identification of the issues

(Fryer "The Omnibus Hearing : Benefit or Burden for State Courts?" (1976) 28 Mercer Law Review 329 at p330.)

59.6 The Advisory Committee noted that "without any particular authority or guidelines, counsel throughout the nation are typically left to their own devices for some period at the beginning of criminal litigation." (At p112.) The Committee, recognising both the value of discussions between counsel at an early stage and the fact that such discussions did not always take place, sought to encourage informal discussions between defendant and prosecution.

59.7 Standard 5.2 ("Exploratory stage and setting of omnibus hearing") attempted to establish conferences of an informal nature between counsel. The extent of disclosure which was envisaged exceeded that available under formal discovery rules in any state court system and under the Federal Rules of Criminal Procedure. (At p5.)

59.8 Nimmer noted that:

> *Although informal discussions with respect to guilty plea negotiations already occur in most jurisdictions, the discussions contemplated in the report are unique in the extent to which information is routinely made available to the defence and in the fact that an informal discussion period is encouraged - if not required - by the court. The purpose of these discussions is full knowledge of the facts of the case on both sides and identification of most issues, as well as the assurance that the possibility of a guilty plea has been explored prior to any extensive involvement of the court.* (Prosecution Disclosure and Judicial Reform: The Omnibus Hearing in Two Courts 1975 ABA Chicago at p3.)

60 Aim of the Omnibus Hearing. The second stage of the new procedure was the focal point - the omnibus hearing itself. The ABA Report envisaged the omnibus hearing as an efficient and effective procedure which would capitalise on both sides being fully conversant with the facts and issues in the case following their informal conference.

> *The novel feature ... is the Omnibus Hearing, so named because it is intended to serve as an all-purpose hearing, dealing with a wide variety of matters in a greatly simplified, systematic way. Before such hearings, however, counsel will have been given adequate time to work things out for themselves.* (At p8.)

60.1 One of the features of the omnibus hearing about which the ABA Advisory Committee was particularly enthusiastic was the use of a check list by the parties and the court. Standard 5.3 provided that:

> *(a) At the Omnibus Hearing, the trial court on its own initiative, utilising an appropriate check list form, should:*
>
> *(i) ensure that standards regarding provision of counsel have been complied with;*
>
> *(ii) ascertain whether the parties have completed the discovery required ... and, if not, make orders appropriate to expedite completion;*
>
> *(iii) ascertain whether there are requests for additional disclosures ...;*
>
> *(iv) make rulings on any motions, demurrers or other requests then pending, and ascertain whether any additional motions, demurrers or requests will be made at the hearing or continued portions thereof;*
>
> *(v) ascertain whether there are any procedural or constitutional issues which should be considered;*
>
> *(vi) upon agreement of counsel, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set a time for a Pretrial Conference; and*
>
> *(vii) upon the accused's request, permit him to change his plea.*
>
> *(b) All motions, demurrers and other requests prior to trial should ordinarily be reserved for and presented orally at the Omnibus Hearing unless the court otherwise directs. Failure to raise*

any prior-to-trial error or issue at this time constitutes waiver of such error or issue if the party concerned then has the information necessary to raise it. Check-list forms should be established and made available by the court and utilised at the hearing to ensure that all requests, errors and issues are then considered.

(c) Any and all issues should be raised either by counsel or by the court without prior notice, and if appropriate, informally disposed of. If additional discovery, investigation or preparation, or evidentiary hearing, or formal presentation is necessary for a fair and orderly determination of any issue, the Omnibus Hearing should be continued from time to time until all matters are disposed of.

60.2 The Advisory Committee felt that the use of an "appropriate check-list" was necessary to ensure an orderly, expeditious and fair hearing. The Committee had not found any existing procedure which attempted to dispose of such a large number of issues on a single occasion (which had been the inspiration for the name "omnibus hearing") and recognised the need for a form to which all participants could refer:

> *The form should materially assist the court and counsel in ensuring that consideration is given those issues which, when ignored, typically form the basis for subsequent invalidation of an adjudication of guilt. With the use of such a form, the need for the usual variety of motion papers with supporting affidavits and briefs is obviated - papers which consume such an inordinate amount of time in their preparation, filing, giving of notice, docketing and reading and which often merely repeat arguments already familiar to the court and counsel or fact situations which need only to be sketched to apprise court and counsel of their implications.* (Standards at pp118-119.)

60.3 One other important effect of a checklist used by the court as well as counsel is that it reinforces the view that early and thorough canvassing of pretrial issues is of such importance that it requires court involvement - it needs to be "procedurally designed into the system" rather than left unsupervised and dependent entirely upon the experience and ingenuity of individual counsel. (See Law Reform Commission of Canada Study Report: Discovery in Criminal Cases 1974 at p106.)

60.4 The third stage is the pretrial conference and is used only in complex cases in which both sides believe that a trial is unavoidable. The conduct of the trial is discussed with the judge in court. Nimmer reported that since most cases do not go to trial and of those that do few need additional preparation, this stage is seldom necessary. (Prosecution Disclosure and Judicial Reform: The Omnibus Hearing in Two Courts 1975 Chicago at p4.)

60.5 The ABA Advisory Committee noted in its commentary that each of the three stages described above were not mandatory.

> *In a sense, the standards in Part V provide a procedural menu. Once the function and utility of each stage is understood, the choice of the procedural items needed for the particular case should become routine.* (Standards at p111.)

60.6 For example, in a case in which the accused is expected to plead guilty the first (exploratory) stage may be the only one employed, and then possibly only to the extent necessary to inform the prosecutor of the accused's intention to plead guilty and to make a record of the potential issues waived. In other cases the accused may only decide to plead guilty after ascertaining the strength of the prosecution case or after raising relevant collateral issues at the omnibus hearing.

61 Omnibus Hearings - Evaluation. The impact of the introduction of the whole omnibus procedure has been studied and commented upon extensively. In particular two studies by the American Bar Foundation have been published - in 1971 Nimmer reported on the impact in the Federal District Court for the Southern District California (focussing on San Diego) in The Omnibus Hearing : An Experiment in Relieving Inefficiency, Unfairness, and Judicial Delay (1971 American Bar Foundation, Chicago) and in 1975 Nimmer reported on the ABF's study of the impact in the Federal District Court for the Western District of Texas (focussing on San Antonio) in Prosecutor Disclosure and Judicial Reform: The Omnibus Hearing in Two Courts (1975 ABF Chicago).

61.1 The performance of omnibus in San Antonio was closer to the hoped for result than its performance in San Diego. While at least one very important achievement was the establishment of regular and extensive disclosure there were a number of side effects of the whole procedure which detracted from this success.

62 San Diego Evaluation. Nimmer found that although the omnibus procedure established a pattern of extensive disclosure, it increased time spent in court and elapsed time to disposition. However, with the benefit of hindsight, Nimmer commented that these undesirable results were not surprising: they were related to the San Diego system.

> *In San Diego the practice before omnibus had been to subject all complaints to intensive screening before the filing of an indictment, followed by negotiations in the cases that remained between prosecution and defence about plea. Guilty plea, in fact, was 'predominant disposition type' and many pleas were entered soon after the filing of indictment. In this setting, omnibus introduced an additional appearance in court and failed to compress plea negotiation practices.* (Nimmer Prosecutor Disclosure and Judicial Reform: The Omnibus Hearing in Two Courts 1975 at p2.)

62.1 The San Diego criminal process was already very efficient - it coped with an enormous caseload. In fact, the Southern District of California had the largest criminal caseload of all the US District Courts - in 1974 there were 2,470 criminal cases filed with the court which meant an average of 502 criminal cases per judge whereas the national average was 99 criminal cases per district judge. (Director of the Administrative Office of the US Courts, Management Statistics for United States Courts 1974 Washington at pp99 and 129.) A very efficient system had evolved to cope with this caseload and could not easily be streamlined any further: omnibus added another court appearance which required 10-25 minutes per case:

> *For defendants who formerly would have pleaded guilty anyway, perhaps as early as arraignment, the additional time involved in the hearing was not counterbalanced by such benefits as fewer continuances or fewer other appearances, since no such appearances had been necessary before. In other cases as well, increases in the judges' time in court were not offset by an increase in guilty pleas or a decrease in continuances.* (Nimmer Experiment 1971 at pp11-12.)

62.2 A further failure in San Diego was that the omnibus hearing did not manage to identify, clarify and dipose of issues. Nimmer blamed this fundamental failure on the court's inability to devote enough time to each hearing and on its holding the hearing before the lawyers were fully prepared to make binding commitments in negotiating dispositions. (Experiment at p14.)

62.3 However, Nimmer was also concerned to stress that it was the nature of the system existing in San Diego which was the main reason for the poor results:

> *It is ... important that the negative effects of omnibus not be viewed as a product of individuals' failure to comply with omnibus in fact or spirit. Rather, the failures should be assessed in light of the*

nature of the court process. Plea negotiation was prevalent and served, prior to omnibus, to minimise time in court. In such a context the enforcement elements and disclosure aspects of omnibus produced results that might have been anticipated.

63 San Antonio Evaluation. The San Antonio court was selected because its process of criminal cases differed markedly from the process in San Diego. Although the Western District of Texas averaged 250 criminal cases per district judge, which was much higher than the 99 case national average, it was much lower than the San Diego 502 case average.

63.1 Another difference between the nature of the two courts was that in the former there was very little plea negotiation and in fact only five per cent of all gulty pleas were pleas to reduced charges. In the Southern District of California (San Diego) there had for a long time been a very high rate of guilty pleas - in San Diego "the guilty plea was the predominant disposition type, and many pleas were entered shortly after the filing of the indictment". (Nimmer Prosecutor Discretion and Judicial Reform; The Omnibus Hearing in Two Courts 1975 at p95.)

63.2 While the introduction of the omnibus procedure had virtually no effect on the rate of guilty pleas in San Diego, there was a 30 per cent increase in San Antonio in this type of disposition by 1971. (Myers, "The Omnibus Proceedings: Clarification of discovery in the federal courts and other benefits" (1971) 6 St.Mary's Law Journal 386 at p404.)

64 Changes to Omnibus Procedure. The format of omnibus was as described above for the first three years but changes were brought about in 1970.

64.1 Phase I. The first three years of its operations saw many successes - the establishment of routine disclosure and reduction in the amount of written motions. Omnibus also brought a reduction in the average time from arraignment to disposition and some formal hearings were able to be dispensed with entirely. A further achievement was the curbing of the tendency of counsel, usually the less experienced, to advise clients to plead guilty at an early stage - in San Antonio private defense attorneys at the time of the study were appointed to represent indigent defendants on a rotation basis from among all members of the local federal bar with the result that many indigent defendants were represented by attorneys inexperienced in the criminal law. Data collected in the ABF study showed that cases involving inexperienced appointed counsel had "an abbreviated pattern of representation". The omnibus procedure presented "an informal mode of obtaining disclosure and raising issues that was attractive to, and used by, less experienced counsel". Moreover, better armed by the disclosure and discussion the less experienced counsel more frequently contested issues of law or fact. (Nimmer Prosecutor Disclosure and Judicial Reform: The Omninbus Hearing in Two Courts 1975 at pp30, 32.)

64.2 Omnibus was not an unqualified success in the first three years though - the major cause of dissatisfaction amongst its detractors was that it had increased the overall time from indictment to disposition - the omnibus hearing itself required time in court which was only partially offset by reductions in other time in court. The changed nature of representation by those appointed counsel who were inexperienced in the practice of criminal law had also had the effect of increasing the time to disposition of indigents' cases. (At p32.)

64.3 This explains to some extent why the percentage of guilty pleas at arraignment in cases involving "less experienced counsel" decreased from the pre-omnibus 84 per cent to 46 per cent at the end of Phase I. It should be noted, however, that only in cases involving defence counsel who were both experienced in criminal law and retained rather than appointed was there no marked shift in the timing of guilty pleas away from arraignment. And more

importantly, in relation to less experienced counsel in general, Nimmer expressed the view that if the changes in the nature of representation meant in fact "more adequate representation" then the attendant increases in disposition time (pre-omnibus 140 days, end of phase I 184 days in complex cases; for bail cases an average increase of 64 days; for custody cases an average increase of 11 days) were not too high a price to pay. (Nimmer Prosecutor Disclosure at pp27, 32.)

64.4 Phase 2. The format of the omnibus procedure was altered late in 1970 in the following ways -

* rescheduling of the informal conference of prosecution and defence to take place between indictment and arraignment

* eliminating the omnibus hearing by utilising arraignment for judicial supervision of disclosure and issue discussion

64.5 These changes were made because by 1970 disclosure of the prosecution case was routine and the omnibus hearing was not needed to enforce disclosure. Omnibus hearings were required less by 1970 and in those which were held the judge's time was spent more often in discussion of motions to be filed in the case and in fixing the dates for the next court appearance, matters which had not been the primary purpose of the omnibus hearing.

65 Omnibus Hearings in Other Jursidictions. Apart from the federal jurisdictions of the Southern District of California and the Western District of Texas, the omnibus procedure was adopted in three other federal jurisdictions : the Western District of Missouri in 1968, the District of Kansas in 1969 and the Middle District of Florida in 1971; and in at least five states: Arizona, Indiana, Oregon and Washington (in 1973) and Minnesota (in 1975). (Weninger "Criminal Discovery & Omnibus Procedure in a Federal Court: A Defense View" (1976) 49 Southern California Law Review 514 at pp521-522.)

65.1 For the introduction of extensive disclosure the omnibus hearing was initially found to be necessary - it provided judicial supervision and enforcement of discovery. Once full informal discovery had become routine the hearing had been eliminated.

66 Canadian Assessment of Omnibus Hearings. When the Canadian Law Reform Commission was considering the application of omnibus in Canada it reviewed its operation in the United States and made the following comments:

> *The concept of an automatic pretrial consideration of collateral issues may appear to be more suited to the solution of problems arising in the United States because of their use of an exclusionary rule ... However, there are numerous 'collateral' matters presently dealt with at trials in Canada that could be considered at a pretrial hearing, including motions to quash charges, motions for severance of charges and of accused, constitutional and 'Bill of Rights' issues, admissibility of confessions, and so on. In short there does not appear to be anything peculiarly foreign about the Omnibus Hearing system or some version of it that would make it inapplicable to Canadian procedure.* (Study Report: Discovery in Criminal Cases 1974 at p113.)

66.1 The Canadian Law Reform Commission saw a great virtue in the automatic raising of pretrial issues; this would help redress the unequal footing of the accused as against the prosecution, "minimising or even eliminating disparities in the ability of counsel to raise matters that may be of great importance to the accused". (At p113.)

66.2 The Canadian Law Reform Commission also commended the fact that discovery was to be unrestricted unless one party, seeking to restrict discovery, was able to establish a likelihood that improper action would be taken by the other side upon discovery of certain information. It was felt to be

far preferable to have the onus on the party asserting the possibility of such abuse before restrictions would be ordered:

> *Unquestionably the possibility of the accused abusing discovery is more properly dealt with in this way rather than by uniformly denying discovery in all cases because of a general fear that it will be abused in some.* (At para 267.)

67 Central Criminal Court. A pretrial review procedure was introduced in 1974 under experimental court practice rules for the Central Criminal Court (the Old Bailey). (The Practice Rules are reproduced in Appendix IV.)

67.1 The scheme was aimed at the elimination of "avoidable waste of time in the hearing of complicated cases" and was intended originally for complex fraud cases. However, on the application of either side or on the initiative of the court itself, a case could be set down for a pretrial review to identify the essential matters in issue and avoid the unnecessary attendance of witnesses or production of exhibits at the trial. (Royal Commission on Criminal Procedure The Investigation and Prosecution of Criminal Offences in England and Wales : The Law and Procedure London HMSO 1980 Cmnd 8092-1 Appendix 27.)

67.2 The application could be made as soon as the case had been given a trial date and the review would normally be held not earlier than fourteen days before trial. This timing was intended presumably to give the parties sufficient time before the trial to comply with any orders made at the review while also being close enough to the trial for the solicitors and counsel to retain their familiarity with the case up until the trial.

67.3 The James' Committee reported that the summons for directions procedure was used in about twenty cases in the first six months of operation and was generally felt to have reduced considerably the length of the subsequent trials. (Report of the Interdepartmental Committee The Distribution of Criminal Business between the Crown Court and Magistrates' Courts London HMSO 1975 Cmnd 6323 at para 267.) The James' Committee, however, did not recommend that the procedure be made to operate in all cases because for short and uncomplicated cases it was considered unduly time

consuming and expensive. Instead, the Committee suggested that the court be given power to compel the procedure in cases where it seemed to be desirable. (Report at para 267.)

68 Crown Court Circuit. The Courts Administrator in the Lord Chancellor's Department reported that the procedure had been adopted (with some modifications) in each Crown Court Circuit. Although at that time the operation of the scheme was still being evaluated and no final conclusion had been reached on the best form of procedure, the Courts Administrator was able to make the following comments:

> *It does appear ... that it is in the large cases where the issues are complex and the evidence is extensive that the most worthwhile reductions occur in the amount of preparation required before trial and in savings in court time ... It is difficult to assess the proportion of cases in which a pretrial review would produce worthwhile savings. To be worthwhile, the savings achieved on preparation and trial work must naturally exceed the additional cost of the review itself. On this basis, the proportion of cases in which worthwhile savings would be achieved is likely to be relatively small. For example, in the first six months of 1978, 23.5 per cent of all contested trials in the Crown Court lasted for less than three hours, and 70 per cent lasted for less than nine hours. Some savings might be achieved if a two day case (approximately ten hours) were reduced to one day or one-and-a-half days, but these would be small given the cost of the pre-trial review itself. Consequently, it is probably only in cases likely to last more than two days that the pre-trial review would generally be an economic proposition, as the daily sums of money involved are generally greater and there is a real possibility of significant savings in time.* (Royal Commission on Criminal Procedure The Investigation and Prosecution of Criminal Offences in England and Wales : The Law and Procedure Appendix 27.)

68.1 In the North Eastern Circuit the procedure was combined with a "plea day" scheme: cases in which the defendent intended to plead guilty or in which the likely plea was not known were listed for a date five weeks from committal, and so if a plea of not guilty was entered the court could proceed to a pretrial review. (The Directions for cases committed for trial to the Crown Court in the North Eastern Circuit are reproduced in Appendix V.)

68.2 The field of operation of schemes like the summons for directions procedure must be very carefully considered in order to prevent the creation of a greater problem than the one which the scheme is meant to solve. "Application to too narrow a range of cases will result in a negligible impact on the eradication of delay; use in every case will produce a process more unwieldy and time consuming than the one it replaces". (Osborne Delay in the Administration of Criminal Justice 1980 Commonwealth Secretariat London at p46.)

69 Preparation for Trial - The Watkins' Working Party. Recently Lord Justice Watkins was asked to form a Working Party to discuss and recommend improvements in the preparation of cases for trial in the Crown Court. The proposals put forward form a scheme which is a combination of discovery and pretrial conference.

69.1 The Working Party stated that it was not desirable to introduce formal interlocutory stages: "Procedure in the Crown Court is best focussed on the trial" para 5. However, the Working Party noted two undesirable consequences flowing from the existing lack of formal interlocutory steps:

> *First, there is in most cases neither the occasion nor the incentive after committal to do any preparatory work for a trial until shortly before the hearing is due. Secondly, the parties are not required at present to communicate with each other about the case, and preparation often takes place without the benefit of knowing what in fact is in issue.* (Report at para 5.)

The Working Party therefore sought to devise a system which would remedy these failings while not cluttering up the Crown Court with a "cumbersome and expensive interlocutory apparatus."

69.2 The solution devised was to utilise the process by which the court obtains information for listing purposes. The form issued by the magistrates' clerk at committal would be expanded so as to require much more comprehensive information about a case. Among the questions to be answered by the accused's solicitor (on "Form A") are the following:

> *How does the Defendant intend to plead to the charges?*
>
> *Will the Defendant be prepared to plead guilty to any alternative charges?*

The proposed scheme requires the information to be exchanged. The Working Party recommended that the defendant's solicitor be required to send the completed form to the Crown Court within 14 days of committal with a copy to the prosecuting solicitor.

69.3 A separate form ("Form B") will in some cases be sent to the prosecuting counsel. The procedure is described:

1 *On the direction (general or specific) of the judges at each Crown Court Centre, the staff send as many copies of the form as there are defendants to prosecuting counsel, specifying the date by which it is to be returned.*

2 *Prosecuting counsel completes the appropriate parts of the form, signs it and returns it to prosecuting counsel.*

3 *Defence counsel completes the appropriate parts of the form, signs it and returns it to prosecuting counsel.*

4 *Prosecuting counsel completes and signs it and sends it to the Crown Court, with a copy to defence counsel.*

5 *The Crown Court sends copies of the completed forms to solicitors for all parties.*

The Working Party claimed that "The act of obtaining the information required for the forms will necessitate the early preparation of the case." (At para 6.)

69.4 Oral pretrial reviews were proposed "as a last resort" in cases where matters could not be resolved or issues sufficiently defined on paper.

70 Enforcement of Pretrial Review Procedures. It was noted that the procedures existing for pretrial review in the Crown Court and the informal procedures for the provision of information to listing officers did not impose any formal obligation on parties and therefore lacked "teeth". The Working Party recommended that its proposed new scheme be supported by a Crown Court Rule. An example was given in Annex E to the Report:

Rule XX

(1) The solicitors acting for a defendant in a trial or indictment, within 14 days after the date on which he is committed for trial, shall give in such form as the Court may require the information specified in paragraph (1) of Schedule 4.

(2) When requested to do so by the appropriate officer of the Crown Court, prosecuting and defending counsel, within the period allowed by the court, shall give in such form as the Court may require the information specified in paragraph 2 of Schedule 4.

(3) The Court may require the attendance of the prosecutor and

defendant with counsel and solicitors for the purpose of giving directions for the just, expeditious and economical conduct of the proceedings.

(4) The prosecutor or defendant, if intending to apply to sever an indictment or for the separate trial of a defendant, shall within seven days of receiving notice of a pre-trial review under paragraph 3 give written notice of his intention to the court and to the other parties unless he has already done so.

70.1 The Working Party pointed out that, in order to ensure observance of the new Crown Court Rule, steps must be taken to ensure that it fits in properly with the arrangements for the remuneration of the legal profession, and is in fact workable. "Our scheme will be ineffective, and even counter-productive, if the forms are completed inaccurately or carelessly, or if proper preparation does not in fact take place at the right time, and the fault will be compounded if the legal profession are paid for such ineffective work." (At para 12.)

70.2 The Working Party expressed its desire to see a payment system which would give effect to the fact that the time at which work is done is important to the operation of the system. The Working Party noted that judges and taxing officers were unable to penalise practitioners who "do not play their part" and that there was no machinery in existence which might enable this penalisation to be made with precision and effectiveness. The Working Party therefore recommended that the implementation of the scheme be coordinated with reform of the costs and legal aid system.

70.3 Pretrial hearings would only take place if the judge, having read all the forms, considered it necessary. If the judge does consider it necessary, the Crown Court sends notices to all parties in which deletions and additions to the standard notice the Court can notify the parties precisely what matters they

will have to address themselves to at the hearing. (See this Report, Appendix VI.)

71 Criminal Law Act 1977. The Interdepartmental Committee on the Distribution of Criminal Business Between the Crown Court and Magistates' Courts ("the James Committee") was appointed in 1973 to consider what should be the distribution of matters between those courts. The main recommendation in the 1975 Report was that there be a new classification of offences: indictable, intermediate and summary. The intermediate would be triable either on indictment or summarily, and the justices would have the power to commit for trial against the wishes of the parties but would not be able to dispose summarily of the case unless the accused consented to this course. Scott commented that the overall effect of these and the other proposals was that the number of situations in which the accused could accept summary trial was increased, while the number of situations in which the accused could reject it was decreased. (Scott and Latham "A Comment on the Report of the James Committee" [1976] Criminal Law Review 159 at p161.)

72 The James Committee considered several matters affecting the distribution of criminal business not directly related to the jurisdictional classification of crimes. Among these was advance disclosure of the prosecution case. "One feature of summary trial which is often compared unfavourably with ... trial on indictment is the defendant's general lack of information about the case he has to answer". (Interdepartmental Committee The Distribution of Criminal Business between the Crown Court and Magistrates' Courts London HMSO 1975 Cmnd 6323 at para 12.)

72.1 The James Committee noted that apart from the procedure under the Magistrates' Courts Act 1957 (whereby a person is given the opportunity to plead guilty by post to a minor offence and is sent a "statement of facts" summarising the facts that the prosecution alleges) there was no other statutory provision for advance disclosure of the prosecution evidence to the

defence in summary trials. (At para 212.)

72.2 Many of those who submitted evidence to the Committee attributed a significant number of elections for trial (over summary hearing) to "the desire to obtain knowledge of the prosecution's evidence". The Committee was aware that there was conflicting evidence from a survey by the Office of Population, Censuses and Surveys ("the OPCS") of defendants in the London area and from results of research by two academics of defendants in an area outside London (Sheffield). (Bottoms and McClean Defendants in the Criminal Process 1976 London.) While only one per cent of defendants in the OPCS survey gave the desire to obtain knowledge of the prosecution's evidence as their primary reason for electing trial by jury and none of the defendants in the Sheffield research mentioned it, the James Committee felt that these figures might understate the importance which lawyers attach to obtaining detailed information of the prosecution case and so could not be used to discount the evidence received from barristers and solicitors. "A solicitor may advise his client to elect trial on indictment without mentioning specific reasons; in other cases it may be a subsidiary rather than a primary reason". (Interdepartmental Committee The Distribution of Criminal Business at para 212.)

72.3 The James Committee conceded that a greater measure of disclosure might not have a dramatic effect on the distribution of business between the Crown and Magistrates' Courts, but believed that it would contribute significantly to preventing cases being unnecessarily committed for trial. The Committee could not predict the extent to which unnecessary trials would be avoided but expressed the view that "it is ... most desirable in the interests of justice that defendants should be fully acquainted with the case against them as far as it is practicable to achieve this." (At para 212.)

72.4 The Committee considered the question of how the prosecution case should be disclosed to the defence. The first major question was whether copies

of witness statements should be disclosed or a written summary of the facts, similar to that served in cases dealt with under the Magistrates' Courts Act 1957 (see para 210). The Committee was of the opinion that a summary of the facts prepared by the prosecution would be the less satisfactory.

> *First, a statement of facts would not reveal the identity of the witness or witnesses, which may be a matter of importance to the defence. Secondly, a statement of facts inevitably represents the prosecution's appraisal of the evidence, whereas the witness statements may, from the defendant's point of view, be capable of a different construction. Thirdly, the preparation of a separate document to serve as the statement of facts, if this were necessary, would be likely to involve more work for prosecuting authorities than the making of a copy, often merely an additional copy, of the witness statements.* (At para 214.)

73 Objections to Pretrial Disclosure of the Prosecution Case. Noting the concern which was expressed about the danger of witnesses being intimidated or induced to change their evidence the James Committee acknowledged that there had been instances of improper approaches to witnesses in indictable cases (where the defence receives copies of witness statements or depositions). However the Committee could not regard this as a compelling objection - "it would be illogical to withhold copies of statements in the less serious cases on this ground." (At para 215.) Furthermore the Committee felt that where intimidation of witnesses was likely to be a real danger the prosecutor should be able to apply to a magistrate to be relieved of the obligation to serve a copy of those witnesses' statements.

73.1 To the Committee the more serious objections raised in evidence related to the amount of additional work that would be imposed on the police and prosecuting authorities:

> *This would involve not merely the making of a copy, or additional copy, but in some cases the need to edit the statement in order to*

exclude irrelevant material or material defamatory of, or prejudicial to, third parties and not essential to the case. It would involve service in one way or another of the statements on the defence. Service on unrepresented defendants presents particular problems. (At para 218.)

73.2 Conscious of the need to avoid adding more work than necessary to the police, and of the limits of its terms of reference, the Committee considered various ways in which to limit the provision for the service of witness statements on the defence to those cases where it is most desirable and likely to have some effect upon the distribution of criminal business between the Crown Court and magistrates' courts.

74 First, the Committee considered whether disclosure of the prosecution case ought to be restricted to cases in the intermediate category of offences - that is those in which the accused would have the option of trial by indictment or summary hearing. The Committee was constrained by its terms of reference from examining the application of the proposal to summary offences since it would have no effect on the distribution of business. The Committee however made the following comments:

We think ... that the principle that a defendant should be fully informed of the case against him is equally applicable to summary offences, and that it would be desirable in principle for the defence to be served with witness statements in certain categories of summary offences. We suggest that the possibility of extending the requirement of serving witness statements to certain summary offences be kept under review in the light of experience of the application of this requirement to cases in the intermediate category. It might be appropriate for legislation to contain a provision enabling the scheme to be extended, perhaps by statutory instrument ... The eventual aim should be to extend the scheme to all imprisonable offences and other summary offences which merit it. (At para 219.)

Owing to its terms of reference, the Committee proposed that the scheme be initially limited to intermediate offences.

74.1 Secondly, the Committee considered further limiting of the scheme by restricting it to contested cases. This was easily rejected. Although the Committee felt that such a restriction would reduce the workload to manageable proportions there was an "insuperable difficulty": the reason behind the whole proposal was that advance information of the prosecution case would enable the accused to make a more informed and responsible decision as to the court in which he chooses to be tried. Therefore, it was fundamental to the proposal that the witness statements be served on the defence before the accused was put to his election and called upon to plead. Restricting the scheme to contested cases would mean forcing election and plea before the accused was able to make an informed decision. (At para 221.)

74.2 Thirdly, the Committee considered whether the service of statements ought to be limited to those cases in which the defence asked to be provided with them. The Committee felt that this was a reasonable limitation, provided that defendants were aware of their right to ask for the witness statements. Where defendants were not legally represented the court should have the responsibility of informing them of their right. (At para 222.)

74.3 A summary of the Committee's proposals relating to advance disclosure of the prosecution case appeared at para 230 of its report:

> *(i) before giving his consent to summary trial or at any time before the opening of the prosecution case, a person charged with an offence in the intermediate category should have a statutory right to receive, on request, copies of the statements of the witnesses on whose evidence the prosecution proposes to rely;*

(ii) *if the prosecution calls as a witness a person whose statement has not been served, the defendant should be offered an adjournment to enable it to be served;*

(iii) *if the prosecution considers that it would be against the interests of justice to provide copies of the statements, it should be able to apply to a magistrate for a direction that they should not be served; and*

(iv) *where witness statements have not been prepared or where a magistrate directs that statements should not be served, a summary of the facts upon which the prosecution intends to rely should, on request, be supplied to the defence instead.*

75 Criminal Law Act 1977 - Provision for Rules for Pretrial Disclosure. Following the James Committee's 1975 Report containing the proposals above, inevitably limited by its terms of reference to disclosure in "intermediate offences", the Criminal Law Act 1977 provided for rules to be made for advance disclosure of the prosecution case and did not specifically limit this to any particular category of offences. Section 48 enables rules to be made:

(1) *(a)* *for requiring the prosecution to do such things as may be prescribed for the purpose of securing that the acused or a person representing him is furnished with, or can obtain, advance information concerning all, or any prescribed class of, the facts and matters of which the prosecution proposes to adduce evidence; and*

(b) *for requiring a magistrates' court, if satisfied that any requirement imposed by virtue of paragraph (a) above has not been complied with, to adjourn the proceedings pending compliance with that requirement unless the court is satisfied that the conduct of the case for the accused will not be substantially prejudiced by non-compliance with the requirement.*

75.1 It can be seen that section 48 does not itself prescribe a disclosure scheme but enables rules to be made to that end. Section 48 is drafted in broad terms in order to enable the rules made under it to prescribe not only the procedure for disclosure but also the offences or classes of offences to which the scheme would apply.

75.2 It is more than six years since the passing of the Criminal Law Act and no rules have yet been made under section 48. A Working Party on Disclosure of the Prosecution Case was set up to examine the "resource implications" of implementing section 48. In 1982 the Chairman's Report of Interim Conclusions appeared. It revealed that the costing of advance disclosure had been exceptionally difficult. So much depended on accurate information about the methods and practices of police forces in recording evidence but this information was not routinely available and had to be obtained by questionnaire sent to police stations around the country. The questionnaire however was found to be deficient - the variety of practices used by the police was too great to be easily summarised in a limited number of questions.

75.3 The Working Party's conclusions were

(i) that a system of advance disclosure based on summaries would be cheaper nationally than one based on statements, largely because a number of police forces do not at present routinely take statements at an early stage.

(ii) that the costs of our advance disclosure schemes lay in the range of one-and-a-half to four-and-a-half million pounds for a scheme depending on summaries, and three-and-a-half to 16¼ million pounds for a scheme depending on statements.

The members of the Working Party were unanimous about the conclusion in (i) above but there was a general belief amongst them that the figures in (ii) might be under-estimates, perhaps by as much as 25 per cent.

75.4 In terms of labour, the Working Party estimated that a scheme of disclosure by summaries would require at least 40-50 extra full-time police officers while a scheme of disclosure by statements would require at least 150-200.

75.5 These conclusions met with some criticism from a number of commentators who argued that statements once obtained would only need to be photocopied, requiring little time and effort - a task which could be performed by any junior, whereas summaries would have to be composed, requiring the time and effort of the police officer in charge of the matter.

75.6 In March this year the Home Secretary made a statement in which he said that he hoped to implement section 48 within a year. He intended to begin by making advance disclosure available to defendants charged with offences triable either way (before they were required to indicate whether they wished to be tried in the magistrates' court or the Crown Court). He was adopting an approach which would minimise the need for changes in police procedure. The rules made would be reconsidered in the light of experience, with a view to prescribing a single method of advance disclosure for use in all cases. The single method would be likely to be based on the supply of copies of witnesses' statements. In the meantime, however, disclosure would be made either by a summary of the case or by copies of witness statements. The choice of method would rest with the prosecutor who would have regard to the material available at the time. The Home Secretary announced that he was to start discussions of the proposals with the police, the local authority associations and other interested parties and that final decisions would depend on the outcome of those consultations, taking particular account of the likely costs to central and local government. (Brittan, Secretary of State for the Home Department Official Report 26 March 1984 vol 56, col 22.)

DISCOVERY AND PRE-TRIAL PROCEDURE - SCOTLAND

76 Disclosure to Defence - Statutory Provisions. For many years the practice in Scotland has been to have very wide disclosure from the prosecution to the defence. In 1975 the practice was given the force of statute:

> *Section 70 of the Criminal Procedure (Scotland) Act 1975, c. 21, a consolidating statute: 'The accused shall be served with a full copy of the indictment and of the list of the names and addresses of the witnesses to be adduced by the prosecution'.* (Osborne Delay in the Administration of Criminal Justice 1980 London at p54.)

76.1 Of course, this is not discovery as that term is generally understood (see para 58.1-2 of this Report) - the prosecution evidence is not disclosed. However, the defendant is provided with the means to obtain it. Among the advantages of the Scottish procedure is the fact that only a small amount of extra work is imposed upon the prosecution.

76.2 The Scottish experience is interesting in light of the fears expressed by some, when discovery in criminal cases is proposed, that Crown witnesses might be under threat if the defence were given their names and addresses.

> *Longstanding Scottish experience has not found witness intimidation following release of the list of witnesses to be asignificant problem.* (Osborne at p 44 citing the Thomson Committee's Report Criminal Procedure in Scotland (Second Report) Edinburgh HMSO 1975 Cmnd 6218 at chapter 17.)

76.3 Scotland has also required disclosure from the defence to a far greater extent than other jurisdictions. Section 36 of the Criminal Procedure (Scotland) Act 1887 was re-enacted in section 82(1) of the Criminal Procedure (Scotland) Act 1975.

s. 82 (i) *It shall not be competent for the accused to state any special defence unless a plea of special defence shall be tendered and recorded at the first diet, or unless cause be shown to the satisfaction of the court for a special defence not having been lodged till a later day, which must in any case not be less than two clear days before the second diet.*

76.4 The Thomson Committee found that there was no authoritative list of special defences. There are however the following generally accepted ones: alibi, insanity, incrimination, self defence and automatism. (Criminal Procedure in Scotland (Second Report) Edinburgh HMSO 1975 Cmnd 6218 at para 27.01.)

76.5 In very few common law jurisdictions does there appear to have been a similar tradition of systematised disclosure and co-operation between the prosecution and defence. (At pp44, 48.)

PRE-TRIAL PROCEDURES - CANADA

77 Background. In Canada disclosure has operated on an informal basis in a number of jurisdictions for some time. Whether it should be formally incorporated into the system has been the subject of debate since 1969. The Law Reform Commission of Canada ("the LRC") has been firmly of the view that disclosure procedures should be formal and introduced by statute (Criminal Procedure Part 1: Miscellaneous Amendments 1978 at p3) and recently in its 22nd report to Parliament it has recommended the addition of a specific new Part on Disclosure to be added to the Criminal Code. (Disclosure By The Prosecution 1984 Ottawa.)

77.1 The "evolution" of its proposals, as the LRC itself called it, is worth summarising because it reflects the debate that took place in Canada over the last 15 years on the issue of disclosure and pretrial procedure.

77.2 The initial interest in discovery before trial might well have arisen from the initiatives being taken in the United States in the middle and late 60's relating to the formulation and implementation of "Standards" for the administration of criminal justice (see following section on the United States) among which were standards relating to discovery and procedure before trial. (See this Report at paras 49-55.3.)

77.3 Then in 1972 the Canadian Law Reform Commission began an extensive study of criminal law procedures leading to trial, including disclosure practices, in order to make recommendations on possible legislative reforms. It published a Study Report called Discovery in Criminal Cases 1974 in which it recommended (i) the abolition of the preliminary inquiry, and (ii) the introduction of a formal system of disclosure with (a) an informal discussion between counsel and (b) a pretrial conference before a judge. Several pilot projects, based in different degrees on these proposals, were subsequently conducted in different jurisdictions, the results of which:

Affirmed that a system of disclosure avoided the needless summoning of witnesses and allowed the disposition of some cases without a preliminary inquiry, either by waiver or guilty plea, [although] it could not be asserted that disclosure obviated the utility of a pretrial inquiry on the strength of the Crown's case. (Disclosure by the Prosecution 1984 Ottawa at pp4-5.)

77.4 In 1976 the Commission presented a Preliminary Study on Pretrial Procedures to the meeting of Attorneys-General and a conference on Preparing for Trial followed in 1977, sponsored by the Commission and attended by judges, Crown and defence counsel, police, and representatives of agencies involved in the administration of criminal justice. At the conclusion of these discussions, it was clear to the Commission that pretrial disclosure by the prosecution could not proceed solely on a voluntary basis and that legislation was the only effective alternative (At p5.)

77.5 In its 1978 report on Miscellaneous Amendments for Criminal Procedure the Commission recommended inter alia that proof of certain facts be allowed by solemn declaration. (On the proposals and commentary for Evidence by Solemn Declaration see Appendix VII of this Report.) This procedure which requires some pretrial disclosure was a step towards fuller disclosure.

77.6 On the question of whether reform should be formal and mandatory or informal and voluntary the Commission made the following comment:

In our adversary criminal law system, in which the burden of proof remains to be borne by the prosecution, we have concluded after much consultation that reforms effected by voluntary agreement cannot long endure. Unless procedure itself be authoritatively re-cast, why should the contending adversaries not exploit every benefit it actually offers? At the end of the day, there is no answer

to that question. We therefore conclude that the reform must, at last, be not merely corrective, but also authoritative. It must be statutory or it will be ignored ultimately, if not out of hand.
(Report on Criminal Procedure Part 1: Miscellaneous Amendments 1978 at p3.)

77.7 In 1981 the Criminal Law Review was begun and by 1983 when the LRC met representatives of the Attorney-General the Commission was of the view that the preliminary inquiry ought to be retained.

77.8 The LRC presented the following results of the pilot projects in Montreal, Edmonton and Ottawa:

The discovery project in Montreal avoided the appearance of 35,000 witnesses in 1976, witnesses who would have been otherwise summoned needlessly ... The Disclosure Court in Edmonton during a six week period in early 1977, demonstrated that over 50 per cent of the witnesses who would have been required for preliminary inquiries did not have to be called and there were instances of charges being withdrawn, stays of proceedings and defence counsel agreeing to abridged preliminary inquiries ...

The Pro-Forma Court system in Ottawa, between June 29th and November 30th, 1976, obviated the necessity of subpoenaing 2,141 witnesses. Of some 1,547 cases dealt with in the Pro-Forma Court, slightly over one-third of them were finally disposed of in that court by guilty plea, or by a plea of guilty to lesser charges or by withdrawal by the Crown. In eight per cent of all those cases, the attendance of one or more witnesses was waived by defence counsel.

(Report on Criminal Procedure - Part 1: Miscellaneous Amendments at p3.)

78 Edmonton Project Evaluation. The Edmonton project involved a large variety of criminal cases including: breaking and entering, possession of stolen goods, theft, fraud and false pretences, all over $200, and assault occasioning bodily harm. The procedure was as follows:

> *After arraignment for preliminary inquiry [committal] the accused was given the option of participating in a 'Disclosure Court'. If he took up this option the case adjourned for two weeks to allow counsel to meet for discussions and then the case would appear before the Disclosure Court to find if the preliminary inquiry could be curtailed if there was to be a guilty plea or if the points at issue could be reduced.* (Osborne Delay in the Administration of Criminal Justice 1980 at p47.)

78.1 The Canadian LRC's 1978 evaluation of the Edmonton project (as "encouraging") does not include the disappointing aspects noted by Chief Judge R A Cawsey. He found that defence counsel were not interested in utilising the disclosure procedure and even after the Bar was canvassed in an attempt to increase interest and the project had been expanded to cover all offences for which a defendant could elect trial in a higher court, participation remained poor. (Law Reform Commission of Canada Preparing for Trial 1977 Ottawa at pp211-216.)

78.2 In an attempt to discover counsel's reasons for not using the Disclosure Court, the Chief Judge sent a letter to each of the ten defence counsel who most frequently appeared in the Provincial Court. Their replies revealed that:

* the general feeling amongst these defence counsel was that there was no need to formalise the existing arrangements for disclosure, since traditionally in Alberta the Crown was very approachable and willingly disclosed its case

* some of the defence counsel felt that they would not be acting in the best interests of their clients by participating in the Disclosure Court and dispensing with a preliminary hearing because frequently at preliminary hearings the Crown was unable to produce key witnesses leading to dismissal of the charges

* they wanted the opportunity, provided by the preliminary hearing to test Crown witnesses, rather than using the Disclosure Court and then facing the witnesses for the first time at the trial

* none of the defence counsel mentioned the inconvenience to witnesses called unnecessarily to preliminary hearings (leading the Chief Judge to comment that he could only assume that this was not a consideration of the Defence Bar) (At p215.)

78.3 The impressive statistic quoted by the LRC - "over 50 per cent of the witnesses who would have been required for preliminary inquiries did not have to be called " - must be read in light of the fact that this was 50 per cent of the witnesses in the small sample of cases that did in fact go to the Disclosure Court. Chief Judge Cawsey found that overall very few preliminary inquiries were waived; a few were reduced in size but without a significant saving in time. The conclusion after six month's operation of the Disclosure Court in Alberta, Edmonton, was that there did not appear to be any need for a formal or statutory disclosure procedure, mainly owing to the existing practice of full disclosure on an informal basis.

79 Ottawa Project Evaluation. In contrast, the experiment in Ottawa, Ontario, worked well. For its success in both reducing delays and also earning the support of the police, defence bar, prosecutors and judges, the Ottawa pilot project deserves more detailed consideration.

79.1 Between the years 1960 and 1972, it had been the practice for the

Crown to provide a great deal of information to defence counsel before election as to mode of trial or plea. However, a number of factors (increasing crime rate, increasing complexity of cases, introduction of Legal Aid and consequently a greater number of defendants able to pursue all available substantive and procedural defences, and legislative charges introducing new hearings into the criminal process for matters such as bail combined to increase greatly the workload of Crown counsel and it became very difficult for them to maintain their former standard of pretrial disclosure. Defence counsel for their part were more frequently failing to meet appointments with Crown Counsel for informal disclosure. The result of these developments was that "the system for preparing cases in advance of trial began to collapse" and the informal disclosure system was dispensed with in 1975 "to free Crown staff for court purposes". (Preparing for Trial at pp257, 285.)

79.2 Without the formal disclosure system the general feeling was that the criminal justice system was more expensive, inefficient, and now lacking an important control mechanism:

> *The opportunity for both sides to prepare cases in advance of trial had been impaired. Crown counsel considered their ability to supervise the manner in which charges below the serious level were formalised, screened and supported by appropriate evidence had been weakened.* (At p 285.)

79.3 The 1976 pilot project was established to fill the gap. The scheme was a combination of disclosure and pretrial hearing (evidenced by its two titles: "judicially supervised disclosure" and "pro-forma hearings").

79.4 The defence Bar in Ottawa was invited to draft the rules in co-operation with the Crown Attorney's Office and much of the success of the Ottawa project has been attributed to the early involvement of the Defence Bar. (At p 269.)

79.5 The procedure is voluntary and if both parties consent they appear before the Disclosure Court together with the investigating police officer:

> *The Crown Attorney then advises the Court; the defence counsel and investigating officer can retire from the courtroom, meet, and disclosure between them proceed. If defence counsel is not satisfied that he has had full disclosure, he may confer with Crown counsel, and, if no resolution is made, their respective positions may be stated to the court and the presiding judge may, with inquiries, help resolve the issue. If the defence counsel is satisfied with the disclosure he so states for the record and his client is then arraigned in the usual way. The accused may then waive the preliminary inquiry, demand a preliminary inquiry on the evidence of certain named witnesses only, or require a full inquiry in the usual manner.* (Osborne at p49.)

79.6 This procedure, implemented in Ottawa, was based on the system introduced experimentally in Montreal in February 1975. The system was perhaps even more successful in Ottawa from the outset because there the information to be disclosed was determined in advance. The LRC noted that -

> *The evaluation of the Montreal pilot project regarded the lack of prior definition of the evidence to be disclosed as a shortcoming. This shortcoming was one of the chief sources of defence counsel's dissatisfaction until the Crown Office in Montreal adopted informal guidelines on the subject.* (LRC of Canada Disclosure by the Prosecution 1984 at p 9.)

79.7 The success of the disclosure system in Ottawa's five criminal courts is clear from the statistics shown in a study conducted by Ottawa's Senior Provincial Judge T R Swabey. He found that Ottawa had not only matched Montreal's success in eliminating the need to call thousands of witnesses at preliminary inquiries but also unexpectedly disposed of many cases

at the disclosure stage by either plea of guilty, plea of guilty to a lesser charge or withdrawal by the Crown. (Preparing for Trial at p223.)

79.8 Judge Swabey also found that before the disclosure project was in operation the average time spent in court each day by the judges was just over two hours even though an estimated four-to-six hours had been listed. Approximately 50 per cent of the cases each morning and afternoon were "falling through" with last-minute pleas of guilty or withdrawals. Judge Swabey attributed these collapses to the fact that "disclosure was taking place on the doorstep of the court". The most serious problems were:

* inconvenience to witnesses, called to court but not required to give evidence

* court rooms and judges without work and the impossibility of finding cases immediately to go on with

(Preparing for Trial at p230.)

79.9 After the introduction of the disclosure system the trends were reversed. Pro-forma hearings began in June 1977 and were held on two afternoons each week. In the first five months of operation (as noted above) 1,547 cases were dealt with in the Pro-Forma Court and the procedure saved 2,141 witnesses from having to be subpoenaed.

79.10 Only 13 per cent of the cases which went to the Pro-Forma Court then proceeded to a full preliminary hearing. The criminal case load disposition for the months of September, October and November 1977 increased by about 300 cases and judges sat in court for an average of over four hours.

79.11 These results confirmed Judge Swabey's view that the pretrial stage

in the criminal process had previously been ignored, but could, when properly organised, be used to effect great improvements in the system:

> *The failing of our system to cope with increased demands if the results of our Ottawa experiment ... mean anything, must reside to a great extent in our neglect to address ourselves to confronting the issues at the front end of the system rather than the back end where court time has been committed and witnesses have been conscripted.* (Preparing for Trial at p223.)

79.12 He believed that the key to the success of the disclosure experiment in Ottawa was the direct involvement of the judge: "there needs to be some formal manner of bringing the parties together at a fixed time and place". The other methods had finally failed essentially because they lacked judicial involvement - one or other party would fail to keep the appointment for disclosure or would send instead a junior to attend. Under the "judicially supervised disclosure" procedure, on the other hand:

> *The lawyer actually taking the case is required to appear at the Pro-Forma hearing and the Crown Attorney's Office assigns only its more senior staff to the Pro-Forma Court. The investigating officer is under subpoena ... The result is that disclosure takes place between the parties in a position to make decisions and the presence of the judge enables these decisions to be acted upon without any delay.* (At p228.)

79.13 Judge Swabey anticipated criticism that the system was "a plea bargaining palace with a judicial overseer". He reported that as far as he was able to ascertain the number of withdrawals and the number of guilty pleas had not increased as a result of the Pro-Forma system:

> *What has happened however is that the pleas of guilty and the withdrawals are coming at a stage in the proceedings before court*

time has been committed to the case and before witnesses have been unnecessarily inconvenienced. And this has permitted us to make greater use of our trial courts by being able to schedule with more certainty. The decisions that are being made by defence counsel in the Pro-Forma Court are the same decisions defence counsel were making before the system began. The difference is, however, the Pro-Forma system puts the parties in the position to make these decisions at a much earlier stage of the proceedings. (At p232.)

79.14 The aims of the Crown Attorney's Office served by the procedure include:

* the reduction of court delays occurring between the laying of criminal charges in provincial court and their disposal by way of pleas of guilty, trials, or preliminary hearings

* improvement in the assignment of judicial and other personnel and space

* earlier exchange of information between Crown attorney and police

* earlier agreement between crown attorney and police on
  (i) charges, and
  (ii) evidence and witnesses needed

* disclosure of information from prosecution to defence at an earlier stage to facilitate defence decisions on election, plea, admissions, excusing of witnesses and to isolate the real issues

* greater accuracy in estimates of duration of trial for the more efficient use of court rooms (Preparing for Trial at pp259-260.)

79.15 For defence counsel the major benefit of the judicially supervised disclosure system is the early opportunity provided to discuss the appropriate charges with Crown Counsel.

79.16 Both the Defence Bar and the Crown Attorney's Office consider the pro-forma hearing to be an improvement in that it ensures an early and regular screening of police charges, asserting the Crown's supervisory role over the preparation and formal laying of police charges. Without the exercise of this supervisory function there was perceived to be a real risk, owing to the "increased demands and complexity of police activity" that inappropriate charges and weak cases could take up valuable court time. (At p261.)

79.17 According to the then President of the Ottawa-Carleton Defence Bar Association, experienced Crown counsel often exercised their discretion and accepted pleas to lesser offences. In cases where the matter obviously would proceed to a preliminary hearing and trial, defence counsel have the advantage of earlier access to the Crown evidence enabling better informed and more efficient preparation for trial and thereby a better provision of professional service.

79.18 The view of the great majority of investigating police officers was that the benefits of the pro-forma disclosure procedure far outweighed the negative aspects. (At p251.) If the defence counsel requests a pro-forma hearing the investigating officer receives a subpoena, a copy of the information against the accused and a list of instructions. (See Preparing for Trial Appendix B at pp281-285.) Before the hearing the investigator makes an appointment to see the Crown attorney assigned to the screening. The police welcomed this opportunity which they previously had not had, to discuss the case with the Crown prior to the preliminary hearing. The Crown can advise the police officer as to any additional material requested for the pro-forma hearing or trial.

79.19 For the pro-forma the police are required to have:

(1) a typed summary of the evidence of each witness (basically for the investigator's own use at the pro-forma). For example:

> Witness No. 1 - is the owner of the store at 611 Front Street
>
> Witness No. 2 - observed the break and enter occurring from her window 50 feet away. She called the police and will identify accused.
>
> Witness No. 3 - arrested the accused at the scene. Will identify him and state his condition. No Statement. (At pp246-247.)

(2) copies of photographs, diagrams, witness and accused statements, criminal records and, where considered necessary by the Crown, exhibits.

79.20 In most cases it is the investigating officer who actually makes disclosure to defence counsel. However, in major or complex cases the Crown may choose to be present.

79.21 From the experience of one police investigator the advantages of the system include:

* the informal atmosphere in which disclosure takes place with comments passing back and forth to the benefit of all

* the enhancement of the relationship between the investigator, crown and defence counsel

* the commonly-reached agreement that certain civilian witnesses need not attend the preliminary hearing

* the saving to the police budget and saving in work hours of police officers who might otherwise have had to attend the preliminary hearing (for example, officers whose evidence relate to continuity, the introduction of simple exhibits or whose evidence may be required in a voir dire)

80 Elsewhere in Ontario an informal system has been operating successfully since 1977. In that year the Attorney-General of Ontario issued a set of "Guidelines on Disclosure in Criminal Cases" which were intended to reduce the length of preliminary hearings by providing informal disclosure to defence counsel at an early stage in order to permit the defence to decide which witnesses are really necessary at a preliminary hearing and which ones can be dispensed with in favour of a written synopsis of their anticipated evidence along with other specified types of written evidence:

> *After the preliminary inquiry has been held, the 'Practice Direction Concerning Supreme Court Criminal Trials' issued by the Chief Justice of the High Court comes into operation. Crown attorneys and defence counsel are invited to meet prior to trial to complete a Pretrial Conference Report with a view to narrowing the issues. Where necessary, a judge may be present. In both instances, participation is purely voluntary.* (Osborne Delay in the Administration of Criminal Justice 1980 at p48.)

81 Montreal. The Montreal experiment was subjected to "extensive evaluation" The procedure consisted of two stages - on the day of the pro-forma hearing counsel would (1) meet to make disclosure and discuss plea and the future course of the case, and (2) appear before a justice who would ascertain whether disclosure had been made, note the parties' estimates of time and record the decisions of the parties. The defendant would have the following options:

* to waive the preliminary inquiry, with the consent of the prosecution

* to request that a partial preliminary inquiry be held, by undertaking to waive the continuation of the inquiry after one or more named witnesses had been heard

* to request a preliminary inquiry

* to enter a guilty plea

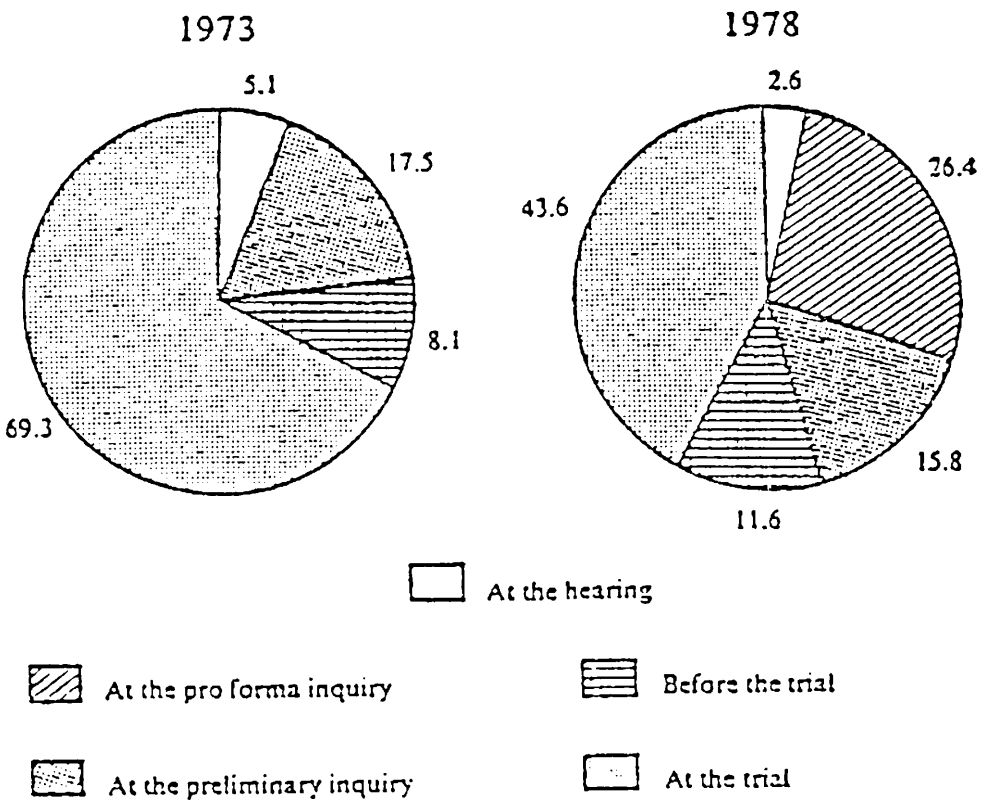
* to request that the hearing be adjourned for purposes of a possible guilty plea or in order to complete disclosure

* to make certain admissions

(See Law Reform Commission of Canada Disclosure By The Prosecution 1984 Ottawa at pp7 & 9.)

81.1 Statistics for 1973 and 1978 (that is, before and after the introduction of the disclosure procedure) relating to the stage at which cases were disposed of, reveal that many more were disposed of before trial in 1978. These statistics are represented graphically in the Table shown below.

TABLE



(Disclosure by the Prosecution at p8.)The table shows that the pro-forma inquiry resulted in the disposition of 26.4 per cent of all cases disposed of in 1978.

81.2 The table does not reveal one of the other benefits:

> *a significant proportion of cases disposed of at trial were not preceded by a preliminary inquiry, due to a waiver under section 476 of the Criminal Code.* (Disclosure by the Prosecution 1984 at p8.)

81.3 Guilty pleas rose between 1973 and 1978 - for example in 1973 only 8.1 per cent of cases ended at the stage of the preliminary hearing with a guilty plea whereas in 1978 this had grown to 19 per cent. The number of charges withdrawn by the prosecution "almost tripled after the introduction of the experiment, increasing from 4.5 per cent in 1973 to 12.2 per cent in 1978". The LRC of Canada remarked that all these figures "necessarily imply a significant saving in the cost of the administration of criminal justice". (At p8.)

81.4 It is the view of the Canadian LRC that the aspect of the Montreal procedure which had ensured its success was the "creation of a distinct procedural stage in the judicial process". This stage - between the first appearance and the preliminary inquiry - had been introduced experimentally and on a temporary basis but became common practice. (At p9.)

81.5 The Commission in 1984 referred briefly to the history of the debate on the preliminary inquiry and its role if disclosure procedures are introduced:

* the Commisison's 1974 proposals which included a recommendation that the preliminary inquiry be replaced by disclosure procedures with a right for the accused to make a motion that there was no prima facie case on the disclosed material
* the 1982 majority report of the Special Committee on Preliminary Hearings that there be introduced "paper committals" subject to the right of the prosecutor or the accused to call witnesses

* the minority report of the same Committee advocating the retention of the right to have a preliminary inquiry with the power given to judges to order counsel who wasted time to bear the costs for work not reasonably/necessarily done; the minority believing that improved disclosure would lead to a reduction in the duration of preliminary inquiries

* the Ontario Criminal Lawyers' Association report The Preliminary Hearing also advocating the retention of the right to a preliminary inquiry and citing a statistical study which found that in fact preliminary inquiries in Ontario were infrequent (accounting for 0.5%-4.7% of the dispositions of the Provincial Court's criminal cases)

* the Federal Department of Justice study of the preliminary inquiry which found that, of 7,219 cases in which a preliminary inquiry was available, in only 30 per cent (2,714 cases) was a preliminary inquiry held; and of those 2,714 cases, witnesses were summoned and heard in only 46 per cent and of those cases in which witnesses were heard only 20 per cent took a day or longer; and finally, of the 1,800 cases that led to a committal for trial after the preliminary inquiry 71 per cent of them resulted in a plea of guilty

(Disclosure By The Prosecution at pp10-11 citing the Report of the Special Committee on Preliminary Hearings at pp12-15, 18 & 22; Criminal Lawyers' Association The Preliminary Hearing 1982 at p18 and Alford The Preliminary Inquiry in Canada - Advance Report 1983 unpublished at pp1-14.)

81.6 The Commission considered that on the figures from the Department of Justice study it was obvious that the preliminary inquiry and a scheme for pretrial disclosure could coexist and that full disclosure would reduce the length and number of preliminary hearings. Furthermore, "If there is full disclosure the preliminary inquiry will survive to perform its true

function as a screen against an insufficient case". (Disclosure By The Prosecution 1984 at p11.)

82 The 1984 Recommendations of the Canadian Law Reform Commission. The recommendations, in the form of draft statutory provisions, presented to the Canadian Parliament with the June 1984 Report were, in the Commission's own words, "somewhat narrow, covering as they did only pre-trial disclosure by the prosecution and not dealing with preliminary inquiries or disclosure by the defence". The Commission felt constrained by the existence of the Criminal Law Review which was concerned with reform of the whole of pre-trial procedure. The Commission therefore decided to "modify its approach by opting for discrete recommendations" that could be conveniently introduced into current law without major disruption and also survive a general revision of pre-trial disclosure. (Disclosure by the Prosecution at pp5-6 and 33.) However, despite the limited scope of the recommendations the Commission felt that they would make a significant improvement:

> *The traditional notion of disclosure as a voluntary and discretionary procedure would be replaced by a legislative scheme that would afford judicially enforceable rights to the accused.* (At p 33.)

82.1 The scheme was deliberately "lean" to allow implementation in all jurisidictions despite their differences in practice. The Commission recommended that the following Part be added to the Criminal Code:

> *PART XIV.2 Disclosure*
>
> *462.5 A judicial officer shall not proceed with a criminal prosecution at the time that the accused first appears unless he has satisfied himself*
>
> *(a) that the accused has been given a copy of the information or indictment reciting the charge or charges against*

him in that prosecution; and

(b) that the accused has been advised of his right to request disclosure under section 426.6.

426.6 (1) Upon request to the prosecutor, the accused is entitled, before being called upon to elect mode of trial or to plead to the charge of an indictable offence, whichever comes first, and thereafter,

(a) to receive a copy of his criminal record;

(b) to receive a copy of any relevant statement made by him to a person in authority and recorded in writing (or to inspect such a statement if it has been recorded by electronic means);

(c) to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, to receive copies thereof;

(d) to receive a copy of any relevant statement made by a person whom the prosecutor proposes to call as a witness and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness;

(e) to inspect the electronic recording of any relevant statement made by a person whom the prosecutor proposes to call as a witness;

(f) to receive, where his request demonstrates the relevance of such information, a copy of the criminal record of any victim or proposed witness; and

(g) to receive, where known to the police officer or prosecutor in charge of the investigation, and not protected from

disclosure by law, the name and address of any other person who could be called as a witness, or other details enabling that person to be identified, unless, upon an ex parte application by the prosecutor supported by an affidavit demonstrating that disclosure will probably endanger life or safety or interfere with the administration of justice, a judicial officer having jurisdiction in the matter orders, in writing and with reasons, that disclosure be delayed until a time fixed in the order.

(2) A request under subsection (1) imposes a continuing obligation on the prosecutor to disclose the items within the class requested, without need for a further request.

(3) A statement referred to in paragraph (b), (d) or (e) of subsection (1) does not include a communication that is governed by Part IV.1 of this Act.

462.7 Where a judicial officer having jurisdiction in the matter is satisfied that there has not been compliance with the provision of section 426.6, he shall, at the accused's request, adjourn the proceedings until in his opinion there has been compliance, and he may make such other order as he considers appropriate in the circumstances.

PRELIMINARY HEARINGS/COMMITTAL PROCEEDINGS - ENGLAND AND WALES

83 Preliminary hearings are a necessary step in many jurisdictions other than Victoria before the trial of a person charged with a serious offence. In England, for example, all cases to be tried in the Crown Court must first be committed for trial by magistrates at committal proceedings.

83.1 Preliminary hearings have a long history and have taken different forms. They eventually evolved into judicial proceedings, taking place after the accused's first appearance in court and before the trial.

83.2 Obviously an extra step in the procedure (which a preliminary hearing represents) delays the final disposition of a case, but this particular step was seen as an essential safeguard for the accused person, and therefore worth preserving. In 1973 Lord Widgery discussed the purpose of committal proceedings in 1973:

> *What is the function of the committal proceedings? Is it ... simply a safeguard for the citizen to ensure that he cannot be made to stand trial without a prima facie case being shown; or is it ... a rehearsal proceeding so that the defence may try out their cross-examination on the prosecution witnesses with a view to using the results to advantage in the Crown Court at a later stage? ... For my part I think that it is clear that the function of committal proceedings is to ensure that no one shall stand his trial unless a prima facie case has been made out.* (R v Epping & Harlow Justices, ex parte Massaro [1973] 1 QB 433 at p435.)

83.3 While the intended function of committal proceedings might be universally considered desirable, the actual performance of committal proceedings in the task has continually drawn criticism and prompted suggestions for reform.

83.4 McConville and Baldwin note, after quoting Lord Widgery's comments above, that it might be expected that committal proceedings would provide an effective screening mechanism preventing hopelessly weak cases from reaching the Crown Court. Their research revealed that this was not so.

83.5 Before the English Criminal Procedure Act of 1967 came into operation, committals were all full oral hearings. They were attracting much adverse comment by 1959. One commentator wrote:

> *The real demerit of [this system] would seem to lie only in the reluctance of magistrates to acquit at committal proceedings.*
>
> *... Time and time again, there is a serious and argued plea by the defence that no jury would possibly convict on the evidence before the court, the accused is committed for trial and subsequently acquitted.* (Goldrein in "Proposals to Expedite Criminal Trials: Some Comments" [1959] Criminal Law Review 269 at p274.)

83.6 Williams wrote that while the preliminary inquiry had been conceived as a safeguard for the innocent it had virtually ceased to perform that function ("Proposals to Expedite Criminal Trials" [1959] Criminal Law Review 82 at p84). Lord Devlin in his article "The Police in a Changing Society" called the preliminary inquiry "the biggest time-waster of all". [(1966) 57 Journal of Criminal Law, Criminology and Police Science 123 at p125.]

84 Reform of Preliminary Hearings. In view of the criticisms that the full committal proceedings were time-consuming, wasteful of magistrates' time and of resources, legislation was introduced in 1967 providing for an alternative method. And since the English Criminal Procedure Act 1967 (said to have led the way) there have been numerous reforms of the committal procedure throughout the British Commonwealth and other jurisdictions.

84.1 The English legislation introduced "paper committals". Now in England and Wales committals may take any of the following forms:

* full oral hearing under s 7 of the Magistrates' Courts Act 1952 - The accused may cross-examine the prosecution witnesses in an effort to have the charge dismissed. The oral evidence of each witness is read to him/her, signed by the witness and authenticated by the magistrate. This record of the evidence is called the deposition.

* curtailed committal proceedings under s 2 of the Criminal Justice Act 1967 - The accused agrees to accept written statements from a prosecution witness and the court does not require the witness to attend and give evidence.

* committals without consideration of the evidence under s 1 of the Criminal Justice Act 1967 - Where all the evidence before the court consists of written statements, the magistrates may commit the accused for trial at the Crown Court without consideration of the contents of those statements, unless:

  (a) the accused or one of them is not legally represented; or

  (b) counsel or a solicitor for the accused or one of them has asked the court to consider a submission that the statements disclose insufficient evidence to put that person upon trial by jury for the offence.

84.2 In 1966 before the Act was passed a case for section 1 committals was argued by Gardner and Carlisle. They contended that the proposed procedures would meet all the objects of the old system:

* to inform the accused of the case to be met

* to establish whether a prima facie case existed

* and, if so, to commit the accused for trial in a particular court either on bail or in custody

If an accused was uncertain of the prosecution's case after reading the written statements or wished to challenge or test the strength of the case against her or him the accused could elect committal under the full oral procedure. Where an accused decided, after considering the written statements of the witnesses, to submit that there was no case to answer he could elect also to have a full oral committal. (Gardner and Carlisle "The Case for Reform" [1966] Criminal Law Review 498 at p 501.)

84.3 Some of the jurisdictions apart from Victoria which have enacted similar legislation providing for paper committals include South Australia, Tasmania, New Zealand, Hong Kong, the Solomon Islands and Cyprus.

84.4 Some jurisdictions in the British Commonwealth have abolished committals altogether - Bangladesh, Sri Lanka, Nigeria and India. (Osborne Delay in the Administration of Criminal Justice at p58.) Scotland has never had committals.

84.5 It is generally said in England that the proportion of committals under s 7 of the Magistrates' Courts Act 1952 (that is full oral proceedings) to committals under s 1 of the Criminal Justice Act 1967 (paper committals) is extremely small. (Royal Commission on Criminal Procedure The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure London HMSO 1980 Cmnd 8092-1 at para 193.)

84.6 Research supports this view:

* a study of cases committed for trial by Sheffield magistrates during 1972 revealed that only one case out of a total of 356 had full committal proceedings. (Bottoms and McClean Defendants in the Criminal Process 1976 London.)

* a survey of the New Zealand Department of Justice found that in some areas of England and Wales over 90 per cent of all committals for trial were made on the papers alone. (Study of Preliminary Hearing Before Committal for Trial 1978 Wellington.)

* Baldwin and McConville's sample of 2406 cases committed for trial contained only four in which a full oral hearing was held, and only eighteen others in which any oral evidence was taken at all. (Courts, Prosecution, and Conviction 1981 at p83.)

84.7 The theories of Baldwin and McConville on the popularity of the s 1 committal are considered above (see this Report para 25.7.) They point out that the provision introduced in 1967 sought to relieve magistrates of the responsibility of determining in all cases whether there was sufficient evidence to warrant committal for trial. A greater responsibility consequently fell on police, counsel for prosecution and defence. Baldwin and McConville however found that "all the indications are that neither prosecution nor defence scrutinizes cases with sufficient care before requesting or giving consent to the paper procedure". They quote Fisher who said:

> *There is obviously scope for using committal proceedings to a greater extent to test the prosecution case. But this will not happen unless there is either a defence submission or the person appearing for the prosecution himself draws the attention of the magistrates to a point of difficulty in the prosecution's case. And this will not happen unless there is a careful and dispassionate survey and review*

of the evidence by the counsel, solicitor or police officer responsible for presenting the case on committal, a survey devoted not only to seeing whether there is evidence to support the charge but whether there are any weaknesses in the prosecution's case which should be brought out before the magistrate.

What is the point of "protective" procedures, such as preliminary hearings, if they do not protect?

84.8 In 1975 the James Committee (the Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts) and later, in 1981, the Royal Commission on Criminal Procedure expressed the view that too many weak cases were being committed for trial in the Crown Court.

84.9 One indication that weak cases (which ought not to have been committed for trial) are reaching the Crown Court is the number of cases in which the Judge directs an acquittal.

84.10 Baldwin and McConville found that of the 2406 cases committed for trial in the Crown Court in their sample 116 resulted in a directed acquittal and none of these had been committed on a full oral hearing.

84.11 National statistics for 1978 revealed that 40 per cent of cases ended in an ordered or directed acquittal and in one area 54 per cent ended in this way (that is, with the judge ordering an acquittal before the jury has heard any evidence, or directing the jury to bring in a verdict of not guilty after evidence has been heard.)

84.12 The Royal Commission on Criminal Procedure considered whether

there was any need to "retain a filter", other than that provided by the Crown Prosecutor, of cases coming to the Crown Court. The Commission reiterated that fairness in the prosecution system "demands that so far as possible no one should be required to stand trial in the absence of good cause and that the defence should have an early opportunity to assess whether such cause exists". (Royal Commission on Criminal Procedure Report at para 8.27). The Commission acknowledged that such an opportunity is all the more important if the trial will not begin promptly owing to delays in the system.

85 The Royal Commission's proposals. The Commission was confident that its proposals for disclosure would enable the defence to make some assessment at to whether there is sufficient evidence on paper to justify committal. It proposed that if the defence wished to challenge this it should have the option of a hearing before magistrates (unless the case could be brought to trial within a specified (short) time to submit that there is no case to answer. This procedure would be called "application for discharge":

> *Since it is the delay which has undesirable consequences and not whether the case is to be tried summarily or on indictment, the possibility of applying for discharge should be available in respect of all cases which are triable on indictment or either way where the delay before trial will exceed the specified period.* (Royal Commission on Criminal Procedure Report London HMSO 1981 Cmnd 8092 at para 8.28.)

Discharge at this hearing would have the same effect as discharge at committal.

85.1 The Commission recommended that the application for discharge replace the committal hearing under s 7 of the Magistrates' Courts Act 1952. Further, the Commission called for the abolition of paper committals under s 1 of the Criminal Law Act 1967:

To the extent that sifting is necessary, it will be undertaken by the Crown prosecutor or by the magistrates if there is an application for discharge. There is no reason in principle why the Crown prosecutor (or other official prosecutor) should not send cases that are to be tried on indictment to the Crown Court. (Report at para 8.30.)

85.2 The Commission recognised that committal proceedings had served other useful purposes such as:

* imposing a deadline by which time both sides needed to have the case prepared

* providing an opportunity for the consideration of bail

* enabling the making of witness orders (requiring witness to attend trial)

85.3 Another purpose served by committal proceedings is that of providing disclosure. If the Commission's proposals were adopted new provisions would have to be made for the resolution of matters such as bail, witnesses' orders, and, in some cases, the mode of trial. Regarding the "deadline" which committals provided the Commission received representations that modification of committal proceedings would "remove a discipline on defence and prosecution to prepare for trial and on the prosecution to comply with the requirement for disclosure". (Report at para 8.30.) The Commission's response was that the necessary discipline could be maintained with the imposition of a period within which disclosure would have to be made and a time limit for the making of an application for discharge.

85.4 The Commission did not achieve unanimity on the issue of the ideal procedure for the hearing of an application for discharge. The options

considered were

* an examination of the case on paper

* an oral hearing with witnesses being called to give evidence and be cross-examined upon it

85.5 The majority on the Commission took the view that, although the former would remove the right of the defence to challenge the credibility of the prosecution witnesses by cross-examination, an examination of the case on paper was sufficient. The magistrates would be concerned to check the prosecutor's assessment that on the evidence available (in the form of written statements and other information set down in writing) there was a case to be answered. (Report at para 8.31.) The evidence before the Commission suggested that this was particularly a problem in those cases where witnesses were likely to experience stress in giving evidence (for example, victims of sexual assaults, young children and old people).

85.6 The Commission majority was in favour of no oral evidence at hearings of discharge applications, believing that such abuses of oral proceedings, even if only rare, ought to be avoided.

85.7 If oral hearings were retained the Commission recommended that consideration be given to the use of tape recorded interviews with witnesses who might be particularly susceptible to stress arising from their attendance at court. A group from the Commission had visited Sweden in order to observe amongst other things the use of tape recorded interviews with such witnesses in court.

85.8 No action has yet been taken in relation to the form of committal proceedings in England and Wales. The Attorney-General, in reply to a question

in the Commons in early 1984, stated that his department believed that committal proceedings were best left the way they were. A Home Office study was being conducted on court listing and other aspects of the administration of criminal justice in order to uncover any areas which might be improved to alleviate court delays. The Attorney-General pointed out that an important principle was involved in committal proceedings, and although the scrutiny provided might sometimes be perfunctory, it would be contrary to the interests of defendants to remove it. [(1984) 148 Justice of the Peace at p158.]

86 Scotland - Alternatives to Preliminary Hearings/Committal Proceedings. In modern times, Scotland has not had a system of committal procedures. The public prosecutor has the responsibility of deciding whether or not to proceed with a case, based on the statements of evidence to be given by witnesses for the Crown. (Delay in the Administration of Criminal Justice 1980 London at p58.)

86.1 The accused first appears in court for a bail hearing. At this stage, the prosecution can move for "full committal" and the usual practice is for the lower court judge (sheriff) to grant the motion upon assurance from the prosecutor that there is a prima facie case. If the prosecutor is not in a position to do this at the first hearing, a second will be arranged at which the prosecution can move for committal.

87 A Committee set up in Scotland to review criminal procedure considered the re-adoption of the old practice whereby the sheriff considered the evidence and committed for trial only those cases in which he was satisfied that there was a prima facie case. The conclusion was that this would not be desirable, mainly because it was felt that it would have too great an effect on sheriffs' workloads. (Thomson Committee Criminal Procedure in Scotland (Second Report) Edinburgh HMSO 1975 Cmnd 6218 at para 10.01)

DISCOVERY AND PRE-TRIAL PROCEDURE - CONCLUSION

88 As mentioned above, committal proceedings now serve the purpose of providing disclosure, especially of the prosecution case. Any changes to the procedure must be carefully considered in relation to their effect on this function. If this means of disclosure is removed alternative means must be provided.

88.1 In her survey of British Commonwealth developments relating to delays in criminal courts, Osborne notes that most Commonwealth governments in making amendments to committal procedures have sought to provide alternative means of disclosure. (For example, section 2 of the English Criminal Justice Act 1967 provided that a written statement is admissible on certain conditions, one of which is that before the statement is tendered in evidence, a copy must be given to each of the other parties to the proceedings.)

88.2 If the main intended purpose of committal proceedings is to prevent the trial of innocent persons, an opportunity must be provided for an accused person to challenge the sufficiency of the prosecution case before a court. If, however, in the majority of cases, the defence does not seriously fight for discharge at the committal stage, then there would not appear to be a need for a court's consideration of the prosecution evidence automatically in every case.

88.3 The need for "quality control" in the selection of cases going to trial will always remain. When magistrates' scrutiny is reduced or removed, procedures or guidelines to be followed by police and prosecutors might be required to ensure that cases with no prospect of conviction do not clog up trial courts.

88.4 While the curtailment or abolition of committal proceedings undoubtedly saves the time of magistrates and their courts, police, witnesses,

accused persons and lawyers, the time spent in the trial of cases is likely to be greater because the participants have not had the benefit of the "dry run".

FINDINGS

PRE-TRIAL PROCEDURE - VICTORIA

89 In its Preliminary Report on delays in Courts the Committee noted observations of various legal experts on the efficacy of pre-trial hearings. (See Preliminary Report, "Pre-Trial Hearings", at pp 148ff, 174.) The value of pre-trial hearings in overseas jurisdictions has been confirmed by the Committee's overseas research. The Committee notes that the Supreme Court (Pre-trial Criminal Procedure) Rules 1984 (SR No 331) and the County Court (Pre-trial Criminal Procedure) Rules 1984 (SR No 314) regulating pre-trial hearings in Victoria were made possible by section 5 of the Crimes (Procedure) Act 1983 and came into operation on 3 September 1984. The courts now become effectively involved at an early stage. Previously a case did not usually come before a judge until trial.

89.1 FINDING 8

The Committee believes a mechanism for monitoring the operation of pre-trial hearings should be established under the auspices of the Law Department. The Committee believes that with oversight by the Law Department, this might be appropriately done by suitable consultants under an arrangement with the Law Foundation. After the procedure has been in operation for a sufficient time, the questions listed on the reverse side of the form of Application for Pre-Trial Hearing which the judge may ask of counsel or the accused (if unrepresented) should be reviewed. Further questions may be necessary. The involvement of the judiciary and the profession should be sought on this matter.

89.2 FINDING 9

The Committee believes that prosecutors, defence counsel and judges should consult regularly with the Attorney-General to ascertain and promote the

effectiveness of the pre-trial procedure. The Committee notes that the Attorney-General has reconvened the Flanagan Committee*, whose work was referred to in the Preliminary Report on Delays in Courts. (At p300ff and generally.) That Committee has been expanded to include a member of the community and senior representatives of the following:

* Criminal Bar Associatiom

* Criminal Trial Listing Directorate

* Director of Public Prosecutions

* Law Department

* Law Institute of Victoria

* Legal Aid Commission

* Prosecutors for the Queen

* Victoria Police Force

(Ministerial Statement 19 September 1984 at p5.)

The Legal and Constitutional Committee considers it is the appropriate body to coordinate such consultations.

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* The Committee appointed by the Attorney-General to examine Methods of Improving the Disposal Rate of Criminal Cases in the County Court at Melbourne

89.3 FINDING 10

The Committee commends the Leo Cussen Institute for Continuing Legal Education for offering an extensive practical training programme in, amongst other areas, criminal law and procedure, and notes that it now includes pre-trial procedure. The Committee believes it is important that pre-trial procedure continue as part of the programme and that lawyers should avail themselves of it. The Committee also commends the University of Melbourne Law School and the Monash University Law School for their undertaking to extend continuing legal education in the criminal law area, including the administration of criminal justice. (Ministerial Statement 19 September 1984 at pp3-4.) The Committee emphasises the place that pre-trial and trial procedure should take in the university law school curriculum and suggests that pre-trial hearings be included in moot court programmes.

89.4 FINDING 11

In relation to pre-trial disclosure and discovery, the Committee in its Preliminary Report noted the view of a number of witnesses, including the Director of Public Prosecutions and Professor Ian Scott, on the pros and cons of extending these procedures. The views were diverse. (Preliminary Report "Pre-Trial Hearings" at p148ff.) In its Overseas Report the Committee has noted some of the reforms relating to disclosure overseas, particularly in Canada. The Committee appreciates that the conditions and circumstances in overseas jurisdictions do not necessarily pertain in Victoria. Nonetheless it believes that there is benefit to be gained from looking at this issue more closely in the Victorian context. The Committee has determined to publish an Issues Paper on Preliminary Hearings (see further Finding 13) and pre-trial disclosure and discovery will be discussed as a part of that Paper.

PRELIMINARY INQUIRIES/COMMITTAL PROCEEDINGS - VICTORIA

90 In its Preliminary Report on Delays in Courts the Committee determined that further research should be undertaken in relation to preliminary inquiries (committal proceedings). The Committee stated:

> *330 Committal Proceedings. There are divergent views on the role of committals in the criminal justice system. The Committee believes the restriction, abolition, or retention of committal proceedings requires further inquiry and research, to be undertaken by the Committee with a view to formulating recommendations.* (At p180.)

Research into the role of committals overseas reveals that in several jurisdictions they have been abolished altogether. The Committee notes that the English Royal Commission on Criminal Procedure recommended in 1981 that full committal hearings and "paper committals" (similar to Victoria's "hand up brief" procedure) be abolished. An accused could apply for discharge and the Commission considered that, to the extent that "sitting" is necessary, it would be undertaken by a magistrate if such an application was made, and in all other cases it would be undertaken by the Crown Prosecutor.

90.1 FINDING 12

The Committee believes that some overseas experience may be applicable to the Victorian situation. However to gauge Victorian opinion on this, the Committee will produce an Issues Paper on Preliminary Hearings to distribute to the judiciary and magistracy, the legal profession and the community generally, canvassing various matters including:

* the place of preliminary hearings in the Victorian criminal justice system

* arguments for and against the retention, in their present form, of preliminary hearings

* proposals put forward in Australia for possible changes to preliminary hearings

* a precis of variations suggested in overseas jurisdictions as outlined more fully in this Report

* possible options for consideration, including the retention of preliminary hearings in their present form, optional hearings, greater provision for pre-trial disclosure and discovery and other options

The Issues Paper will be distributed to promote discussion on the role of preliminary hearings in the Victorian criminal justice system. Following the hearing of witnesses on the matters raised in the Issues Paper and analysis of written submissions received, the Committee will publish a Report on Preliminary Hearings with recommendations.

TRIAL: DEVELOPMENTS RELATING TO THE ROLE OF JURIES

91 General Issues. The involvement of juries in criminal trials undoubtedly increases the time they take. Some of the time consuming features of a jury trial which are not found in a summary trial (with judge alone) are

* the empanelling of the jury (before which the judge might hear excuses from prospective jurors, for example, when the judge has told the jury that the trial is likely to be long)

* the explanation by the judge of certain matters for the benefit of the members of the jury (such as their role; the importance of their not discussing the case except with the other jurors; the reasons why they must be removed for voir dires)

* the jury's deliberations after all the evidence and summing up

And when the jury is unable to reach a unanimous decision (or sufficient agreement in those jurisdictions which do not require unanimity) the entire trial can be viewed as a waste of time because a new trial will be required.

91.1 Jury trial has attracted criticism in Victoria and elsewhere for other reasons, not directly impinging on the problem of delay. For example, it has been alleged that jury trials have too high a rate of acquittals - the suggestion being that some, at least, of the acquittals would have been convictions had the judges been sitting alone. It is further argued that the (allegedly) too high rate of acquittals endangers society (by exonerating some guilty defendants from whom society needs to be protected) and demoralises the police force (who have worked hard to apprehend offenders and collect evidence). These and other issues relating to the jury are beyond the scope of this report, but will be addressed in a forthcoming report of this Committee.

92 The Jury and Court Delays. In this report the arguments for and against the jury system will not be canvassed. Rather the different approaches that have been taken in other jurisdictions to reduce delays in jury trial will be discussed. In the following section the report prepared for the Commonwealth Secretariat by Osborne (Delay in the Administration of Criminal Justice: Commonwealth developments and Experience 1980) (hereinafter referred to as "Delay") has been heavily relied upon.

92.1 The approaches to reducing delays occasioned by the involvement of juries can be separated into three:

* reforming and streamlining jury trial procedures

* restricting jury trial to a limited number of offences

* abolishing jury trial

92.2 Developments reforming and streamlining jury trial procedures have mainly concerned the assembling of the jury; the hearing of complex cases; and the requirement of unanimity. (Delay at p104.)

93 Empanelling the Jury. The assembling and empanelling of a jury is far more time consuming in the United States of America than anywhere else.

> *"Jury engineering" is a phenomenon, if not a science, which is widely known and used in the United States, but which, fortunately, is much rarer in Commonwealth jurisdictions. In the United States it generally entails a detailed questioning of each individual prospective juror to elicit details of his background and possible prejudices. This consumes a large pool of jurors and a substantial amount of time.* (Delay at p104.)

93.1 In England measures have been taken designed to prevent emulation of the American practices. The Lord Chief Justice in 1973 issued a Practice Direction:

> *A jury consists of twelve individuals chosen at random from the appropriate panel. A juror should be excused if he is personally concerned in the facts of a particular case, or closely connected with a party to the proceedings or with a prospective witness and he may also be excused at the discretion of the judge on grounds of personal hardship or conscientious objection to jury service. It is contrary to established practice for jurors to be excused on more grounds such as race, religion or political beliefs or occupation.*

93.2 In 1977, section 43 of the Criminal Law Act (England) reduced the number of the accused's peremptory challenges from seven (as had been provided by s 12(1) of the Juries Act 1974) to three. The prosecution's right of challenge remained unlimited.

93.3 In Canada, the number of peremptory challenges, available under the Criminal Code to an accused, depends upon the severity of the punishment for the offence charged. Under s 562 of the Canadian Criminal Code R.S.C., 1970, an accused has 20 peremptory challenges if charged with high treason or first degree murder; 12 challenges if the offence charged is punishable with more than five years' imprisonment; 4 challenges if the offence charged is punishable with less than five years' imprisonment. (Delay at p105.)

94 The Jury and Complex Cases. "Special juries" have sometimes been suggested as the solution to the problem of presenting complex technical cases to a jury of laypersons. That "ordinary" jurors experience difficulty in grasping points in complex cases and may, in fact, fail to comprehend or give up the attempt has often been said (particularly by police and prosecuting counsel).

94.1 For example, in relation to complex commercial prosecution the evidence is likely to include a large number of documents, books of account, financial records and computer printouts. Connelly, Q.C., reporting to the Parliament of Queensland on the affairs of Queensland Syndication Management Pty. Ltd. and others (1973) wrote that such evidence "is largely beyond the understanding of the common jury" (Para 114, quoted in Delay at p106.)

94.2 The "special jury" that has been suggested would consist of people whose qualifications (either by education, training or experience) in a particular field would enable them to understand the evidence to a much greater degree than the ordinary juror (or at least without as much time spent in explaining the evidence). Special juries along these lines have been proposed in Scotland by the Thomson Committee (Criminal Procedure in Scotland (second report) Edinburgh Cmnd 6218 1975 at paras 34-47, 51) and in South Australia by the Criminal Law and Penal Methods Committee (Third Report, Court Procedure and Evidence 1975 Adelaide at p101). Despite these recommendations for special juries Osborne could only report that "[a]s a solution ... this remains largely untested". (Delay at p106.)

95 The Requirement of Unanimity. The problem of "hung" juries - that is, where a unanimous verdict cannot be reached - is one which adds to the delays and backlogs in courts. If the jury can neither acquit nor convict (both of which traditionally require a unanimous verdict) that jury is dismissed and a new trial ordered. Osborne described the time consumed by a hung jury: "not only are there essentially two full-blown trials which are time-consuming in themselves, but the initial jury deliberation is usually a lengthy process". (Delay at p105.) Whether the time consumed by the first trial is regarded as "a delay" or as time necessarily spent in the just disposition of a case depends upon the value accorded to the jury and the requirement of unanimity.

95.1 In New Zealand the Royal Commission on the Courts reached the conclusion that the incidence of disagreement between jurors was not

sufficiently frequent to justify any alteration to the principle of unanimity. (Report 1978 Wellington at para 219.)

95.2 In England majority verdicts were introduced by s 13 of the Criminal Justice Act 1967, which provided:

> *(1) Subject to subsections (3) and (4), the verdict of a jury in proceedings in the Crown Court or the High Court need not be unanimous if -*
>
> *(a) in a case where there are not less than 11 jurors, 10 of them agree on the verdict; and*
>
> *(b) in a case where there are 10 jurors, 9 of them agree on the verdict.*
>
> *(3) The Crown Court shall not accept a verdict of guilty by virtue of subsection (1) above unless the foreman of the jury has stated in open court the number of jurors who respectively agreed to and dissented from the verdict.*
>
> *(4) No court shall accept a verdict by virtue of subsection (1) above unless it appears to the court that the jury have had such period of time for deliberation as the court thinks reasonable having regard to the nature and the complexity of the case, and the Crown Court shall in any event not accept such a verdict unless it appears to the court that the jury have had at least two hours for deliberation.*

95.3 M. Cohen in a recent article ("Retrial After a Hung Jury" in (1983) 12 Anglo-American Law Review 174-180) discussed hung juries in criminal cases in the U.K. and the question of whether it is fair to the defendant to order a retrial after a jury is hung.

95.4 The magnitude of the problem of hung juries prior to the 1967 amendment can be seen from the following statistics:

* *in 1963, out of 699 trials at the Old Bailey there were 27 hung juries (4.5 per cent) and of 1,087 trials at London Sessions there were 29 hung juries (3 per cent).* (Report of the Departmental Committee on Jury Service (the Morris Committee) London HMSO 1965 Cmnd 2627 at 356.)

* *In 1964, of 1185 Old Bailey trials there were 49 hung juries (4.1 per cent) and in 1965, of 1159 London Sessions' trials, there were 41 hung juries (3.5 per cent).* (Basil Wigoda The Times 19 Oct 1966 at p13.)

95.5 Cohen noted that while the advent in England and Wales of the majority verdict provision would be expected to reduce the proportion of hung juries, the contrary view was also possible:

> *it may be that on some juries the very possibility of a majority verdict will make a group of three or four jurors less ready to compromise than they would have been under a system requiring unanimity.* (Cornish The Jury 1968 London at p260.)

95.6 The available statistics suggest that the proportion of hung juries has not declined dramatically despite the introduction of the provision for majority verdicts:

* *Between 1968 and 1969, just under ten per cent of trials in England were decided by majority verdicts.* (JUSTICE Society, Annual Members Conference 1974 The Future of Trial by Jury at p4.)

* *In a small sample of 30 contested trials, there was one hung jury, (3.3 per cent).* (McCabe and Purves The Shadow Jury at Work 1974 Oxford at p19.)

95.7 Cohen proceeds to mount an argument that retrial after a hung jury is not fair, especially since the provision for majority verdicts, concluding that:

> *[I]f, as is undoubtedly the case [see Erle, C.J. in Winsor [1866] LR1 QB 390 Ex Ch at 395], the original justification for allowing a retrial was that one juror could prevent a conviction, this justification ceased to exist after 1967 with the introduction of the majority verdict provision. To say that three jurors are being perverse or corrupt is not a very credible view ...*
>
> *At the very least it must certainly be a tenable view that if the jury is evenly split, or if there is a majority in favour of an acquittal, then a retrial should not be permissible.* ("Retrial After a Hung Jury" at p179.)

If Cohen's view were adopted the court and judge time involved in a retrial could be devoted to the trial of a new case.

95.8 In Nigeria, jury trials remain in Lagos State only. There, provision is made for majority verdicts although in capital offences a unanimous verdict is still required. For non-capital offences a verdict must be unanimous if given upon two hours (or less) of deliberation. If given after more than two hours deliberation a majority verdict of 7:1 or 6:2 will be accepted. On the trial of a capital offence, if not less than eleven out of twelve jurors agree after two hours that the accused is not guilty of the capital offence charged but guilty of a lesser offence, the judge may accept that majority verdict. (Nwadialo The Criminal Procedure of the Southern States of Nigeria 1976 Bemin City at pp 206-7.)

96 Restriction or Abolition of Jury Trial - England. Restricting jury trial to a limited number of offences has been a very popular proposal in relation to the problem of time consumed by juries. Another development is the reclassifying of certain offences as triable 'either way' - that is, either by jury trial or summarily.

96.1 The abolition of jury trials for certain offences has the advantage, from the perspective of time saving, over the option of jury or summary trial - the jury trials for those offences are not merely reduced in number but completely eliminated. (Delay at p98.) The abolition of the right to jury trial for certain offences and its replacement with summary trial is a drastic step and, as was recently found in England, such a proposal can be met with fierce opposition. The proposal that jury trials might be abolished arose out of the success of the implemented recommendations from the Beeching Report.

96.2 The Interdepartmental Committee set up in 1973 under Lord Justice James to examine the distribution of business (that is, cases between the Crown Court and Magistrates' courts) considered several ways of relieving "the heavy pressure on, and delays in, the Crown Court". (Mr. Carr, the Secretary of State for the Home Department, 6 July 1973.) The Crown Court had replaced the old system of assizes and quarter sessions only the year before. The new court administration had endeavoured to make proceedings on indictment more efficient.

96.3 The James Committee reported in 1975. The Committee noted that at the time of its appointment (in 1973) there had been a "good deal of concern" about the considerable workload on the Crown Court. However some witnesses, notably the Law Society, had said that in most areas the Crown Court was coping satisfactorily with its workload and that, in fact, a greater cause for concern was the time taken to dispose of cases in the magistrates' courts. The Committee found that while it might have been, in 1973, that the Crown Court could manage its caseload (statistics showed that there was only a

small increase in the number of committals for trial), in 1974 there was a considerable increase in the number of committals for trial in the Crown Court and this continued in 1975.

96.4 The new court administration succeeded in making proceedings on indictment more efficient, at least in some areas, with the result that the Crown Court had become a more attractive forum than the courts under the old system before the Courts Act 1971. This Act implemented the recommendations of the Royal Commission on Assizes and Quarter Sessions ("the Beeching Commission"). The Beeching Commission itself was concerned to recommend ways in which the existing court structure could be changed to more efficiently dispense justice.

96.5 The Beeching Commission recommended a simplified structure for the courts above the level of magistrates' courts. The Commission advised that, in its view, control of the courts by a single Minister and the creation and maintenance of an efficient court management service were essential. The Lord Chancellor, who already controlled many aspects of the court system, was recommended to be Minister responsible for court administration. Among the main features of the new system which was established as a result of the Beeching Commission's recommendations were the circuit basis for administration (England and Wales were divided into six circuits); the flexibility introduced into the system so that cases could be moved from court to court and judges from jurisdiction to jurisdiction. Part time judges (called recorders and assistant recorders) have played a vital role.

96.6 Bourne recently wrote that the single most important feature of the Beeching system is flexibility "all in the interests of ensuring that maximum use is made of judge-power and scarce physical resources". As a result of the changes brought about by the Beeching Commision's recommendations, the Crown Court became so much more efficient that it came to attract more business than it could dispose of, even with its expanded and flexible capacity. Osborne described it as "a victim of its own success" and went on :

This underscores a point that has been made before: developments to deal with delays cannot be enacted without due consideration of their possible consequences. They will not be operating in a vacuum and may have an impact on other parts of the system and on the future operation of the courts. (Delay at p99.)

Bourne noted that the great flexibility would not have been used to maximum advantage without the work of the strong administrative structure at the circuit and courts administration level. He commented that part time judges have been an essential element in the measure of flexibility achieved but had been relied on to a much greater extent than had been envisaged by the Beeching Commission - they were disposing of between 10-12 per cent of the court's business. There were drawbacks to the use of part time judges:

* their sitting time is limited and so only certain types of cases can be listed for them

* a disproportionate amount of administrative staff time is taken up in arranging their sittings (AIJA Workshop 1982 Document H at p5.)

96.7 Bourne wrote that in his opinion the legal system in England could not have done without Beeching:

The crucial factor is the volume of criminal work and the rate of its disposal. In very round terms, the volume of what is now Crown Court ... work has doubled in the last decade. The post-Beeching system has, with a good many hiccups, made it possible for the disposal rate to keep up, without losing the essential qualities of judicial determination and without increasing (with, in most areas, decreasing) delays. We could not go back to less centralised administrative control without an unacceptable loss of "efficiency" ... (AIJA Workshop 1982 Document H at pp10-11.)

96.8 The James Committee's recommendations included a recommendation that certain cases of theft and related offences of dishonesty, where the value of the money or property involved did not exceed twenty pounds, be tried exclusively in the magistrates' courts. The original Criminal Law Amendment Bill 1976 picked up this recommendation in clause 23. It was estimated that this $20 limit in theft and property cases would have removed 5,000 cases anually from the Crown Court. ("The Criminal Law Bill" [1977] Criminal Law Review 65 at p68.) Also, cases of criminal damage other than arson, in which the damage was not estimated to exceed 100 pounds were also proposed to be transferred to the lower courts, abolishing the right to elect jury trial in those cases. (Delay at p99.)

96.9 The Committee reached its recommendations after weighing the opposing policy considerations:

> *In the last analysis, society has to choose between two conflicting aims. On the one hand is the existing right of the citizen to be tried by a judge and jury on any charge of theft or criminal damage, however small the amount involved. On the other is the right, especially important defending a serious charge, to be heard as soon as possible. These two requirements have to be met with resources which are finite and cannot be expanded without limit. At present, defendants on serious charges are suffering the injustice of long-delayed trial, while the time of the Crown Court is partly occupied with minor cases of low monetary value.* (Report of the Interdepartmental Committee The Distribution of Criminal Business between the Crown Court and Magistrates' Courts London HMSO 1975 Cmnd 6323 at para 87.)

96.10 The Government adopted the Committee's recommendations in its original Bill but met with "vehement opposition from the public, the press, professional bodies and Parliament". (Delay at p99.) For example, Lord Edmund-Davies opposed the proposal because it was founded, in his words,

"frankly and expressly, on the basis of expediency". (378 Parl Deb H L (1976) 5th Ser 848, quoted in Delay p99.) The opponents argued that the right of a person charged with theft, no matter how minor, to jury trial could not be overridden by the right of another person on a serious charge to be tried as soon as possible. (Delay at pp99-100.)

96.11 Following prolonged debate in the English House of Lords, the Government removed this clause from the Bill, and inserted in its place a clause much narrower in scope. The new clause (now s 23 of the Criminal Law Amendment Act 1977 c 45) provided that the offences under s 1 of the Criminal Damage Act 1971 (except arson) and the offences of aiding, abetting, counselling or procuring, or attempting or inciting another to commit such offences (where the value of the property does not exceed 200 pounds) all of which had been triable either way, would be triable summarily only. In the climate at the time this amendment was as far as the restriction of jury trials could be taken. However greater acceptance of the idea behind the James Committee's proposal may now be found. Osborne quotes Lord Hailsham's later remarks:

> *We began this Bill in an atmosphere of almost excited controversy ... I can remember the speeches ... of those who thought that the rule of Magna Carta and trial by jury was being brought to an end ... because of the Government's then intention to implement the James Committee on the subject of small thefts. I admit ... that I am among those who advised the Government to give in on that point. I think I was right to do so; all the heat has been removed from the Bill by that very wise concession, because public opinion is not ready for that kind of amendment. However, I now want to say, in the cool of the evening, that I think the James Committee and the Government's original intentions were perfectly right. We shall come to them in the end.* (382 Parl Deb H L (1977) 5th Ser 74, quoted in Delay at p100.)

97 Restriction of and Alternatives to Jury Trial - Canada. In contrast to the opposition to jury trial restrictions in England, the monetary criterion for determining whether a theft trial is to be summary or heard by a jury has been accepted in Canada for some time. Under the Canadian Criminal Code RSC 1970 c C-34 section 483 the jurisdiction of a magistrate to try an acused is absolute and not dependent upon the accused's consent, where the accused is charged in an information with:

> (i) *theft, other than theft of cattle;*
>
> (ii) *obtaining money or property by false pretences;*
>
> (iii) *unlawfully having in his possession any property or thing knowing that all or part of the property or thing or the proceeds was obtained by or derived directly or indirectly from the commission in Canada of an offence punishable by indictment; or*
>
> (iv) *having, by deceit, falsehood or other fraudulent means, defrauded the public or any person, whether ascertained or not, of any property, money or other security, where the subject-matter of the offence is not a testamentary instrument and where the alleged value thereof does not exceed two hundred dollars.*

97.1 The defendant in Canada has an absolute right to jury trial for the most serious offences (including murder and treason), although an accused charged with an indictable offence may consent to be tried by a judge alone of the superior court of criminal jurisdiction. (Canadian Criminal Code RSC 1970 c C-34 s 430.) The option for trial of indictable offences by judge alone is frequently exercised in Alberta. (Office of the Attorney General for Saskatchewan Study of the Organization of the Courts in Saskatchewan (No 2) 1974 at p46 cited by Osborne in Delay at p101.)

97.2 For a large number of serious indictable offences (including rape, manslaughter, criminal negligence and bribery) the defendant has the options of trial by judge and jury, by single judge, or by magistrate, unless the Attorney General requires the trial to be in a superior court.

97.3 Canada is unusual in having provisions for trial by single judge as an alternative to trial by judge and jury. In other jurisdictions where there is an option it is generally between trial by judge and jury or trial before a magistrate. Osborne reports that in New Zealand, the Minister of Justice and Attorney General published a paper ("A New Court Structure for New Zealand") which contained a proposal that every person charged with an indictable offence continue to be entitled to be tried by a jury, but that the Crimes Act be amended to permit an accused to elect trial before a High Court judge alone, except in very serious cases. (Delay at p109 fn 17.)

97.4 Canada is unusual in another respect - the accused's preference as to mode of trial is irrelevant where the offence is "triable either way" for the summary trial of offences triable on indictment or summarily. This is also the situation in Scotland. When a person in these two jurisdictions is charged with an offence triable either way (that is, either on indictment or summarily) the choice as to mode of trial is made by the prosecution and not the defence. English commentators have looked askance upon such a provision, fearing that when the choice as to mode of trial is not the defendant's there is more likelihood of appeal because the defendant feels that the case has been dealt with unfairly. (Scott and Latham "A Comment on the Report of the James Committee" [1976] Criminal Law Review 159 at pp 166-67.)

97.5 The "compensation" for Canadian defendants whose indictable offence charges are heard summarily is a lesser penalty. Every person convicted of an offence punishable on summary conviction is liable to a fine of not more than $500 or imprisonment for no more than six months, or both, except where otherwise expressly provided by law. [Canadian Criminal Code RSC 1970 c C-34 section 722(1).]

98 Summary Versus Jury Trial - Scotland. In Scotland, the first decision as to whether a case should be dealt with summarily or sent on petition to a sheriff sitting with a jury or to the High Court of Justiciary is made by the prosecutor (the procurator fiscal in Scotland). If the decision is that the case should go on petition, that decision is reviewed by the Crown Office when it receives the results of the fiscal's investigations into the alleged offence. The case might be found to be more appropriate for summary trial in which case it will be sent back. Osborne quotes from a report by the Home and Health department in Scotland on the Sheriff Court and the decision as to mode of trial:

> *We are most anxious ... that there should not be introduced into the Scottish criminal system a right on the part of the accused to opt for jury trial. While in general we do not think that persons accused of crimes against property or crimes of violence would opt for jury trial, persons accused of driving offences might do so in the hope of finding a sympathetic jury, and delays in disposing of criminal business. In any event, we think that jury trial in Scotland, as a matter of right, is unnecessary. In summary cases in the sheriff court, as in solemn, the Scottish system of prosecution is based on direction by the Lord Advocate, a corps of professional prosecutors, the need for corroboration of evidence and the trial of cases by professional judges, and legal aid availability. It may be that in England the jury is thought to offset any shortcomings of prosecution by the police, lack of corroboration of evidence, and the trial of cases by lay magistrates.* (The Sheriff Court Edinburgh HMSO 1967 Cmnd 3246 at para 227.)

99 Abolition of Jury Trial - Other Jurisdictions. Reforms abolishing jury trial have been implemented in many jurisdictions, including India (the Code of Criminal Procedure 1973 which repealed the Code of 1898), Singapore, Fiji, the Solomon Islands, the East African nations and Nigeria (except Lagos State). Osborne reports that in these countries indictable offences are heard by judges sitting with or without assessors, but is unable to indicate to what extent

if at all the abolition of juries has expedited criminal proceedings. (Delay at pp107.)

100 Jury Management. Among the developments in the United States is the movement towards better management of jurors. The National Institute of justice commissioned a guide to "juror usage". A forthcoming report by the Committee on juries will consider this guide in greater detail. However, one of the seven general rules promulgated for good juror usage is worth mentioning in the context of court delays: "Maintain continuous court operation":

> *With continuous operation, the theoretical maximum use of juror time (about 70 per cent) can be attained. High juror usage is assisted if a court starts a second jury trial almost as soon as the first trial is finished.* (Johnston Court Statistical Data Collections: A Study of Overseas Developments at p53.)

FINDINGS

COURT MANAGEMENT - VICTORIA

101 The Legal and Constitutional Committee in its Preliminary Report on Delays in Courts identified some areas relating to court management requiring further research and inquiry, and made an immediate recommendation on one aspect of jury management. Recommendation 15 of that Report states:

> *326 An information booklet should be produced by the Law Department to alert jurors to their rights and responsibilities, and to give them any other information necessary to fulfill their duties.* (At p179.)

The Committee indicated its intention of formulating further recommendations on the management of courts in relation to good operation of the jury system. (At p179.) In the course of its research into court management overseas, certain matters have been identified which the Committee believes should be investigated, with possible application to Victoria.

101.1 FINDING 13

The Committee notes that in his Ministerial Statement in response to the Committee's Preliminary Report the Attorney-General indicated that Recommendation 15 "had been strongly supported particularly in light of public discussions in recent times on the jury system". The Director of Public Prosecutions has forwarded to the Chief Judge of the County Court and the Chief Justice of the Supreme Court a draft pamphlet which is under consideration by the judges. The Attorney-General concluded by saying that it is "expected that a pamphlet will be issued by the end of [1984]". (19 September 1984 at p6.) The Committee is gratified that this should be so, and looks forward to the participation of jurors being enhanced when they are supplied with information about their role, by means of the pamphlet.

101.2 FINDING 14

The Committee considers that some of the overseas initiatives may be incorporated into the Victorian system to enhance court management in terms of judge-control, jury participation, and witness and victim participation in the criminal justice system. The matters of particular concern to the Committee include:

* the powers of the judiciary and magistracy in controlling management of the courtroom, and whether powers should be clarified or increased

* means of ensuring that juries are able to participate fully in accordance with their role in the court as arbiters of the facts

* for witnessses, means of ensuring that they are able to participate adequately in the court process

* for victims of crime, means of ensuring that they are enabled to play an appropriate and meaningful role in the system, rather than being disaffected by their experiences in the criminal courts

The Committee calls for written submissions from interested parties, taking into account the matters raised in this Overseas Report and in the Preliminary Report on Delays in Courts. In the course of its inquiries in this area the Committee intends also to call witnesses to put their views on current court management issues, to assess the relevance of overseas proposals contained in this Report, and on the introduction of schemes which may improve court management in the areas outlined, and thus serve to alleviate delays in the criminal courts of Victoria.

TRIAL : EXPEDITING THE HEARING OF EVIDENCE

102 Introduction. The rules and practices in relation to the presentation of evidence dictate to a certain extent the length of time consumed by a trial. Sometimes the time taken in criminal trials in the presentation of evidence appears to be unnecessarily long. The more serious consequences dependent upon conviction demand that the rules of evidence applicable in criminal trials are stricter and more numerous than the rules applicable in civil litigation.

103 Admission of Undisputed Facts. The principle that the prosecution must prove its case beyond reasonable doubt has been generally interpreted to require the prosecution to prove all the facts essential to the establishment of the offence including those which are not disputed by the defence. The memorandum prepared by the Commonwealth Secretariat for the meeting of Commonwealth Law Ministers in 1977 addressed this issue, saying that so far as the accused is concerned, once a plea of not guilty is entered it is incumbent upon the prosecution to prove every fact and circumstance constituting the offence charged, there being no mid point between a plea of guilty which admits the truth of everything charged and a plea of not guilty which puts everything in issue.

103.1 As the British Criminal Law Revision Committee has commented since an accused person can admit the whole of the prosecution case by pleading guilty, it seems illogical if that person cannot admit part of it. (Report No. 9 Evidence: Written statements, formal admissions and notices of alibi London HMSO 1966 Cmnd 3145 at para 22.) Of course, confessions or admissions of guilt are treated with great caution by the criminal courts and their admissibility as evidence hedged around by many rules and safeguards. Just as safeguards have been provided for admissions of the whole case, safeguards would also be needed for the admission of part of a case.

103.2 Osborne stresses that by allowing formal admission of undisputed facts nothing more is envisaged than the formal admission of facts which would in any case be admissible in oral evidence. It is not suggested that anything would become admissible by formal admission which would otherwise be inadmissible under the laws of evidence. (Delay 1980 at p80.)

103.3 In Canada a widely framed section of the Criminal Code provides for admission by an accused on trial for an indictable offence of "any fact alleged against him for the purpose of dispensing with proof thereof". (RSC 1970 c C-34 s 582.) This provision has operated successfully and at the Uniform Law Conference of Canada in 1978 it was proposed that this section be amended to apply to all proceedings and enable the Crown to make admissions. (Proceedings 1978 at p55.)

103.4 In New Zealand s 369 of the Crimes Act 1965 states:

> *Any accused person on his trial, or his counsel or solicitor, may admit any fact alleged against the accused so as to dispense with proof thereof.*

The Summary Proceedings Act 1957 was similarly amended in 1961 to enable persons accused of summary offences or their counsel or solicitors to make formal admissions.

103.5 In Scotland, formal admissions are made pre-trial and must be set down in writing as "minutes of agreement and admissions" (Summary Jurisdiction (Scotland) Act 1954 s 36 and Criminal Procedure (Scotland) Act 1975 s 150) and can only be used where the accused has legal assistance. The Committee on Criminal Procedure in Scotland concluded that more use could be made of these minutes if the pre-trial preparation period were extended to allow drawing up and adjustment to these documents. (Criminal Procedure in Scotland (Second Report) Edinburgh HMSO 1975 Cmnd 6218 at para 36.04.)

103.6 In England, s 10 of the Criminal Justice Act 1967 provides as follows:

> *(1) Subject to the provisions of this section, any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the prosecutor or defendant, and the admission by any party of such fact under this section shall as against that party be conclusive evidence in those proceedings of the fact admitted.*
>
> *(2) An admission under this section -*
>
> *(a) may be made before or at the proceedings;*
>
> *(b) if made otherwise than in court, shall be in writing;*
>
> *(c) if made in writing by an individual, shall purport to be signed by the person making it and, if so made by a body corporate, shall purport to be signed by a director or manager, or the secretary or clerk, or some other similar officer of the body corporate;*
>
> *(d) if made on behalf of a defendant who is an individual, must be approved by his counsel or solicitor (whether at the time it was made or subsequently) before or at the proceedings in question.*
>
> *(3) An admission under this section for the purpose of proceedings relating to any matter shall be treated as an admission for the purpose of any subsequent criminal proceedings relating to that matter (including any appeal or retrial).*
>
> *(4) An admission under this section may with the leave of the court be withdrawn in the proceedings for the purpose of which it is made or any subsequent proceedings relating to the same matter.*

103.7 Legislation identical for all practical purposes to s 10 has been enacted in Hong Kong, Singapore, Bermuda, Malawi and the Seychelles. (Delay 1980 at p83.)

104 Oral Evidence versus Written Statements. The reliance on oral evidence is another aspect of trials said to be a cause of unnecessary delay. The English Criminal Law Committee in 1966 suggested that where an accused does not wish to question the person giving evidence, that evidence could be given by means of a written statement. The Law Revision Committee recognised that in relation to crucial evidence it is probably easier for judge and jury to follow it and assess its weight when they see and hear the witness. However, when evidence is technical the usual process of question and answer is not only slow but hinders a jury's comprehension. The Law Revision Committee believed that juries would be less likely to be wearied and distracted from the main issues if formal or uncontroversial evidence was read out rather than given by a succession of witnesses. (Evidence: Written statements, formal admissions and notices of alibi London HMSO 1966 at paras 7-9.)

104.1 Following the Criminal Law Revision Committee's report the English Criminal Justice Act 1967 provided for written statements to be admissible in committal proceedings subject to certain conditions. Section 9 provides that in all criminal trials, evidence of a witness may be admitted in written form to the same extent as oral evidence, subject to the right of the person against whom it is tendered and the power of the court to require the witness to give evidence orally.

105 Acceptance of Technical Evidence. Technical evidence is not always challenged by the other side. Some jurisdictions have enacted provisions specifically related to expediting the reception of technical evidence. For example, in Jamaica s 33 of the Food and Drug Act provides that:

(1) Subject to subsection (2), the certificate of an inspector or analyst stating that he has examined or analysed an article or sample for the purpose of this Act and stating the result of his examination or analysis shall be admissible in evidence in a prosecution for a contravention of this Act and shall be prima facie proof of the statements contained in the certificate but the party against whom it is produced may require the attendance of the inspector or analyst for the purpose of cross examining him.

(2) A certificate under subsection (1) shall not be admissible in evidence unless the party intending to produce it has before the trial given to the party against whom it is intended to produce it reasonable notice of such intention and a copy of the certificate.

A similar provision exists in Scotland - s 42 of the Food and Drugs (Scotland) Act.

105.1 In Ontario medical reports may be admitted in evidence with the leave of the court and notice having been given to all parties. The report must contain a statement that an examination was made, the qualifications of the person who conducted the examination and the conclusions. Where a medical practitioner is required to give evidence orally and the court is of the opinion that the evidence could just as effectively have been received by way of a written report the court has power to order the party who called the doctor to pay as costs such sum as it considers appropriate. (Evidence Act of Ontario RSO 1970)

106 Expert Opinion Evidence. When expert evidence is really a matter of expert opinion trials may be unduly extended by the desire of the prosecution and defence to call a number of experts to add weight to the particular opinion. In Canada the Evidence Act limits the prosecution and defence to five "opinion"

witnesses unless the leave of the court is obtained. (RSC 1970 cE-10 s 7.) In British Columbia a written statement of opinion by an expert is admissible in evidence following amendments to the Evidence Act in 1976. A copy of the statement must be furnished at least 14 days before it is tendered in evidence to every party to the proceeding who is adverse in interest. (Evidence Act 1960 RSBC c34 s 12.)

107 Tape Recording/Video Evidence. The delay between an offence and the trial of the alleged offender tests witnesses' memories. The problem of the fallibility of the human memory can never be completely eliminated because some delay at least between an offence and trial is essential, both for the preparation of the prosecution and the preparation of the defence. Another problem arising out of the inevitable delay before the trial is that of witnesses dying or otherwise becoming unavailable. Further delay is often the result of these occurrences.

107.1 A possible approach to solving these problems is to make use of new (in the sense that it would be new to the courts) technology. For example tape recording or video taping of witnesses' statements has been suggested. The tape could then be played in court in the event of the witness becoming unavailable.

107.2 A different use of video taping was successfully tried in Vernon, a town in British Columbia. Drivers suspected of being impaired by alcohol or drugs and stopped by the police were asked to perform physical sobriety tests while being videotaped. The tape was made available to the charged driver and the driver's legal representatives before the court appearance and if the matter proceeded the tape was submitted in evidence. A "profound effect" on the disposition or drink driving cases was observed. There was a 40 per cent drop in the number of "not guilty" pleas, implying that the charged drivers, upon seeing their appearance on tape, decided against challenging the charge. There was a 25 per cent fall in the number of drink driving charges. This was generally

believed to be the result of the prosecution dropping charges which would have been pursued, because the videotape evidence was not sufficiently convincing. (Delay 1980 at p90.)

GUILTY PLEAS

108 Introduction. The court time consumed by a guilty plea is likely to be much less than that consumed by a trial. While the court hearing a guilty plea needs to be satisfied that the accused is voluntarily pleading guilty, understands the charge, and is aware of the right to have the case against her or him proved beyond reasonable doubt, a trial involves the proving of facts with the examination, cross-examination and re-examination of witnesses and so on.

108.1 A guilty plea generally requires much less court time but the time-saving benefits are minimal if the plea is made at the arraignment preceding trial. The court might be free to start the next case but on such short notice it may be that no case is ready to go on. The time-saving benefits can be maximised if the accused notifies an intention to plead guilty at an earlier stage - not only court time but also time spent by solicitors and counsel in the preparation of the case and by court administrators in the allocation of trial dates can be saved. As Zeisel has said:

> *[t]ime spent on cases that are pleaded guilty is measured in fractions of an hour; time spent on preparing and conducting a trial is measured in days or weeks.* ("The Offer That Cannot Be Refused" in Zimring and Frase (eds) The Criminal Justice System 1980 558 at p559.)

108.2 It should be noted here that the scheduling of trials is much more difficult than the scheduling of pleas. The anticipated length of a trial might be several days or weeks and allocating a trial date involves finding a date on which a judge becomes free for that length of time and on which the witnesses are all expected to be available (otherwise an adjournment is likely to be sought). In contrast, a plea is likely to be completed in less than a day and in fact several pleas can normally be listed before the one judge on one day. The only witnesses usually are character witnesses.

108.3 The developments resulting from concern about court delays must be distinguished in a discussion of guilty pleas:

* the first and less controversial is the increasing interest in means by which guilty pleas can be "identified" as soon as possible. "Identification of guilty pleas" is to be understood as clearly differentiated from inducement

* the second is the growing attention paid to the practice of negotiation with the accused to obtain a plea of guilty to some lesser charge. Just as there are different forms of plea negotiation/bargaining so there are different views as to its fairness and desirability

109 Early Identification of Guilty Pleas. The extent of the problem in Victoria which the early identification of guilty pleas could alleviate can be seen from published figures: Willis and Sallman found that 42 per cent of cases in the County Court listed for trial actually became guilty pleas on the day of trial. ("Criminal Statistics in the Victorian Higher Courts: A First Glimpse of the Possibilities" (1977) 51 Law Institute Journal 498 at p504.)

109.1 The advantages of identifying guilty pleas at an earlier stage are obvious when the time-consuming work in arranging a trial date, notifying witnesses, providing depositions to the judge and so on, are considered. After all this administrative work, pleading guilty instead of going to trial results in an empty court and a judge with no case to hear.

109.2 Obviously, the first step towards preventing this situation is to ask why so many defendants wait until the day of trial to plead guilty. The question is especially important because in most jurisdictions an accused will have to wait much longer for a trial than for the hearing of a plea.

109.3 The reason for many last minute pleas is that numerous defendants have not until then been able to ascertain the strength of the prosecution case. (Delay at p70.) Improved procedures for disclosure of the prosecution case (particularly those procedures providing early disclosure) should reduce the number of last minute pleas.

109.4 Another factor which influences the timing of a guilty plea is the accused's perception of an increased chance of leniency depending upon the time available to demonstrate rehabilitation. By delaying the guilty plea for as long as possible (and that involves pleading not guilty in the meantime) an accused can (if not in gaol) obtain a job/get married/have children/make restitution - generally exhibit contrition and demonstrate a rehabilitated character. These matters are taken into consideration by the judge and may result in a more favourable sentence. (Westling "Plea Bargaining: A Forecast for the Future" (1976) 7 Sydney Law Review 424 at p425.)

110 Plea Identification - Scotland. Scotland has had greater experience than most jurisdictions of measures aimed at preventing late pleas. One measure is well established but another more recent procedure was scrapped after being judged a failure. The unsuccessful procedure was introduced in Glasgow and required an accused who had pleaded not guilty to renew his plea four days before the date on which trial was listed. It was hoped that by requiring another court appearance the accused would be prompted to plead guilty on the earlier day, and the unnecessary attendance of witnesses could be avoided. Another advantage would have been that the court timetable could be altered three or four days ahead and earlier notification given to the parties involved in the cases next in line. Unfortunately, the procedure did not significantly reduce the number of guilty pleas on the day of trial. (Thomson Committee Criminal Procedure in Scotland (Second Report) Edinburgh HMSO 1975 Cmnd 6218 at para 20.04.)

110.1 The Thomson Committee invited comments and suggestions relating

to the improvement of criminal procedure in Scotland. On the issue of last minute guilty pleas the suggestions of the Law Society of Scotland included:

* using remands on adjournments without plea rather than pleas of not guilty which result in the fixing of trial dates

* invoking sanctions against a defendant where there is a late change of plea or where a trial proceeds but the court considers that the defence had no substance. ("Response of the Council of the Law Society to the Questions submitted by the Committee on Criminal Procedure ..." (1972) 17 Journal of the Law Society of Scotland 7 at p11.)

110.2 The Thomson Committee concluded, however, that introducing sanctions for late changes of plea would be counter productive - more accused persons would be likely to go to trial to avoid sanction. The suggestion that sanctions be available where the court considered a defence of no substance would offend against the fundamental principle that the prosecution must prove its case and the defence be not required to do anything. Also, it could be argued that if this suggestion was adopted, there ought to be a reciprocal right in the event of an acquittal (for example, to have expenses awarded against the Crown). (Thomson Committee Report, paras 20.05-0.6.)

110.3 The best approach to adopt for the early identification of guilty pleas is succintly put by Osborne - it "must be more subtle than coercive and must represent the actual wishes of the accused". (Delays at p71.)

110.4 The long-established Scottish procedure (mentioned above in para 110) meets these requirements. It is called the "section 31 procedure" (although the original provision - s 31 of the Criminal Procedure (Scotland) Act 1887 - is now embodied in s 102 of the Criminal Procedure (Scotland) Act 1975, c 21). Under this procedure an accused awaiting trial on indictment ("solemn

procedure" in Scotland) who intends to plead guilty can cause the case to be expedited by giving notice that she or he wishes to have the case disposed of quickly and intends to plead guilty. The accused's solicitor gives the notice, in the form of a letter signed by the solicitor, to the office of the Crown prosecutor. The accused is then served with a notice to appear in the lower court at an early date and an indictment in short form (without a list of witnesses or exhibits). The sheriff may impose sentence at the hearing or remit the case to the High Court for sentence.

110.5 The s 31 procedure works subtly to induce early notification of an intention to plead guilty: not only is the length of any pretrial detention considerably curtailed but also

> *the possibility exists that in a limited number of cases the sheriff will not remit the case to the High Court in circumstances where the High Court might be expected to fix a trial in that court. This could result in a lighter sentence for the accused.* (Delay at p71, referring to comments made by Gordon in "Plea Bargaining" 1970 Scots Law Times (News) 153.)

111 Plea Negotiation/Bargaining. Different practices are loosely collected under this heading. In 1980 the Victorian Court of Criminal Appeal (Young C J, McInerney and McGarvie J J) had cause to consider the expression "plea bargaining":

> *It is, in our opinion, an ambiguous expression which is better avoided. It is a misnomer of most situations it is used to cover. It is frequently used without sufficient indication of what precisely is being referred to, but since it is used, we shall indicate briefly what we understand the expression to cover ...*
>
> *The expression "plea bargaining" is sometimes used to cover discussions between the Crown and an accused's advisers concerning*

the charges upon which an accused will be presented for trial and including indications that the acused is prepared to plead guilty to certain offences. Since, in Victoria, the decision as to the charges upon which a person is presented rests with the Crown and does not involve the Court (see Crimes Act, s 353 and R v Parker [1977] VR 22) we shall say nothing about any such discussions. Another sense in which the term "plea bargaining" is sometimes used covers discussions in which the trial judge takes part. Counsel for an accused and counsel for the Crown attend the judge in his private chambers and discuss an arrangement whereby, upon the judge indicating the probable sentence and the Crown indicating that it will accept a plea of guilty to a particular charge, the accused through his counsel indicates that he will plead guilty. We do not know that such discussions are common in Victoria but we are clearly of the opinion that any such discussions should not take place. (R v Marshall [1981] VR 725 at 732.)

111.1 In view of these comments this report will not consider developments in other jurisdictions concerning plea bargaining in the second sense - that is discussions in which the trial judge takes part. However, the law and practice in some other jurisdictions in relation to the acceptance of pleas of guilty to lesser charges are worthy of a brief examination.

112 Plea Negotiation - England. In England s 6(1)(b) of the Criminal Law Act 1967 provides that where an accused is arraigned on an indictment for any offence, and can lawfully be convicted on such indictment of some other offence not charged on the indictment, the accused may plead not guilty to the offence charged but guilty of such other offence, although it is always in the discretion of the judge to refuse to allow a plea to a lesser offence. (Delay at p 72.)

112.1 In England there is no provision specifically listing the lesser

charges available. Some jurisdictions list the lesser included offences which may be accepted for each offence. For example, in Tasmania s 333 of the Criminal Code Act 1924-77 provides that upon an indictment for murder, an accused may be convicted of manslaughter; concealment of birth; causing the death of child before birth or infanticide, and s 338 provides that upon an indictment for stealing; obtaining property by a false pretence; cheating or receiving stolen property, the accused may be convicted of any such crimes respectively. There is a general provision enabling an accused to plead guilty to "any other crime of which he might be convicted upon such indictment": s 355(1)(a).

112.2 As Osborne points out the specification of lesser included offences provides some guidance for the person who is responsible for the acceptance or rejection of a plea to a lesser offence. (Delay at p73.) In England where there has not been a professional prosecuting service, judicial consent is required before a lesser plea can be accepted: s 6(1)(b) Criminal Law Act 1967.

113 Plea Negotiation - Canada. In Canada a plea of guilty to a lesser charge can be accepted if the prosecution consents: Criminal Code RSC 1970 c C-34 s 534(4). It has been noted that statutory provision like this implicitly recognise some sort of plea bargaining (and provide, in the case of jurisdictions specifying lesser included offences, some guidance as to what can be accepted) but little guidance is given as to how the plea negotiating should be conducted. (Delay at p73.) In Ontario, however, the Attorney-General in 1972 issued guidelines ("Principles Applicable to Plea Discussions") to the Crown Attorneys involved in the prosecution of criminal cases. Nine principles were laid down - not of statutory force but of considerable "persuasive value":

* The proper administration of justice is the paramount consideration in all plea discussions, and, as with all the duties of the Crown Attorney, due regard must be had for the rights of the accused, the protection of the public and the interest of the victim in accepting the plea of guilty to a lesser or included offence.

* The Crown Attorney should do nothing to compel a plea of guilty to a lesser number of charges or a lesser or included offence.

* The Crown Attorney should indict only on those charges on which she/he intends to proceed to trial or, in trials in the Provincial Court (that is the lower Court), the Crown Attorney should, with leave of the court, withdraw those charges on which he does not intend to proceed to trial.

* The Crown Attorney should not consent to the acceptance of a plea of guilty to a charge that cannot be prosecuted because it is barred at law.

* In all discussions with defence counsel, Crown Attorneys must maintain their freedom to do their duty as they see fit. Nothing should be said or done to fetter the freedom of Crown Attorneys and defence counsel.

* The Crown Attorney may state to defence counsel the view he/she may give if asked by the presiding judge to comment on the matter of sentence. The Crown Attorney should not agree to a specific sentence but may draw the attention of the presiding judge to any mitigating or aggravating circumstances that may appear to be relevant and may make submissions concerning the appropriate form and range of sentence. However, the Crown Attorney should take clear position that the matter of sentence is strictly for the judge and that any statement that is made cannot bind the Attorney-General in the exercise of discretion whether to appeal against a sentence or not.

* Crown Attorneys always should consider themselves as agents of the Attorney General and, as such, responsible for the proper administration of justice.

* Apart from exceptional circumstances neither Crown Attorney nor defence counsel, either alone or together, should discuss with the judge matters bearing on the exercise of the judge's discretion, in the judge's chambers or any place other than in open court. Where attendance in the judge's chambers is dictated by the circumstances, the Crown Attorney should always request that a court reporter be present to take down the full discussion which should form part of the record of the case. All representations to judges on which they are to base the exercise of discretion concerning a plea of guilty should be made in open court.

(Gerhart "Plea Negotiations" Crown's Newsletter Jan 1979 p2, quoted in Delay at p75.)*

113.1 Although the Canadian Law Reform Commission recommended in 1975 that plea bargaining be eliminated (Criminal Procedure: Control of the Process, Working Paper 15), that view was rejected by the Ontario Attorney General who was reported to support the practice provided that it was controlled by responsible people. (The Globe and Mail (Toronto) 24 February 1976 at 5 cols 1-6.) The Attorney General endorsed the guidelines issued in 1972 but added two provisos:

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* **NOTE:**In Canada it is widely accepted that the prosecution can "speak to sentence" as part of an agreement with the accused - see, for example, R v Macarthur (1978), 15 Newfoundland and Prince Edward Island Reports 72 (PEI Court of Appeal) at p 74: "It cannot be stated that there is anything wrong in Crown Counsel making a submission to the court as to the sentencing of the accused" quoted Delay at p78 fn 23. The judge is not bound by the Crown's suggestions. Attorney-General of Canada v Roy (1972) 18 Criminal Reports New Series 89 (Quebec Court of Queen's Bench).

1 *Expediency in reducing work load is not acceptable as a reason for accepting a plea to a lesser offence or to a lesser number of offences. Expediency in this sense does not include weaknesses in the Crown's case on the major charge or charges, which may be a valid reason for accepting a plea to a lesser offence or to a lesser number of offences.*

2 *[Whenever] you accept a plea to a lesser offence or to a lesser number of offences you should state in open court your reasons for doing so. The statement need not be lengthy but should be sufficient to satisfy the public in each case that there is nothing sinister or clandestine in the process of plea discussion.* (Memorandum from Deputy Director of Crown Attorneys, 26 Feb 1976 quoted by Stuart "Annual Survey of Canadian Law - Part 3: Criminal Law and Procedure" (1977) 9 Ottawa Law Review 568 at p645.)

114 Plea Negotiation - Differences Between the United States and England. In the United States there is a voluminous amount of research and writing on plea bargaining. Although there are widely differing opinions about it, the fact that it has been so often and publicly discussed and a "virtual obsession with American authors" perhaps partly explains the apparent prevalence of plea bargaining (in various forms) and the greater acceptance of it. (See Baldwin & McConville Negotiated Justice 1977 London at p1.)

114.1 The existence of plea bargaining in the United States could hardly be said to have been concealed from the American public and as a result politicians and lawyers are not reluctant about discussing it. In contrast in England there has been very little public debate. When Baldwin and McConville were about to publish their book Negotiated Justice: Pressures to Plead Guilty concerning the extent to which plea bargaining occurred in the Birmingham Crown Court they became embroiled in controversy. Both the President of the Law Society and the Chairman of the Bar sought to prevent its publication,

ostensibly on the grounds that they had doubts about the research methods and therefore about the validity of the results. The research had in fact been part of a large-scale study, funded by the Home Office, on the outcome of Crown Court jury cases. It was precisely because of the "paucity of empirical research on plea determination in England" that Baldwin and McConville decided to examine the cases of a number of defendants who changed their plea to guilty at a very late stage. They comprised ten per cent of the defendants pleading guilty. (See Negotiated Justice at p3.) Baldwin and McConville noted that most researchers and commentators in England were of the view that whilst there might be some limited pressures upon a defendant to plead guilty to an offence, there was little scope for bargains to be struck over plea. In America the generally accepted view has been that some form of plea bargaining is inevitable.

> *[Plea bargain] compromises are inevitable in an overburdened criminal justice system.* (Barzilay "The D.A.'s Right Arms" New York Times 27 November 1983 No 5 (Magazine) at pp118, 124 quoted in Schulhofer "Is Plea Bargaining Inevitable?" (1984) 97 Harvard Law Review 1037-1107 at p 1039.)

> *Abolition [of plea bargaining] is an impossibility ... to speak of a plea bargaining-free criminal justice system is to operate in a land of fantasy ... Plea bargaining ... will remain the bedrock for case disposition in all communities ... It will inevitably provide a central means of disposing of cases ...* (Heumann Plea Bargaining at pp162, 170.)

114.2 In England, however, several fundamental differences in the system are said to curtail the incidence of plea bargaining. These differences between the English and American systems include:

* Differences in the sentencing system - in England it remains almost completely within the judge's discretion whereas in the United States many offences in many jurisdictions carry

mandatory sentences. The existence of severe statutory minimum sentences in many parts of the United States has led to informal procedures to mitigate the harshness of the law. Baldwin and McConville cite an American study which found that in states with fixed sentences and therefore seriously limited judicial discretion there was great reliance on negotiated pleas to reduced charges, whereas in states with low statutory minimum sentences and therefore greater judicial discretion there were much higher rates of straight guilty pleas to the original charges. (Newman Conviction; The Determination of Guilt or Innocence Without Trial 1966 Boston at p54 cited Baldwin & McConville Negotiated Justice at pp20-21.)

* The different role played by the prosecutor - in the United States the prosecutor is a paid professional who has a largely unfettered discretion whereas in England the prosecutor is usually a barrister who is likely to be found on other occasions defending the accused. Baldwin and McConville suggested that no "prosecution mentality" had been able to develop in England but that with the growth of prosecuting solicitors' departments this situation might change. (At p22.)

* The judicial supervision over the charge - in the United States there is a Federal Rule of Criminal Procedure (Rule 11) that provides:

> *Notwithstanding the acceptance of a plea of guilty, the Court shall not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.*

However, this rule does not bind state court judges (Waddy v Heer 383 F 2d 789 (6th Cir 1967) and Baldwin and McConville claim that some courts have gone so far as to accept pleas of

guilty to offences that do not exist, citing two cases in particular (People v Foster 225 N E 2d 200 (NY 1967) and People v Castro 44 A D 2 d 808, 356 NYS 2d 49 (1974)). In England "the courts have been insistent that the charge brought should match the facts alleged". For example, in 1948 Lord Goddard C J said that counsel for the Crown had a duty to present the offence charged in the indictment where nothing in the depositions could be said to reduce the crime to some lesser offence (Soames (1948) 32 Cr App R 136, CCA) and in 1969 the Court of Criminal Appeal strongly deprecated any charge reduction made to induce a guilty plea (Coe (1969) 53 Cr App R 66 at 68). It is said that as a result of these judicial pronouncements '[t]he English prosecutor is ... prevented from precipitating a plea bargain by means of an undue reduction in the charge'. (See Negotiated Justice at p22.)

* The legal restrictions on the involvement of the judge in any bargain discussions - in the United States judges can and do participate in plea bargaining, so that the prosecutor can be in a position to guarantee the accused a particular sentence. By contrast, in England, judges cannot participate in any bargaining. In the leading case, Turner (1970) 54 Cr App R 352, the court made several observations about judicial involvement in the determination of plea, including the important observation that a judge should never indicate to counsel the sentence in mind, unless he/she is able to say that no matter what the plea the sentence will or will not take a particular form.

115 Background to Pleading Guilty. Despite these differences between the English and American criminal justice systems, Baldwin and McConville found that plea bargaining did exist (at least in the Birmingham Crown Court). They found that the most important single factor for defendants was pressure

from their barristers. Over one in six of the interviewed defendants claimed to have been party to plea bargaining. Almost 70 per cent of this group had at least five previous convictions for indictable offences (compared with 48 per cent in the main sample). (At p28.)

115.1 Two theories were put forward to explain this greater involvement of recidivists in plea bargaining:

* they are familiar with the system and personnel and are more likely to expect that some compromise or concession will be offered; and being aware of this probability they are more likely to delay their guilty plea, holding out for the best offer

* they know that in contesting a trial any challenge of police evidence will be likely to bring their own character and criminal record into question and also that they run a greater risk of a heavier sentence than a first offender

Of this group of recidivists who claimed to have been party to plea bargaining, half said that they had been told of the specific sentence they would receive upon pleading guilty and "sometimes warned of a quite different and heavier sentence" if they continued with a plea of not guilty. (At p29.)

115.2 Another group of defendants claimed to have pleaded guilty after gaining the impression that their barrister had been able to strike a bargain (usually in the form of a reduced charge) on their behalf. (At pp34-35.)

115.3 After detailed discussion of individual cases in their sample, Baldwin and McConville considered the social and legal implications of their findings. Among the factors to which they attributed the existence of plea bargaining in Birmingham were:

* the practice of awarding a reduction in sentence in return for a guilty plea

* the pressure of work of barristers in Birmingham

* the pressures imposed by the court system (particularly by the weight of the backlog) upon those working within it (Negotiated Justice at pp106-111.)

115.4 They did not attach much importance to "over-charging" - that is the practice of charging an accused with more serious offences than are warranted.

115.5 In the United States "over-charging" is frequently alleged to be the major cause of plea bargaining. It is regarded as standard practice in many American jurisdictions. (President's Commission Task Force Report (1967); Yale Law Journal "Restructuring the Plea Bargain" (1972) 82 Yale Law Journal 286-312.)*

116 Plea Bargaining and Delay - United States. The President's Commission also suggested that plea bargaining is or could become an intrinsically desirable method of disposing of cases. The United States Supreme Court (in Santobello v New York 404 US 257, 261 (1971)) has said that the plea bargaining "is not only an essential part of the process but a highly desirable

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* The existence of "overcharging" as a problem in Victoria was brought to the attention of this Committee by witnesses and is referred to in the Preliminary Report at paras 164-169.

part". (See Schulhofer "Is Plea Bargaining Inevitable" (1984) 97 Harvard Law Review 1037-1107 at p1039.)

116.1 The American proponents of plea bargaining as a remedy for delay argue that it is essential for the handling of huge caseloads and that without it enormous extra costs would have to be incured to dispose of cases and even then delays would worsen dramatically. The argument is that without plea bargaining and the resulting high rate of guilty pleas many more trial courts and judges would be required. The Chief Justice of the Supreme Court said in a speech to the American Bar Association in 1970:

> *The consequence of what might seem on its face a small percentage change in the rate of guilty pleas can be tremendous. A reduction from 90 per cent to 80 per cent in guilty pleas requires the assignment of twice the judicial manpower and facilities - judges, court reporters, bailiffs, clerks, jurors and courtrooms. A reduction to 70 per cent trebles this demand.* (Burger "The State of the Judiciary" (1970) 56 ABAJ 929 at p931.)

The same Chief Justice, in the Santobello case referred to above, said "If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities". (At p 260.)

116.2 The opponents of plea bargaining point out that the "assumed relationship between bargaining and judicial resources" is subject to certain qualifications. (See Schulhofer at p1040.) The elimination of plea bargaining would not eliminate guilty pleas altogether. Furthermore a negotiated guilty plea is not disposed of without taking up some court time.

116.3 Disagreement has also been expressed about the hypothesis that case pressure is related to the incidence of plea bargaining. For example, some

of the social scientists who have conducted research in the criminal justice system (such as Eisenstein and Jacob) have found evidence to support an opposing view - that more complex factors closely related to the social dynamics of the court exert the strongest pressures towards negotiation. (Schulhofer at p1041.)

116.4 Empirical data has also been relied upon as evidence that there is no significant correlation between heavy caseloads and high rates of plea bargaining (Heumann Plea Bargaining at pp27-33, and "A Note on Plea Bargaining and Case Pressure" (1975) 9 Law and Society Review 515; Feeley The Process is the Punishment at pp247-261). However Nardulli was able to demonstrate that Heumann's empirical evidence was too weak to be even suggestive. With a more sophisticated test of the case pressure hypothesis Nardulli found no significant correlation between case pressure and either guilty pleas, dismissals or sentences in guilty plea causes. (Nardulli "The Caseload Controversy and the Study of Criminal Courts" (1979) 70 Journal of Criminal Law and Criminology 89 at pp91-93.) In another empirical study Feely cast doubt on the case pressure hypothesis in relation to misdemeanour prosecutions. (See Feeley The Process is the Punishment at pp247-61.)

116.5 Other studies in the United States have found that there is not the same degree of reliance on guilty pleas in all jurisdictions. McIntyre and Lippman compared several large urban jurisdictions and reported in 1970 that while eighty to ninety per cent of cases in Brooklyn, Detroit and Houston were disposed of by way of guilty plea, in Los Angeles only forty-seven per cent and in Baltimore as few as seventeen per cent were disposed of in this way. ("Prosecutors and Early Disposition of Felony Cases" (1970) 56 ABAJ 1154 at p1156.) In 1972 the guilty plea rate for felonies in Philadelphia was only thirty-six per cent. [Annual Report of the Philadelphia Common Pleas and Municipal Courts (1973).]

116.6 Part of the explanation given by Schulhofer for the varying plea

rates is that in the jurisdictions with the lower rates, and therefore a greater use of trials, greater use is made of what is called a "bench trial" which is not a fully adversarial procedure. Some commentators describe these bench trials (conducted before a judge without a jury) as "slow pleas of guilty". They take place when the accused waives the right to a jury trial.

116.7 In Multnomah County, Oregon, a project was established in 1973 with an award of $395,000 from the Law Enforcement Assistance Administration to the District Attorney's Office aimed at curbing the soaring crime rates which were overtaxing the system, by reducing the incidence of plea bargaining. Between 1961 and the early 1970s the recorded rates for burglary and robbery increased by more than 400 per cent. As a result prosecutors were relying more and more on plea bargaining as a method of speedy resolution for their crowded case load. However, while the high rate of plea bargaining (90 per cent in 1971) had eased the backlogs it had also led to lighter sentences or earlier parole. The District Attorney reported that the "no plea bargain" project (called "High Impact") was highly successful even after only one year. Plea bargaining was reduced from 90 per cent to 5 per cent in the target offences of burglary, armed robbery and offences involving the handling of stolen goods. Furthermore, "all evaluation of the project indicated that time delays in case processing were not a problem". (Harl Haas D.A. Report 1979 Oregon.)

117 Plea Bargaining and Sentence Severity - United States. The link between rates of plea bargaining and severity of sentences obviously has implications for deterrence but there has not been much research in this area. In Minnesota, the Statistical Analysis Center and Research Unit of the Crime Control Planning Board* studied the statistics relating to guilty pleas, trial rates and plea negotiation and discussed some of the implications for the state's criminal justice system. The number of criminal cases disposed of in 1971 was found to be 27 per cent higher than the number for 1970. While the conviction rate remained constant (at 88 per cent) and the percentage of guilty pleas rose only slightly (from 81 per cent to 83 per cent) the number of convicted persons

receiving prison or reformatory sentences dropped by 15-20 per cent: "The system was able to increase the number of convictions from 1970 to 1971 but only by reducing the severity of sentences" (Crime Control Planning Board An Analysis of Minnesota's Criminal Justice System 1976 at p 58).

117.1 Not enough is known about the relative merits and disadvantages of conviction over severity of sentences. Meanwhile criminal justice systems are being forced to choose between fewer convictions on more serious charges with longer sentences and more convictions to lesser charges with more lenient sentences (or probation):

> *In an ideal analysis of the criminal justice system we should be able to estimate the degree of leverage that the number of trials allows in the plea negotiation process. That is, we would like to know what benefits might be gained in the rate of convictions and whether guilty pleas might be gained in the rate of convictions and whether guilty pleas might be obtained with lesser reductions in charges if we increased the provision of trials and related court services.* (At pp55-56.)

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* The Crime Control Planning Board is an agency with the purpose of identifying problems in the criminal justice system. Research, planning and policy are seen as a process - planning following the isolation of a problem as a result of research. The key to research is seen as sample surveys but with care being taken to avoid surveys based on questionable assumptions. Research is focused not on areas which require massive social change, but on areas in which improvements are achievable. (See Johnston Court Statistical Data Collections at p25.)

118 Plea Bargaining and Case Load Size - United States. The size of the caseload per judge was found to have a substantial bearing on the plea negotiation process - 1972 statistics for the district courts in Minnesota showed that the percentage of guilty pleas increased with increases in the size of the caseload per judge. By 1974, however, a new pattern had emerged. As the caseloads rose even higher, the guilty plea rate dropped slightly and the dismissal rate increased fairly strongly. (At p60.) This would suggest that at some point the prosecutors' workloads became too large for productive negotiations to take place in every case.

119 Plea Bargaining - Proposals for Reform - United States. The Whittier College School of Law under Professor Friesen recognised that "the dysfunction of guilty pleas and dismissals on the day of trial has plagued courts for many years" and decided to find a workable solution to the problem. (Justice in Felony Courts: A Prescription to Control Delay 1979 Los Angeles at p28.)

119.1 The recurrence of three problems in the different jurisdictions studied by the Whittier staff (resistance by the prosecutor to the discovery of his case; unstructured plea discussions; serious plea negotiations held on the day of trial) led to the formulation of a solution with three basic elements:

(1) Disclosure by the prosecutor at the time of arraignment,

(2) Structuring the plea negotiation conference, and

(3) Establishing a cut-off date for pleas. (At p28.)

119.2 In support of the second element, structured plea negotiations, the Whittier staff argued that every criminal justice system that they had studied (in Texas, Rhode Island, Florida and Ohio) had had some form of plea negotiation but that if left without structure it would continue to take place in

the court corridor before trial, over the telephone on the eve of trial or even during the trial and always in such a way that the accused did not know what was going on. The structured conference supervised by the court would

* save lawyer time (occurring on a specific date at a set time)

* provide the accused with the opportunity of participating in the negotiation ("a basic justice function")

* save court time by preventing "settlements" on the day of trial. (At p30.)

It was said that:

> *The primary purpose of the court system adopting rules which incorporate [this and the other two concepts] is to provide an orderly process which will take the guilty pleas and dismissals out of the system at an early date. Unless this is done the judges must resort to the old and counter-productive system of having to overset their dockets to compensate for the guilty pleas which are expected at the day of trial. This oversetting results in a loss of judge time, attorney time and certainly the loss of the time of witnesses ...* (At p33.)

FINDING

GUILTY PLEAS - VICTORIA

120 The Committee's overseas research confirms that plea negotiation is a matter of considerable concern in other jurisdictions. In its Preliminary Report the Committee discussed the problems in Victoria in the area of plea negotiation raised by witnesses, particularly the problem of overcharging by the prosecution and the difficulties created within the court system where pleas of guilty are accepted "at the door of the court". Recommendation 9 of that Report states:

> *183 The Committee recommends that the procedures outlined by the Flanagan Committee in its First Report should be followed at all relevant times, namely that:*
>
> *(i) whenever an accused's solicitor or accused's representative from the Legal Aid Commission desires to enter into preliminary discussions about the course a trial should take, the solicitor or representative should contact the preparation section leader in charge of the particular trial in the Office of the Director of Public Prosecutions and indicate the desire to discuss the matter with a Prosecutor for the Crown.*
>
> *(ii) it be the duty of that section leader of the preparation team to ensure that the Chambers Prosecutor (for the time being) is briefed in adequate time to enable the Chambers Prosecutor to be able to exercise discretion as to whether to accept or reject the plea offered in full satisfaction of a proposed presentment at the time that such discussions take place.*
>
> *(iii) the instructing solicitor or the representative on each side, will then make the necessary appointment with the Prosecutor for the Crown to enable the matter to be considered. (A representative of the solicitors should attend at each such*

conference to more readily facilitate expedition.)

(iv) the Chambers Prosecutor should set aside fixed times in each week for the purposes of such conferences taking place.

(v) if the Chambers Prosecutor for the Crown decides that the matter is one in which it is appropriate for the Crown to accept a plea of guilty to some lesser number of counts in satisfaction of a proposed presentment, or to a less serious offence than that originally charged. the Prosecutor should then and there by telephone seek the approval of the Solicitor-General, the Crown Counsel, to the adoption of such a course. (Both being available at fixed times for the purpose of entertaining such applications.)

(vi) the same procedure should be followed even when a case has already had a date fixed for trial, but solicitors representing the accused persons should be educated to the view that it is desirable that all such discussions take place at least seven days prior to the listed date.

Additionally, the Committee recommended that:

* steps should be taken to ensure that the legal professions was made aware of the procedures

* the Legal Aid Commission should be made aware and play a role in disseminating information about the procedures

* the Law Institute and Bar Council should make their members aware of the procedures through their journals and by any other appropriate means

(Preliminary Report para 183 at pp101-102.)

The Committee notes that the Attorney-General has endorsed this recommendation and in his Ministerial Statement indicated that the recommendation had been carried out to the extent possible by his direction. Additionally the Flanagan Committee has, at the behest of the Attorney-General, been reconstituted with additional members to continue its work of overseeing the operation of the criminal justice system in the area of delays in courts. (19 September 1983 at pp4-5.)

FINDING 15

120.1 In light of the overseas material contained in this Report, in conjunction with its researches as outlined in the Preliminary Report on Delays in Courts, the Committee believes that the work of the Flanagan Committee should, as far as possible, concentrate upon the area of pleas. To build upon the Flanagan Committee's earlier reports (see Appendix VA and VB, Preliminary Report on Delays in Courts, 1984, Government Printer, Melbourne at p300ff) and the Preliminary Report of the Legal and Constitutional Committee, to ensure that the system outlined by the Flanagan Committee is working efficiently and effectively without detriment to the rights of accused persons, the Committee believes that a system of monitoring guilty pleas should be established. Monitoring should take place under the aegis of the Flanagan Committee, but having regard to the resources of that Committee, the Legal and Constitutional Committee considers it would be appropriate for the Attorney-General to make available resources to enable consultants (those working in the legal, sociological or criminological areas) to carry out the monitoring.

COURT ADMINISTRATION

121 There are many different problems contributing to court delay which can be attributed to deficiencies at different levels of court administration. A number of approaches to remedying the problems can be subsumed under this heading.

121.1 Among the issues are the judges versus administrators debate; "calendaring theories"; the introduction of computers for collecting and monitoring information; and improving the coordination of agencies involved in the criminal justice system. Sources of overseas information and directions for reform, many of which are related to alleviating delay include:

* the American Bar Association's publications such as The Improvement of the Administration of Justice 1971 Chicago

* Friesen and others Justice in Felony Courts : A Prescription to Control Delay 1979 Los Angeles

* publications from the PROMIS Research Project by the Institute for Law and Social Research (INSLAW) such as Expanding the Perspective of Crime Data : Performance Implications for Policymakers 1977 Washington

* INSLAW's Guide to Court Scheduling 1976 Washington

* publications of the Law Enforcement Assistance Administration such as Court Delay Reduction : Information Guide for Judges, Court Administrators, Clerks and Interested Justice Personnel 1980

* Millar and Baar Judicial Administration in Canada 1981 Kingston

* publications from the National Institute of Law Enforcement and Criminal Justice such as Modern Court Management : Trends in the Role of the Court Executive 1970

* the series on court delay by the National Center for State Courts, especially Managing to Reduce Delay 1980

121.2 Victoria. These issues will be canvassed in the Committee's forthcoming report on Court Management. (See also para 99.2 of this Report.)

REMEDIES WHICH CREATE ALTERNATIVE PROCEDURES AND SPECIALIZED COURTS*

122 Introduction. Among the remedies which create alternative procedures and specialized courts are the following:

* dispensing with the presence of the defendant at court
* special court sittings
* special courts
* fixed penalty notices in lieu of hearings

123 Dispensing with the Presence of the Defendant in Various Jurisdictions. This is only an option in the least serious sorts of cases where maximum penalties are relatively small. In more serious cases the presence of the accused is generally considered essential to the fairness of the proceedings. This time-saving proposal is therefore of most relevance in relation to delays in magistrates' courts.

123.1 Provision already exists in Victoria in relation to certain specified offences for an "alternative procedure" under which the defendant may elect not to appear. (Part VII - Magistrates (Summary Proceedings) Act 1975.) Furthermore all offences triable only summarily may be decided in the absence

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The material under this heading relies heavily upon Part III of Osborne Delay in the Administration of Criminal Justice 1980 London (referred to as "Delay").

of the accused [s 78(3)]. However if a conviction is recorded in an accused's absence that accused may apply to the Magistrates' Court to have the conviction or order set aside and the matter reheard (s 152), and any time saved is lost.

123.2 The alternative procedure is only available in respect of a limited number of offences. They are listed in Schedule Two to the Magistrates (Summary Proceedings) Act:

(a) *'Parking infringements' and 'Traffic infringements' within the meaning of Part VII of the Transport Act 1983.*

(b) *Offences against the Transport Act 1983 (except offences against sections 105, 112 and 113) and the regulations made under the Transport Act 1983.*

123.3 In England however the Magistrates' Court Act 1957 enables the accused to plead guilty and (if she or he wishes) to make submissions in mitigation of sentence by mail in any offence which is only triable summarily unless it is to be heard in the juvenile court or is an offence for which the accused is liable to be imprisoned for a term exceeding three months. The matter will be adjourned and the presence of the accused secured only when the court is minded to cancel or suspend a driving licence or impose a sentence of imprisonment. (Magistrates' Court Act 1957 c29 s 1.)

123.4 In Scotland the Criminal Procedure Act 1975 dispenses with the presence of the accused not only where the accused intends to plead guilty but also in relation to the first appearance where the accused intends to plead not guilty (s 334). The Thomson Committee reported that this latter provision relieved the already overburdened summary courts and prevented the delays which would attend a requirement that accused persons personally appear to plead not guilty at first instance (Criminal Procedure in Scotland (Second Report) Edinburgh 1975 para 14.15.)

123.5 In New Zealand the Summary Proceedings Amendment Act 1973 introduced a summary procedure for minor offences (defined as those offences which did not carry a liability to imprisonment or to a fine in excess of $500). The defendant receives a "notice of prosecution in the prescribed form" containing the alleged offences and the relevant circumstances and a full statement of the defendant's rights. The defendant may plead guilty by letter and avoid the necessity of an appearance. Witnesses are only required to attend when the defendant pleads not guilty. The benefits of this procedure have been unfortunately offset because when it was introduced it was applied to all minor offences incuding those which had previously been subject to an "infringement fee" in lieu of a court hearing. The New Zealand Royal Commission on the Courts reported that since cases which were previously disposed of without recourse to a magistrate were now appearing in court, the amount of time required of magistrates and court staff was greatly increased. Court time had not been saved at all. (Report Wellington 1978 para 444.) With regard to the general use of the minor offence procedure the New Zealand Department of Justice reported that in 1975-76 Auckland justices of the peace disposed of an average of 4,000 cases "on the papers" per month and that in only one in ten cases was a not guilty plea entered or an appearance made for pleas in mitigation of penalty. (Report of the Department of Justice 1975-76 Wellington 1978 at p7.)

124 Special Sittings in Various Jurisdictions. Special sittings (out of ordinary court hours) have the advantage of making better use of court facilities but the disadvantage of imposing greater demands on court staff unless there is a corresponding increase in personnel. Evening sittings may be convenient for defendants who would otherwise have to miss work in order to attend but involve great cost if court staff have to be paid at penalty rates.

124.1 In Toronto a person summonsed to appear in a specific day court is given the option of applying for a night court. This scheme has presumably enabled more cases to be disposed of, and at greater convenience to defendants wishing to appear without missing work. However, those defendands do not

have their cases heard earlier. The date for the night court appearance is not assigned until the date originally specified for the day court and then it is usually set for one month hence (Ontario Law Reform Commission Report on Administration of Ontario Courts 1973 Toronto Part II at p62.)

124.2 In Scotland a night court is held if circumstances require it. For example, if large numbers of accused persons are being held in custody a night court may be convened in order to deal with them as quickly as possible. (Delay at p157.)

124.3 In Tasmania night court experiments have been successful. Plea courts were introduced in two large country courts and from 5 pm justices of the peace would accept pleas from defendants who had opted for a night court to avoid loss of salary or wages. (Delay at p158.)

124.4 In New Zealand a limited survey by the Department of Justice was carried out in April 1977. All persons being summonsed to attend a magistrates' court in the period 4-15 April were sent a letter asking their views of the present system and of a possible night court. Only 200 of the 1725 persons in the survey returned the reply card they had been sent. Of the 200, 132 were in favour of sittings either between 5 and 7 pm or 6 and 9 pm. The New Zealand Royal Commission on the Courts assumed that the 1525 who did not reply did not read the notice or were satisfied with the existing situation or had no particular views at least in relation to "after hours" sittings. Although the Department of Justice considered that a further survey over a more comprehensive range of court business ought to be carried out to ascertain whether there was any public demand for court sittings outside normal hours, the New Zealand Royal Commission on the Courts was not persuaded, on the information available to it, to recommend a change. The Commission did however say that the subject ought to be kept under review by the Judicial Commission. (Report 1978 at para 861.)

125 Special Courts and Tribunals in Various Jurisdictions. These are sometimes suggested as a way to deal with huge backlogs and delays. In particular specialised traffic courts are proposed. Halnan has argued that traffic courts would not only relieve criminal courts of a large amount of work but would also be able to dispose of their traffic cases more quickly owing to greater expertise in traffic maters. The traffic offender would not suffer the stigma of having been dealt with by a criminal court. ("Diversion and Decriminalisation of Road Traffic Offences" [1978] Criminal Law Review 456 at p 459.) In contrast to this last view, deliberate efforts are being made in some jurisdictions (Japan is a good example - "Four Corners" 20 October 1984) to ensure that a social/criminal stigma attaches to traffic offenders.

125.1 A Traffic Court has been established in Jamaica. (Delay at p160 and p171 fn 3.) In Zambia several cities have a court which specialises in traffic offences. In one of these courts there is no one magistrate permanently assigned to traffic cases - magistrates rotate on a monthly basis "presumably because no magistrate is interested in hearing the same wearisome and repetitive traffic offences all the time". (Delay at p160.) However in two other courts there is one magistrate assigned to deal almost exclusively with traffic offences and this system has been found to have the advantage of a magistrate with greater expertise in the technical nature of traffic offences and "the complexities of the Road Traffic Ordinance". (Delay at p160 referring to Spalding "One Nation, One Judiciary: The Lower Courts of Zambia" (1970) 2 Zambia Law Journal 1 at p 138.)

125.2 A special traffic tribunal which has met with public approval was set up experimentally in North York, Toronto in 1974. There were five main aims:

* to encourage a better understanding in offenders of the consequences of their infractions - so all traffic offences were removed from the criminal court with its formal proceedings and taken to the Traffic Tribunal where proceedings were informal

* to implement a driver training programme as part of the available sentencing options

* to introduce the right to "plead guilty with an explanation" on a drop-in basis - which was expected to reduce the number of contested matters as well as making the appearance more convenient for offenders

* to increase the number of daily sessions - which was expected to decrease the time spent waiting by police and other witnesses. the sessions were:

	9.00	-	10.30 am
Monday	10.30	-	12 noon
to	- 1.30	-	3.00 pm
Thursday	3.00	-	4.30 pm
	7.00	-	8.30 pm
Friday	- No evening session		

* to introduce new techniques and methods of administering minor traffic offences - for instance court reporters were dispensed with and in-built sound recording devices used; prosecutors were also dispensed with.

125.3 The North York experiment was closely monitored. An independent study of public reaction was conducted. Osborne says that the results of this study suggested that the Traffic Tribunal had resulted in a vastly improved public opinion of the administration of justice in North York:

> *It is, of course, impossible to measure empirically the benefits which accrue when increased public respect for the judicial system is achieved. Although traffic court is the lowest level of the province's judicial system, it is the only level with which the average citizen becomes personally involved with the administration*

of justice. Increased public confidence and respect for justice as it is dispensed at this level permeates the public's opinion of the entire judicial system. (Delay at pp162-63.)

125.4 Other benefits brought about by this experiment were an improved attitude among police officers towards the judicial system and a reduction in the time that they were forced to wait. Savings in police time also mean savings in money terms. the Attorney General's Annual Report for 1976/77 showed that the tribunal system had reduced the backlog in hearing cases significantly. Cases were taking an average of 41-45 days (from the date of the offence to disposition) under the Traffic Tribunal whereas under the old system they took from 60 to 100 days to reach disposition. (Ontario Ministry of the Attorney General Annual Report 1976/77 1979 Toronto at pp46-52.)

125.5 As a result of the success of the North York Traffic Tribunal, traffic tribunals have been established elsewhere in Ontario. The concept has been extended to cover other types of offences. From April 1980, all provincial offences carrying a liability to a fine of less than $300 (mainly traffic and liquor offences) were removed from the jurisdiction of the criminal courts to "provincial offences tribunals". (Provincial Offences Act 1979 S.O. c4.) These tribunals, like the traffic tribunal, offer an accused the options of a full trial; payment of a pre-set fine without court appearance; guilty plea with explanation in mitigation on a drop-in basis; as well as a right to submit a written legal defence to be considered without the accused having to appear. The last of these options has proved to be the most controversial. Shetreet expressed doubt about whether the written not guilty submission would provide adequate protection to a defendant who genuinely disputed the charge but could not attend the hearing. Another questionable aspect is whether a justice of the peace can maintain his impartiality while questioning Crown witnesses in the light of the defendant's submissions. Shetreet wrote that the entire provincial offences procedure is based on the assumption that considerations of efficiency outweigh the desirability of the personal appearance by the defendant in minor offences and particularly so when the defendant chooses that option. (Shetreet

"The Limits of Expeditious Justice" Background Paper prepared for the Conference on Expeditious Justice, October 1978 Edmonton, Alberta at pp35-36.)

125.6 In some jurisdictions there have been phenomenal increases in certain kinds of criminal behaviour (for example armed robbery after the civil war in Nigeria; offences involving firearms in Jamaica) and special courts have been established to deal with the influx of cases. In other jurisdictions the ability to cope with similar situations is built into the system with provisions for the establishment of special courts. For example, in India s.11(1) of the Criminal Procedure Code 1973 provides for the establishment by the state government after consultation with the High Court of Special Courts "to try any particular or particular class of cases". Sri Lanka has a similar provision. (Administration of Law Act, No 44 of 1973, s 46.)

125.7 Osborne points out that the establishment of special courts might expedite the hearing and disposal of the particular types of cases assigned to them, but:

> *[creating special courts] is ... a rather expensive solution as it entails the setting up and staffing of an entirely new piece of adjudicative machinery. One factor which should perhaps be investigated before money is spent on the creation of new specialized courts is whether the same amount of money spent on expanding and renovating the established criminal courts might not produce the same kind of benefits and to a wider category of cases.* (Delay at p168.)

126 Fixed Penalty Notices in Britain and Canada. Such notices are an even greater time-saving device than that of dispensing with the attendance of defendants. Hearing cases in the absence of defendants enables the cases to be dealt with more swiftly by the court but fixed penalty notices enable cases to be dealt with entirely administratively, therefore saving the valuable time of magistrates.

126.1 The general idea behind fixed penalty notices is that the payment of a set monetary fine is offered to the defendants in lieu of a court hearing. Unless the defendant wishes to contest the charge or fails to pay the fine the case will be dealt with "on the papers" and without the involvement of a magistrate or judge.

126.2 Various forms of fixed penalty notices exist in many other jurisdictions. While they are generally only used to handle traffic offences, they have been extended to other types of offences in some jurisdictions. One of the advantages of the administrative fine system from the offenders' point of view is that a conviction is usually avoided, although in some jurisdictions where a system of demerits operates, offenders are liable to a conviction after a certain number of offences. (See further, this Report at para 126.8.)

126.3 In Britain fixed penalties in lieu of court appearance (limited to offences concerning such matters as car lights, parking, failing to conform to prescribed routes and not displaying a current vehicle licence) have not been particularly successful. The Home Office found that while approximately three million of these notices were being issued annually in England and Wales, the penalties were paid in only about half of the cases. (Offences Relating to Motor Vehicles, 1976 London HMSO 1977 paras 2.9 and 2.10.) In the rest of the cases the police are required to follow up the case and report to the prosecution, necessitating a great deal of extra work. One of the main grounds on which persons receiving these fine notices would challenge the charges was that they were not the drivers or in charge of the vehicles at the time of the

alleged offences. In an attempt to close this loophole, provisions were enacted in 1974 in respect of certain fixed penalty offences as follows:

> (a) *for the purpose of the institution of proceedings in respect of the alleged offence against any person as being the owner of the vehicle at the relevant time, and*
>
> (b) *in any proceedings in respect of the alleged offence brought against any person as being the owner of the vehicle at the relevant time, it shall be conclusively presumed (notwithstanding that that person may not be an individual) that he was the driver of the vehicle at that time and, accordingly, that acts or omissions of the driver of the vehicle at that time were his acts or omissions.* (Road Traffic Act 1974 c 50 s 80.)

126.4 An evaluation of the effectiveness of these provisions has not officially been made but Halnan expressed the opinion that the system was operating more successfully following their introduction. ("Diversion and Decriminalisation of Road Traffic Offences" [1978] Criminal Law Review 458.)

126.5 Britain also has a system of "mitigated penalties" for certain statutory offences whereby an accused is offered the options of paying a mitigated or reduced penalty, or facing prosecution. For example the owner of a vehicle who has failed to take out a current road fund licence may be permitted to pay a mitigated penalty. The Secretary of State for Transport has a discretion in the exercise of which factors such as whether there has been a deliberate fraud will be taken into account. Figures are available for 1970 and they show that 400,000 car owners were found to be without current licences and of these 88,000 were offered the opportunity to pay a mitigated penalty. (Wilcox The Decision to Prosecute 1972 London at pp103-4.) As Halnan points out, the power to offer mitigated penalties in lieu of prosecution is a useful one which can save costs. "The economic cost of prosecution must be several times

greater than the cost of writing a letter demanding payment of a mitigated penalty in default of prosecution". (Delay at p151 referring to comments by Halnan in "Diversion and Decriminalisation ..." [1978] Criminal Law Review at p457.) Another instance of a power to offer a mitigated penalty in lieu of prosecution is that of the Commissioners of Customs and Excise in relation to persons alleged to have attempted to evade the payment of duty on articles brought into the country.

126.6 In Canada various types of administrative penalty procedures exist. The province of Alberta has an interesting "violation ticket" procedure under the Summary Convictions Act 1978. It applies to summary offences under provincial law - mainly of a minor, regulatory nature - as well as to federal criminal offences triable summarily. Action against alleged offenders is initiated by means of a summons (the "violation ticket") which specifies the details of the alleged offence and the courses of action open to the defendant. One of the available courses of action is to indicate a plea of guilty on the summons and to return it with the amount specified as the fine. If the offence is one of a certain group of essentially traffic related offences (specified in Part 3 of the Act) an extra incentive is provided: the fine payable under the administrative procedure is half that which is payable upon prosecution and conviction.

126.7 In Ontario an even more streamlined procedure was introduced - the "Uniform Traffic Ticket" procedure saved the time not only of courts, judges, defendants and prosecutors but also of administrative staff. The ticket specifying the exact amount of the fine would be served on the spot, thereby eliminating the work previously performed by police and clerks in filling out and serving summonses. The system proved to be so successful that in 1972 it was extended to all provincial offences, by way of "Summary Conviction Tickets" (Ministry of Attorney General, Ontario "The Challenge of the Minor Offence" Annual Report 1975/76 1978 Toronto pp44-47 at p44.)

126.8 In British Columbia a demerit point system was introduced in order to take advantage of the benefits of administrative procedures in lieu of court proceedings while minimising the problems arising from non-payment of fines. The non-payment of fines had been seen to cause a great deal of extra work for police, prosecutors and courts. Under a demerit system inactivity on the part of the alleged offender would not necessitate extra work on the part of police or prosecutors. The charge would be considered to be established and the appropriate number of demerit points levied against the offender. Once six demerit points have been accumulated a driver is warned that a further offence may lead to suspension of a driving licence. In British Columbia demerit points were the only type of penalty under the administrative procedure.

126.9 One disadvantage in this system is that a source of revenue is removed. However, in British Columbia, if the defendant wishes to challenge the charge a deposit of ten dollars must be paid, and forfeited if the defendant does not appear at the hearing scheduled before a Provincial Court judge to hear the matter. The demerit system worked well until recently. In fact between 1968 and 1975 the number of traffic related court appearances dropped significantly, and greatly eased the congestion in the British Columbia lower courts. (Alberta Board of Review Provincial Courts Administration of Justice in the Courts of Alberta 1975 Edmonton at p51.) However a compulsory insurance scheme under which premiums were calculated as the square of the number of points against a driver was introduced in British Columbia and within one month of its introduction the number of traffic matters contested in the Provincial Court increased by 200 per cent. (At p111.)

126.10 The New Zealand Royal Commission on the Courts commented that while a scheme of demerit points in lieu of fines removed a source of revenue, the cost of collecting fines and the costs to and pressures on the court system must be considered: "the loss of revenue may be a small price to pay for the results achieved". (Delay at p154 referring to New Zealand Royal Cmmission on the Courts Report at para 445.) A combination of fines and demerit points may be the most effective solution.

FINDINGS

SPECIAL SITTINGS - VICTORIA

127 In its Preliminary Report the Committee did not canvass the idea of special sittings of courts, including night sittings, and the matter was not broached by witnesses. Having reviewed developments and operations of special sittings of courts in overseas jurisdictions, the Committee recognises that at first glance special sittings have attractive aspects:

* the convenience to accused persons who would otherwise be required to absent themselves from paid employment, thus losing wages

* the additional time that might be devoted to the disposition of cases, helping to alleviate court congestion and delay.

However, the extra expense of running courts outside normal working hours might well outweigh these advantages; and the Committee notes that the idea that special sittings may cut down on delays may not necessarily be realised in practice: if a magistrate or judge sits during the evening or night, that magistrate or judge is obviously not available to sit for all of the day. Thus, cases are transferred from daylight hours to evening or night, but there is no judge or magistrate available to take the load which would otherwise have gone to the night court judge or magistrate if sitting normal court hours.

The Committee notes that the five night courts run on an experimental basis in Sydney, New South Wales to handle traffic cases were not as successful as expected and the project was discontinued. On the other hand, a similar project in Tasmania was found to be successful. (Delay 1980 at p158.)

127.1 **FINDING 16**

The Committee believes that at this time it would be inappropriate for the government to commence a programme of special court sittings, at least on any major scale. The government should, however, keep in mind the possibility of night courts. A pilot project might be a useful means of gauging the feasibility of such special sittings, however before any such project was begun, the Committee believes public opinion should be canvassed to determine whether people would actually avail themselves of the special sittings, and that a cost-benefit analysis should precede any such venture. (In this regard, the Committee emphasises that the issues relating to cost-benefit analysis raised in the Report on the Subordinate Legislation (Deregulation) Bill 1983 1984 Government Printer Melbourne at p177ff should be taken into account.) Additionally, if such a move is contemplated the experience relating to night courts in New South Wales and Tasmania should be taken into account as well as the overseas findings outlined in this report.

SPECIAL COURTS - VICTORIA

128 In its Preliminary Report on Delays in Courts the Committee referred to problems experienced in the operation of the courts in the present system and delays created by overlap in jurisdiction between the County and Supreme Courts. The Preliminary Report also adverted to the varying standards of accommodation and facilities at all courts and noted with particular concern the state of the City Courts. (At p180.) Committee visits to the Supreme, County and Magistrates' Courts in the city confirmed evidence given by witnesses of the unsatisfactory nature of the buildings.

The Committee notes that in Victoria some specialisation of courts has taken place over the years. For example, with the Magistrates' Court, courtrooms or courts have been set aside for the hearing of traffic offences, and for preliminary hearings. The overseas experience shows that some jurisdictions have opted for more specialisation whilst some have centralised various functions in the one court building.

128.1 FINDING 17

The Committee understands that the Government intends to establish a Central Criminal Court. Over recent years, successive administrations have pursued a policy of closing small magistrates' courts and establishing regional court complexes. The Committee recommends that the results of these changes be monitored before any action is taken in relation to any creation of specialised courts. If specialised courts on any expanded basis were to be contemplated in future, the Committee believes that the regular rotation of personnel should be made a part of the system.

FIXED PENALTY NOTICES - VICTORIA

129 The alternative procedure introduced into the Victorian system was raised briefly by some witnesses before the Committee during the inquiries leading to the Preliminary Report on delays in Courts but was not the subject of comment in that Report. The Committee believes that the introduction of this procedure serves a valuable purpose in ensuring that the courts are not required to deal as extensively with minor matters; provision is made for some matters to be dealt with administratively. The Committee notes that in some jurisdictions overseas (principally Canadian) a wider variety of offences is dealt with administratively. The Committee believes that such schemes are worthy of further examination.

129.1 FINDING 18

In view of the overseas experience of successful transfer of a wide variety of minor offences from judicial proceedings to administrative procedures, the Committee recommends that:

* a systematic assessment should be undertaken of all offences currently dealt with administratively in Victoria

* an analysis be done of other offences which might suitably be dealt with administratively

An increase in the number of offences dealt with in this manner would decrease the flow of minor matters through the court system, thus enabling court time to be spent on more serious offences. The Committee emphasises, however, that considerations of justice and fairness must be kept in mind whenever any changes are planned which remove the usual judicial safeguards of individuals' rights.

REMEDIES WHICH AIM TO KEEP CASES OUT OF COURT

130 Wide Reach of the Criminal Law. The list of criminal offences is certainly not seen to be immutable, insofar as it is constantly being added to. The growth in the number of offences, however, contributes to the problems of delay and congestion:

> *The ambit of the criminal law has been a continuous historical extension from the one initial offence of parricide; but this extension has now reached unprecedented proportions* and this in turn is having its effects on the courts.* (Osborne Delay 1980 at p175.)

130.1 A memorandum prepared by the New Zealand Government for the 1977 Meeting of Commonwealth Law Ministers addressed this issue. The danger of the judicial system foundering under the sheer weight of matters waiting in line was recognised. The belief was expressed that good administration and management and improved procedures can mitigate but not remove this danger.

> *The question is whether the courts should be reserved for matters that are of some importance to the wellbeing of society. This is an area which calls for examination. There is a real prospect of any criminal justice system being debased and depreciated by over use.* ("Problems in the Administration of Justice" in Selected Memoranda prepared for the 1977 Meeting of the Commonwealth Law Ministers, Winnipeg 1977 London at pp505-8.)

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* "According to a recent report by Justice the list of distinct and separate criminal offences in England and Wales in 1975 exceeded 7,200 [and this figure does not include inchoate offences (attempts)]. Nearly 3,000 of these offences had been enacted since 1960 and in only about 3750 was any criminal intent required" (Moody and Tombs Prosecution in the Public Interest 1982 Edinburgh p133.)

The kind of reform which these statements contemplate are those which remove cases from or keep cases out of court.

130.2 A less radical reform is depenalization which will be used in this report to mean the removal of criminal sanctions and the imposition of some other kinds of sanction. Diversion is a reform which does not completely divest the criminal justice system of jurisdiction but diverts matters from it at a certain point. "Diversion depends more on police and prosecutorial discretion than on legislation. It is more in the nature of being selective law enforcement ..." (Osborne Delay at p186.) Conciliation takes place outside the criminal justice system and has as its main aim something altogether different to the traditional aims of the criminal justice system. Conciliation is directed towards reconciling complainants or victims and offenders.

131 Proposals for Decriminalization - Various Jurisdictions. Decriminalization is a radical step and proposals to decriminalize some sort of behaviour are likely to provoke strong reactions from sections of the community. It is the least widely used of the methods outlined above for keeping cases out of the criminal courts. (Osborne Delay p 176 referring to Brown "Criminal Justice Reform: a critique. An Examination of Decriminalisation" in Chappell and Wilson (eds) The Australian Criminal Justice System (2nd ed) 1977 Sydney for an examination of the political implications of pursuing the path of decriminalization.)

131.1 Decriminalization has generally been proposed and in some jurisdictions carried out in relation to victimless crimes, for instance homosexuality, prostitution and abortion (see the English Sexual Offences Act 1967 s.1; the Canadian Criminal Code RSC 1970 C C-34 s 158 in relation to homosexuality; Canadian Criminal Code s 195.1 which reduced the seriousness of former laws relating to forms of vagrancy connected with prostitution). Vagrancy itself has frequently been discussed as a type of behaviour suitable for decriminalization. In Canada the offence of vagrancy where no moral turpitude

is involved was removed from the Criminal Code in 1972 by s 12(1) of the Criminal Code Amendment Act 1972. In England the Working Party on Vagrancy and Street Offences concluded that the role of the criminal law in controlling vagrancy should be circumscribed but that it could not be entirely removed. In Uganda the offence of vagrancy was abolished by the repeal of the Vagrants Act in 1977 and in its place a comprehensive scheme for the resettlement of vagrants on "community farm settlements" was introduced by Decree No. 5 of 1977.

131.2 Offences relating to the private use of alcohol and drugs are another group around which decriminalization debates continue.

131.3 Excepting the decriminalization of drug and alcohol related offences, reforms which effectively decriminalize certain types of behaviour are unlikely to have a great impact on delays or congestion in the courts. This is because the types of victimless crimes for which decriminalization is most likely to be accepted by the general public simply "do not make up a very significant proportion of the criminal caseload".

> *[Victimless crimes] are difficult to detect and prove in court which results in relatively few prosecutions being brought.*
>
> *Decriminalizing vagrancy offences has slightly more impact as vagrants, once they have appeared in court, tend to get trapped in a "revolving door" coming back into court repeatedly for minor misconduct.* (Osborne Delay at p179.)

131.4 As decriminalization is seen by many in the community as equivalent to a seal of approval, the move which reclassifies behaviour from outlawed to "approved" is a sudden and revolutionary one. More gradual and acceptable methods of removing and keeping cases out of court are those of depenalization and diversion.

132 Depenalization in England, Canada and New Zealand. A form of depenalization has been discussed above - fixed penalty systems operating on an administrative basis without the involvement of judicial officers. The reforms which are most aptly classified as depenalizing, however, are those which offer or prescribe therapeutic treatment or educational courses instead of the conventional criminal sanctions of fines or imprisonment. The most common reforms and suggestions for reform relate to alcohol and drug offenders.

132.1 For example the English Criminal Justice Act 1972 provided that where a police officer has power to arrest a person for being drunk and disorderly, drunk and incapable or drunk and disorderly in a public place the police officer may take the person to a medical treatment centre for alcoholics. While the person is being so taken she or he is deemed to be in lawful custody: s 34(1). Attendance of the person at the centre is voluntary but s 34(2) which reads in part that "the exercise ... of the power conferred by this section shall not preclude [the person] being charged with any offence" implies that failure to attend may result in criminal charges being laid.

132.2 The operation of this provision has been monitored and the published figures suggest that the police, upon whose discretion the proper working of the scheme depends, were possibly using it where formerly they would not have laid charges but would have cautioned:

> *If both convictions and admissions to the detoxification centre are combined ... the 1976 total for that area was nine per cent higher than the 1975 total. This pattern is also evident in the figures for 1978 ... the total number of findings of guilt and admissions to the centre was ... six per cent more than in 1977.* (Osborne Delay at p182 citing figures from Great Britain Home Office Offences of Drunkenness 1976 England and Wales London HMSO 1977 Cmnd 6952 and "Offences of Drunkenness" (1980) 6 Commonwealth Law Bulletin 334.)

132.3 It was not until 1977 that a centre was opened which would deal with women as well as men. The results for this centre were quite different: between 1977 and 1978 "the total findings of guilt [for offences of drunkenness] and admissions to a detoxification centre fell by seven per cent ..." (Delay at p182.)

132.4 In Canada, Ontario has a scheme very similar to the one in England described above. The Liquor Control Act 1970 RSC c 249 as amended by 1971 SO c88 s 1 empowers the police to escort persons found drunk in public to a detoxification centre in lieu of a criminal charge. Giffen notes that the operation of the scheme is dependent upon discretionary decisions of the police and these decisions are often governed by the availability of beds in a centre rather than by considerations such as the suitability of the person for treatment. Giffen also records the objection made against detoxification centres that they become an even faster revolving door than the courts. While the prescribed length of stay is only a few days, the Ontario experience was that most people left after a few hours. The benefit to the health of the inebriate of the enforced liquor-free days in gaol is lost and the police may come to see their role as purely that of providing a "taxi service" and lose enthusiasm for the scheme. ("The Criminal Courts and the Control of Addiction" in Friedland (ed) Courts and Trials 1975 Toronto at pp110, 119.)

132.5 In New Zealand (as in Victoria) treatment for longer periods is the goal of legislation relating to alcohol and drug dependent persons. The decision whether or not to commit to an approved institution is made in New Zealand by a judge (wheras in Victoria it is generally made by the medical officer in charge of a centre upon the certificates of two medical practitioners). Placing the responsibility for committal to a treatment centre upon judges rather than doctors would be likely to involve more work and therefore time of judges.

133 Diversion and Conciliation in Canada, England and the United States. "Diversion" has become a much discussed issue in Canada and England in recent times, having originally been suggested and experimented with in the United States. There is an enormous amount of literature on the subject in the United States. In the following section conciliation is also discussed, as many of the developments overseas, particularly in the United States and Canada, combine the two types of reform.

133.1 The philosophy behind diversionary reforms is clearly explained by the Canadian Law Reform Commission:

> *Underlying diversion is an attitude of restraint in the use of the criminal law... It is unjust and unreasonable to inflict upon a wrong-doer more harm than necessary ... At different stages in the criminal justice system opportunities arise for police to screen a case from the system, the prosecution to suspend charges pending settlement at the pretrial level or the court to exercise discretion to withhold a conviction or to impose a sanction other than imprisonment. At these critical points within the criminal justice system, the case should not be passed automatically on to the next stage ... it makes sense to pause and justify proceeding to the next more serious and costly step.* (Working Paper No. 7 in Studies on Diversion 1975 Ottawa at p3.)

133.2 The Canadian Law Reform described four types of diversionary programmes:

* *Community absorption: individuals or particular interest groups dealing with trouble in their area, privately, outside the police and courts.*

* *Screening: police referring an incident back to family or*

community, or simply dropping a case rather than laying criminal charges.

* *Pretrial diversion: instead of proceeding with charges in the criminal court, referring a case out at the pretrial level to be dealt with by settlement or mediation procedures.*

* *Alternatives to imprisonment: increasing the use of such alternatives as absolute or conditional discharge, restitution, fines, suspended sentence, probation, community service orders, partial detention in a community based residence, or parole release programs.* (At p4.)

133.3 The Canadian Law Reform Commission conducted an experimental project called the East York Community Law Reform project with the object of discovering the difficulties in diverting people from the criminal justice system to other programs run in the community, particularly programs of mediation or arbitration. Many of the observations made in the subsequent report are germane to the study of conciliation; many of the parties to what would otherwise be categorised as a criminal dispute already know each other and are likely to have to continue to see each other: "What the parties want is a solution that will harmonize their difficulties, not necessarily a judgement that will crystallize their discord". (Studies on Diversion at p26.)

133.4 Police officers in the East York district were instructed by the Attorney General and the police chief that they were not required to lay criminal charges in any case, no matter how serious, if in their judgement the public interest would be better served by an alternative. The one proviso was that if the offence had involved a specific victim, both victim and offender had to agree to the proposed alternative rather than criminal prosecution. A mediation service was set up with referral if necessary to appropriate agencies, and if the police officer, offender and victim all agreed one of the project workers was assigned to the case and terms of conciliation worked out.

133.5 The project was generally considered to be a success. Osborne comments:

> *Compared to an adjacent police district, cases referred to court were reduced by one-third in the experimental area. The system appeared to have advantages lost in the adversary system as presentation in court occurs only after a long process involving a great deal of hurt which by necessity is neglected, the purpose of the court hearing being to deal with the substantive issues at stake.* (Delay at p190.)

133.6 One of the major benefits of the mediation process was the airing and resolving of disputes at an early date (rather than the average six to eight month wait for trial in Toronto) which meant that there was less likelihood of "the offender .. [developing] a self-concept of his innocence while the victim is absolutely convinced that the accused is guilty." This is the "win-lose" situation of a trial where "the end result is bound to make someone dissatisfied". (Delay at pp189-90.)

133.7 Following the success and public acceptance of the East York Project other programmes were established in Saskatchewan and British Columbia. A community diversion centre was the focus of the scheme in British Columbia. Alleged offenders could be referred to a diversion worker by a police officer or at a later stage, by the prosecutor. The accused is given the choice of being charged and seeking acquittal in court or accepting diversion and effectively admitting guilt. Aubuchon in an article "Model for Community Diversion" described the diversion programme:

* *restitution of stolen goods or money*

* *apologising in person whenever possible to the victim*

* *attendance at meetings with a diversion worker to enable the diversion worker to assess the offender's needs; and to settle*

a "reconciliation contract", and report on its fulfilment

* *voluntary community service*

* *attendance at a workshop for three or four hours at which offenders examine their situation, the causes and consequences of their offences and discuss the function of law in society and individuals' responsibility for their actions.* [(1978) 20 Canadian Journal of Criminology at pp296-98.]

133.8 This programme was also judged to be a success. By 1978 the programme had been in operation for two and a half years and five full-time and three part-time workers had dealt with 607 accused people. The original costs had been high and in the first year there were only 65 referrals but the budget remained constant while there were 210 referrals in the second year and 311 in the next six months. Although there was no formal follow-up carried out on offenders who had taken part in the diversion programme, staff monitored the criminal court lists and were of the opinion that well below five per cent of them had subsequently been charged with an offence.

133.9 Providing for diversion in the discretion of police or prosecutors with the consent of the defendant has the advantage of saving judge and court time and therefore dramatically reducing delay for the defendants diverted. The counterbalancing disadvantages are:

* the lack of protection and supervision of a defendant's legal rights in the referral process

* the risk that the mere existence of the diversion programme might encourage referrals where previously the police would have simply cautioned a suspected offender or the prosecutor would have dropped the case for lack of evidence (Aubuchon p 299.)

133.10 The informality of diversionary programmes may be conducive to the achievement of social work objectives but these must not be pursued if legal rights are sacrificed in the process. Biles and Swanton had warned that extreme caution must be exercised to ensure that diversionary programmes do not fail to respect legal rights of defendants and coerce them into participation. ("The Future of Criminal Justice In Australia" in Biles (ed) Crime and Justice in Australia 1977 Canberra 167-87 at p180.)

133.11 A number of cases have come before the Canadian courts in which aspects of diversionary programmes have been discussed. In R v Jones [1978] 3 WWR 271 (British Columbia Court of Appeal) a woman charged with possession of marijuana and shoplifting was offered and agreed to diversion but she did not comply with all the terms of agreement. When she was later apprehended on another charge the Crown Attorney restored the original charge on the grounds that she had not complied with the diversion agreement. The Court of Appeal held that this was an abuse of process. The prosecutor could not threaten criminal proceedings to induce a defendant to enter into and carry out the diversion programme. The diversion programme was held to be, in effect, a sentence of probation. In R v Drew [1979] 7 Criminal Reports (3d) S-21 (British Columbia Court of Appeal) the British Columbia Court of Appeal allowed an appeal against sentence on the grounds that the judge at first instance had, in fixing sentence, taken into account the fact that the defendant had previously been charged with shoplifting and completed the diversionary programme, and treated this as though it was a prior conviction. The Appeal Court said that "A purpose of diversion is to avoid court proceedings and a conviction. That purpose should not be defeated by our treating the allegation as a conviction". (Per Seaton J A, Lambert J A concurring at p S-24.)

134 Diversion - England. In England "the air is suddenly thick with talk of diversion from the criminal process". (McKittrick and S. Eysenck "Diversion: A Big Fix?" in (1984) 148 Justice of the Peace 377 at p 377.) Schemes set up in Ayr and Devon have attracted comment, academics have lectured on the desirability of diversion, and different committees and societies have

recommended diversion schemes. One of the committees which has recently made recommendations in favour of diversion was the Stewart Committee in Scotland. (Keeping Offenders Out of Court; Further Alternatives to Prosecution Edinburgh HMSO 1983 Cmnd 8958.) However, there are also voices to be heard warning of the disadvantages of diversion. McKittrick and Eysenck claim that the disadvantages are "substantial": their article was written with the purpose of examining the lack of protection afforded to the community and offenders in diversion schemes and to show that the disadvantages outweigh the "largely national or cosmetic gains" offered by diversion schemes. ("Diversion: A Big Fix?" at p377.) They claim that diversion "automatically deprives [the alleged offender] of the benefit of legal advice", and that timid or gullible defendants, when faced with a police or probation officer wishing to arrange diversion, may not make an informed decision. Such a defendant may be led to believe that a court appearance would be a terrifying experience and choose to be "diverted" when in fact s/he is not guilty at all and would have been acquitted. The other main disadvantage of diversion, according to McKittrick and Eysenck is the lack of public accountability. "The prosecutor/police/probation service/social services assume the function that should repose in judicial officers". (At pp378, 379.) They examine the Ayr and Devon schemes in the light of this charge.

134.1 The Devon scheme was described by the Assistant Chief Probation Officer in Devon, as an extension of the process of caution with the target group being offenders over 17 years, residing locally, arrested for minor or trivial offences who demonstrated serious financial, social or medical difficulties which would only be exacerbated by a court appearance. The police would refer a person to the local probation office. After a visit from a probation officer and with the consent of the accused further inquiries would be made and a report made to the police containing a recommendation either for a caution with or without supervision on a voluntary basis or where there is a clear denial of the alleged offence, no recommendation.

134.2 The six month pilot scheme begun in 1982 was closely monitored. A

high level of co-operation was observed between the police and probation service, both locally and at headquarters. Twenty-five referrals were made - 17 women, eight men, from 18 years of age to 76, but most in the 45-75 age group. The police referred for reasons such as "elderly and confused" (three cases), evidence of mental disorder (four cases), over-dependent on prescribed drugs (four cases), family problems such as marital disturbance and pressures from ill-health (eight cases). In two cases there was a real fear on the part of the police of suicide associated with the pending court appearance. The alleged offences were theft (21 cases of shoplifting), assault (three cases) and one case of wasting police time. In all cases except the one in which there was a complete denial of the alleged offence the probation service recommended a caution and in five cases this was to be combined with voluntary supervision by the probation service. Follow up action in other cases has been undertaken by the social services department, the general practitioner or a consultant psychiatrist. (Anthony "Diversion from the Criminal Process" (1984) 148 Justice of the Peace 156.)

134.3 Since the original pilot study the scheme has continued with 22 more referrals up to November 1983. A comparison study is planned for Cornwall and there is a similar scheme in Scotland. (At p 156.)

134.4 McKittrick and Eysenck noted that unlike the Ayr scheme which is not subject to public scrutiny the Devon scheme at least had periodic reports made to the Devon Probation Committee and discussions organised about cases with the Probation Liaison Committee. However this does not achieve public accountability - the magistrates who attend these committees have no power to intervene in the diversion procedure. McKittrick and Eysenck noted that there was no public scrutiny of the nature of the advice given to those diverted.

135 Conciliation - Britain and Canada. Matters which have been found to be suitable for conciliation are fairly limited but in Britain the Race Relations Board has proved successful in settling disputes which might

otherwise have ended in the criminal courts and in a similar fashion some local housing authorities have achieved reconciliation between landlords and tenants. It is a criminal offence to "harass" the occupier of rented premises and local authorities have been able to explain the law to the parties and reconcile the parties. (See Osborne Delay at p201.)

135.1 As the Canadian Law Reform Commission has said:

> *the criminal law and its processes are a last and limited resort in dealing with social conflict. When it is called upon to deal with conflict and trouble, the criminal law and its sanctions should be used with restraint, and decisions to proceed with criminal processes should be fair, visible and accountable.* (Working Paper No.7 in Studies on Diversion 1975 at p25.)

135.2 These observations are perhaps even more applicable to informal alternative procedures for dealing with social conflict. They must be established only after much research and thought, used in only completely appropriate cases and be fair and publicly accountable. There is always a danger that informal alternative procedures will be resorted to as an easier way of dealing with alleged offenders and consequently many more people might be dragged into the system (whether the formal criminal justice system or the informal "diversion" system). The problems of delay and congestion will not thereby be solved.

FINDINGS

DIVERSION - VICTORIA

136 Although several "diversion" schemes are currently operating in Victoria, they were not the subject of major comment in the Committee's Preliminary Report on Delays in Courts. Having reviewed the rationale and operation of different diversionary schemes overseas, the Committee is of the view that diversion schemes may be suitable for keeping minor criminal matters out of the courts and thereby eliminating some delays. However, negative aspects of diversionary schemes are of concern to the Committee. In particular, the Committee emphasises the dangers inherent in the use of informal procedures to deal with alleged offences. These include:

* persons being included in diversion schemes who might otherwise not have been dealt with by the criminal justice system at all

* persons wrongly admitting guilt through fear or ignorance and in the absence of legal advice

* persons feeling that it is "better to get it over and done with", in the absence of legal advice, and not being fully cognisant of the consequences which flow from such an admission

* penalties sometimes being, in effect, harsher or more lengthy than those which might have been imposed for the same offences when tried through the criminal courts

136.1 FINDING 19

In the Committee's view, without further investigation it is not appropriate to recommend any major introduction of diversionary programmes along the lines of those discussed in jurisdictions overseas. This is not to say that the Committee rejects all diversionary schemes. The diversionary schemes

currently operating in Victoria, and some of those developed overseas, may well have a positive effect or positive potential.

Where diversionary schemes are operating in or are contemplated for Victoria, the Committee believes that provision should be made for judicial oversight, perhaps by way of regular reporting to a judge or judges of the types of cases being referred to diversion. Additionally, regular reports on the operation of diversionary schemes, illustrated by non-identifying case histories, should be made to the Parliament by the responsible Minister. The Committee believes that this would give Members of Parliament a more considered opportunity to determine whether or not diversionary schemes are operating effectively and fairly.

CONCILIATION - VICTORIA

137 Conciliation as a means of diverting minor disputes from the formal criminal justice system was not raised by witnesses appearing before the Committee in the course of its inquiries leading to the Preliminary Report on Delays in Courts. However the Committee's overseas research discloses some schemes which, in the Committee's view, have a possible application to Victoria as well as a potential for alleviating some delays currently being experienced, particularly in the Magistrates' Court.

137.1 FINDING 20

The Committee understands that processes of conciliation in disputes have been the subject of discussion by the Legal Aid Commission and the Law Foundation Civil Justice Project. The Committee supports the continuation of this discussion and looks forward to receiving further information about possible proposals from those bodies.

COMMITTEE ROOM,
31 October 1984

INDEX TO APPENDICES

THE AMERICAN BAR ASSOCIATION'S STANDARDS RELATING TO SPEEDY TRIAL - APPROVED DRAFT 1968

PART I. THE TRIAL CALENDAR

1.1 Priorities in scheduling criminal cases.

To effectuate the right of the accused to a speedy trial and the interest of the public in prompt disposition of criminal cases, insofar as is practicable:

(a) the trial of criminal cases should be given preference over civil cases; and

(b) the trial of defendants in custody and defendants whose pre-trial liberty is reasonably believed to present unusual risks should be given preference over other criminal cases.

1.2 Court control; prosecutor's duty to report.

Control over the trial calendar should be vested in the court. The prosecuting attorney should be required to file as a public record periodic reports with the court setting forth the reasons for delay as to each case for which he has not requested trial within a prescribed time following charging. The prosecuting attorney should also advise the court of facts relevant in determining the order of cases on the calendar.

1.3 Continuances.

The court should grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or

consent of the prosecution or defense, but also the public interest in prompt disposition of the case.

PART II. DETERMINING WHAT IS A SPEEDY TRIAL

2.1 Speedy trial time limits.

A defendant's right to speedy trial should be expressed by rule or statute in terms of days or months running from a specified event. Certain periods of necessary delay should be excluded in computing the time for trial, and these should be specifically identified by rule or statute insofar as is practicable.

2.2 When time commences to run.

The time for trial should commence running, without demand by the defendant, as follows:

(a) from the date the charge is filed, except that if the defendant has been continuously held in custody or on bail or recognizance until that date to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, then the time for trial should commence running from the date he was held to answer;

(b) if the charge was dismissed upon motion of the defendant and thereafter the defendant was held to answer or charged with an offense, from the date the defendant was so held to answer or charged, as above; or

(c) if the defendant is to be tried again following a mistrial an order for a new trial, or an appeal or collateral attack, from the date of the mistrial, order granting a new trial, or remand.

2.3 Excluded periods.

The following periods should be excluded in computing the time for trial;

(a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial, hearings on pretrial motions, interlocutory appeals, and trial of other charges.

(b) The period of delay resulting from congestion of the trial docket when the congestion is attributable to exceptional circumstances.

(c) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel. A defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the court of his right to a speedy trial and the effect of his consent.

(d) The period of delay resulting from a continuance granted at the request of the prosecuting attorney, if:

(i) the continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at a later date; or

(ii) the continuance is granted to allow the prosecuting attorney additional time to prepare the state's case and additional time is justified because of the exceptional circumstances of the case.

(e) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever

his whereabouts are unknown and in addition he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. A defendant should be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained or he resists being returned to the state for trial.

(f) If the charge was dismissed upon motion of the prosecuting attorney and thereafter a charge is filed against the defendant for the same offense or an offense required to be joined with that offense, the period of delay from the date the charge was dismissed to the date the time limitations would commence running as to the subsequent charge had there been no previous charge.

(g) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to him.

(h) Other periods of delay for good cause.

PART III. SPECIAL PROCEDURES: PERSON SERVING TERM OF IMPRISONMENT

3.1 Prosecutor's obligation; notice to and availability of prisoner.

To protect the right to speedy trial of a person serving a term of imprisonment either within or without the jurisdiction, it should be provided by rule or statute and, where necessary, interstate compact, that:

(a) If the prosecuting attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a penal institution of that or another jurisdiction, he must promptly:

(i) undertake to obtain the presence of the prisoner for trial;

or

(ii) cause a detainer to be filed with the official having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(b) If an official having custody of such a prisoner receives a detainer, he must promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs such official that he does demand trial, the official shall cause a certificate to that effect to be sent promptly to the prosecuting attorney who caused the detainer to be filed.

(c) Upon receipt of such certificate, the prosecuting attorney must promptly seek to obtain the presence of the prisoner for trial.

(d) When the official having custody of the prisoner receives from the prosecuting attorney a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that prosecuting attorney (subject, in cases of interjurisdictional transfer, to the traditional right of the executive to refuse transfer and the right of the prisoner to contest the legality of his delivery).

3.2 Computation of time.

The time for trial of a prisoner whose presence for trial has been obtained while he is serving a term of imprisonment should commence running from the time his presence for trial has been obtained, subject to all the excluded periods listed in section **2.3.** If the prosecuting attorney has unreasonably delayed (i) causing a detainer to be filed with the custodial official, or (ii) seeking to obtain the prisoner's presence for trial in lieu of filing a detainer or upon receipt of a certificate of demand, such periods of unreasonable delay should also be counted in ascertaining whether the time for trial has run.

PART IV. CONSEQUENCES OF DENIAL OF SPEEDY TRIAL

4.1 Absolute discharge.

If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, the consequence should be absolute discharge. Such discharge should forever bar prosecution for the offense charged and for any other offense required to be joined with that offense. Failure of the defendant or his counsel to move for discharge prior to trial or entry of a plea of guilty should constitute waiver of the right to speedy trial.

4.2 Release on recognizance.

If a shorter time limitation is applicable to defendants held in custody, the running of this time should only require release of such a defendant on his own recognizance.

FEDERAL SPEEDY TRIAL ACT

The Federal Speedy Trial Act provisions listing the delays which can be excluded from the computation of time within which a trial must commence.

18 U.S.C. 3161 (h)

The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offence must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant including but not limited to:

(a) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant; (b) delay resulting from any proceeding, including any examination of the defendant, pursuant to s.2902 of title 28, United States Code; (c) delay resulting from deferral of prosecution pursuant to s.2902 of title 28, United States Code; (d) delay resulting from trial with respect to other charges against the defendant; (e) delay resulting from any interlocutory appeal; (f) delay resulting from any pre-trial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion; (g) delay resulting from any proceeding relating to the transfer of a case on the removal of any defendant from another district under the Federal Rules of Criminal Procedure; (h) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalisation, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable; (i) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and (j) delay reasonably

attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(a) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness. (b) for purposes of subparagraph (a) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purpose of such paragraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to s.2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offence, or any offence required to be joined with that offence, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and no motion of severance has been granted.

THE AMERICAN BAR ASSOCIATION'S STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL

PART I. GENERAL PRINCIPLES

1.1 Procedural needs prior to trial.

(a) Procedure prior to trial should serve the following needs:

(i) to promote an expeditious as well as fair determination of the charges, whether by plea or trial;

(ii) to provide the accused sufficient information to make an informed plea;

(iii) to permit thorough preparation for trial and minimize surprise at trial;

(iv) to avoid unnecessary and repetitious trials by exposing any latent procedural or constitutional issues and affording remedies therefor prior to trial;

(v) to reduce interruptions and complications of trials by identifying issues collateral to guilt or innocence, and determining them prior to trial; and

(vi) to effect economies in time, money, and judicial and professional talents by minimizing paperwork, repetitious assertions of issues, and the number of separate hearings.

(b) These needs can be served by (i) fuller discovery, (ii) simpler and

more efficient procedures, and (iii) procedural pressures for expediting the processing of cases.

1.2 Scope of discovery.

In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, the adversary system, and national security.

1.3 Procedural concept.

Effective procedure prior to trial should normally encompass three successive stages:

(a) meetings between defense counsel and the prosecuting attorney where, without court intervention, they will engage in required discovery, explore additional discretionary discovery, conduct investigation as needed, and enter upon plea discussions;

(b) court hearings with counsel to ensure the proper conduct of required discovery, rule on matters of discretionary discovery, expose and determine latent procedural or constitutional issues, and obviate cumbersome motion practices; and

(c) preparation for trial which, in cases where the trial is likely to be protracted or unusually complicated, should include a pretrial conference.

1.4 Responsibilities of the trial court and of counsel.

(a) Trial court. The trial court should, on its own initiative, provide for the exercise of discovery automatically, without the filing of formal requests or supporting documents. The court should supervise the exercise of discovery to the extent necessary to ensure that it proceeds properly, expeditiously and with a minimum of imposition on the time and energies of the court, counsel, and prospective witnesses. In any event, the court should encourage effective and timely discovery conducted voluntarily and informally between counsel. The court should take the initiative at appropriate times in ensuring that any latent procedural or constitutional issues are exposed and determined prior to trial. To these ends, the court should provide appropriate check-list forms, time schedules, and hearings; and hearings should be consolidated, if possible, with any other hearings to be held in the case prior to the trial.

(b) Counsel. Prosecution and defense counsel should take the initiative and conduct required discovery willingly and expeditiously, with a minimum of imposition on the time and energies of the court, counsel and prospective witnesses. Counsel should be astute and diligent in defining issues which can most efficiently be disposed of prior to trial, and should engage in plea discussions in an effective and timely manner. Only through the initiative and co-operation of counsel in effecting these standards can criminal cases be fairly and timely disposed of, as justice requires.

1.5 Applicability.

These standards should be applied in all serious criminal cases.

PART II. DISCLOSURE TO ACCUSED

2.1 Prosecutor's obligations.

(a) Except as is otherwise provided as to matters not subject to disclosure (section 2.5) and protective orders (section 4.4), the prosecuting attorney shall disclose to defense counsel the following material and information within his possession or control:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with their relevant written or recorded statements;

(ii) any written or recorded statements and the substance of any oral statements made by the accused, or made by a codefendant if the trial is to be a joint one;

(iii) those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial;

(iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons;

(v) any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused; and

(vi) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

(b) The Prosecuting attorney shall inform defense counsel:

(i) if he has any relevant material or information which has been provided by an informant;

(ii) if there is any relevant grand jury testimony which has not been transcribed; and

(iii) if there has been any electronic surveillance (including wiretapping) of conversations to which the accused was a party or of his premises.

(c) Except as is otherwise provided as to protective orders (section 4.4), the prosecuting attorney shall disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor.

(d) The prosecuting attorney's obligations under this section extend to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office.

2.2 Prosecutor's performance of obligations.

(a) The Prosecuting attorney should perform his obligations under section 2.1 as soon as practicable following the filing of charges against the accused.

(b) The prosecuting attorney may perform these obligations in any manner mutually agreeable to himself and defense counsel or by:

(i) notifying defense counsel that material and information, described in general terms, may be inspected, obtained, tested, copied or photographed, during specified, reasonable times; and

(ii) making available to defense counsel at the time specified such material and information, and suitable facilities or other arrangements for inspection, testing, copying and photographing of such material and information.

(c) The prosecuting attorney should ensure that a flow of information is maintained between the various investigative personnel and his office sufficient to place within his possession or control all material and information relevant to the accused and the offense charged.

2.3 Additional disclosures upon request and specification.

Except as is otherwise provided as to matters not subject to disclosure (section 2.6) and protective orders (section 4.4), the prosecuting attorney shall, upon request of defense counsel, disclose and permit inspection, testing, copying and photographing of any relevant material and information regarding:

(a) specified searches and seizures;

(b) the acquisition of specified statements from the accused; and

(c) the relationship, if any, of specified persons to the prosecuting authority.

2.4 Material held by other governmental personnel.

Upon defense counsel's request and designation of material or information

which would be discoverable if in the possession or control of the prosecuting attorney and which is in possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to defense counsel; and if the prosecuting attorney's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or order to cause such material to be made available to defense counsel.

2.5 discretionary disclosures.

(a) Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to defense counsel of relevant material and information not covered by sections 2.1, 2.3 and 2.4.

(b) The court may deny disclosure authorized by this section if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

2.6 Matters not subject to disclosure.

(a) Work product. Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of his legal staff.

(b) Informants. Disclosure of an informant's identity shall not be required where his identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not be denied hereunder of the identity of witnesses to be produced at a hearing or trial.

(c) National security. Disclosure shall not be required where it involves a substantial risk of grave prejudice to national security and a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not thus be denied hereunder regarding witnesses or material to be produced at a hearing or trial.

PART III. DISCLOSURE TO PROSECUTION

3.1 The person of the accused.

(a) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, a judicial officer may require the accused to:

(i) appear in a line-up;

(ii) speak for identification by witnesses to an offense;

(iii) be fingerprinted;

(iv) pose for photographs not involving reenactment of a scene;

(v) try on articles of clothing;

(vi) permit the taking of specimens of material under his fingernails;

(vii) permit the taking of samples of his blood, hair and other materials of his body which involve no unreasonable intrusion thereof;

(viii) provide specimens of his handwriting; and

(ix) submit to a reasonable physical or medical inspection of his body.

(b) Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the prosecuting attorney to the accused and his counsel. Provision may be made for appearances for such purposes in an order admitting the accused to bail or providing for his release.

3.2 Medical and scientific reports.

Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of and permitted to inspect and copy or photograph any reports or results, or testimony relative thereto, of physical or mental examinations or of scientific tests, experiments or comparisons, or any other reports or statements of experts which defense counsel intends to use at a hearing or trial.

PART IV. REGULATION OF DISCOVERY

4.1 Investigations not to be impeded.

Except as is otherwise provided as to matters not subject to disclosure (section 2.6) and protective orders (section 4.4), neither the counsel for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information (except the accused) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

4.2 Continuing duty to disclose.

If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to

disclosure, he shall promptly notify the other party or his counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

4.3 Custody of materials.

Any materials furnished to an attorney pursuant to these standards shall remain in his exclusive custody and be used only for the purposes of conducting his side of the case, and shall be subject to such other terms and conditions as the court may provide.

4.4 Protective orders.

Upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit his counsel to make beneficial use thereof.

4.5 Excision.

When some parts of certain material are discoverable under these standards, and other parts not discoverable, as much of the material should be disclosed as is consistent with the standards. Excision of certain material and disclosure of the balance is preferable to withholding the whole. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

4.6 In camera proceedings.

Upon request of any person, the court may permit any showing of cause

for denial or regulation of disclosures, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera; the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

4.7 Sanctions.

(a) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

(b) Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

PART V. PROCEDURE

5.1 General procedural requirements.

(a) Procedure prior to trial should recognize the possible need for three successive stages: (i) an exploratory stage, initiated by counsel and conducted without court supervision (see section 5.2); (ii) an omnibus stage, supervised by the trial court and entailing court appearances as necessary (see section 5.3); and (iii) a trial planning stage, entailing pretrial conferences as necessary (see section 5.4). The various stages should be adapted to the needs of the particular case and eliminated or combined as apropriate.

(b) Essential to the proper expediting of proceedings prior to trial are

(i) effective judicial calendar control, and (ii) a requirement (by rule or statute) that criminal charges be brought to trial or otherwise disposed of within a specific time period running from a specified event.

5.2 Exploratory stage and setting of Omnibus Hearing.

(a) Procedures prior to trial should not interfere with but should afford the opportunity for counsel to expedite a fair disposition of the case using, without court intervention, discovery, investigation and plea discussions, as appropriate in the particular case. Wherever such opportunity does not now exist, procedures should be adapted to encourage counsel to exercise their initiative in these matters.

(b) At such time as a plea is first called for in the court having jurisdiction to try the accused, if a plea of guilty is not entered, the court shall then set a time for an Omnibus Hearing.

(c) The time set for the Omnibus Hearing shall allow sufficient time for counsel to (i) initiate and complete discovery required by sections 2.1 and 2.3, and such additional discovery as in their judgment will expedite the proceedings; (ii) conduct further investigation of the case, as needed; and (iii) continue plea discussions.

5.3 Omnibus Hearing.

(a) At the Omnibus Hearing, the trial court on its own initiative, utilizing an appropriate check-list form, should:

(i) ensure that standards regarding provision of counsel have been complied with;

(ii) ascertain whether the parties have completed the discovery required in sections 2.1 and 2.3, and if not, make orders

appropriate to expedite completion;

(iii) ascertain whether there are requests for additional disclosures undersections 2.4, 2.5 and 3.2;

(iv) make rulings on any motions, demurrers or other requests then pending, and ascertain whether any additional motions, demurrers or requests will be made at the hearing or continued portions thereof;

(v) ascertain whether there are any procedural or constitutional issues which should be considered;

(vi) upon agreement of counsel, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set a time for a Pretrial Conference; and

(vii) upon the accused's request, permit him to change his plea.

(b) All motions, demurrers and other requests prior to trial should ordinarily be reserved for and presented orally at the Omnibus Hearing unless the court otherwise directs. Failure to raise any prior-to-trial error or issue at this time constitutes waiver of such error or issue if the party concerned then has the information necessary to raise it. Check-list forms should be established and made available by the court and utilized at the hearing to ensure that all requests, errors and issues are then considered.

(c) Any and all issues should be raised either by counsel or by the court without prior notice, and if appropriate, informally disposed of. If additional discovery, investigation or preparation, or evidentiary hearing, or formal presentation is necessary for a fair and orderly determination of any issue, the Omnibus Hearing should be continued from time to time until all matters raised are properly disposed of.

(d) A verbatim record should be made of all proceedings at the hearing.

(e) Stipulations by any party or his counsel should be binding upon the parties at trial unless set aside or modified by the court in the interests of justice.

(f) At the conclusion of the hearing, a summary memorandum should be made (dictated into the record or written on an appropriate court-established form) indicating disclosures made, rulings and orders of the court, stipulations, and any other matters determined or pending.

5.4 Pretrial Conference.

(a) Whenever a trial is likely to be protracted or otherwise unusually complicated, or upon request by agreement of counsel, the trial court may (in addition to the Omnibus Hearing) hold one or more Pretrial Conferences, with trial counsel present, to consider such matters as will promote a fair and expeditious trial. The accused shall be present unless he waives this in writing. Matters which might usefully be considered include:

(i) making stipulations as to facts about which there can be no dispute;

(ii) marking for identification various documents and other exhibits of the parties;

(iii) waivers of foundation as to such documents;

(iv) excision from admissible statements of material prejudicial to a codefendant;

(v) severance of defendants or offences;

(vi) seating arrangements for defendants and counsel;

(vii) use of jurors and questionnaires;

(viii) conduct of voir dire;

(ix) number and use of peremptory challenges;

(x) procedure on objections where there are multiple counsel;

(xi) order of presentation of evidence and arguments where there are multiple defendants;

(xii) order of cross-examination where there are multiple defendants; and

(xiii) temporary absence of defense counsel during trial.

(b) Conferences should be recorded. At the conclusion of a conference, a pretrial order, or memorandum of the matters agreed upon, should be signed by counsel, approved by the court and filed, which should be binding upon the parties at trial, on appeal, and in post-conviction proceedings unless set aside or modified by the court in the interests of justice. However, admissions by an accused if present should bind the accused only if included in the pretrial order and signed by the accused as well as his attorney.

PRACTICE RULES FOR THE CENTRAL CRIMINAL COURT (THE OLD BAILEY) FOR PRE TRIAL REVIEW

The Practice Rules for the Central Criminal Court were as follows:

1. Any case may be listed for practice directions within these Rules upon an application in writing made to the Court by solicitors acting for any party or by any unrepresented party, provided that a copy of the application is sent at the same time to all other parties and provided that the Court is satisfied that the case is fit for such practice directions. If no party makes aplication the court may list the case for such practice directions of its own volition.

2. The Court shall determine the time and place of the hearing.

3. At least fourteen days' notice of hearing shall be given, unless the parties agree to shorter notice, and that notice shall not be given on a date earlier than fourteen days after the preferment of a bill of indictment.

4. (a) Hearings for practice directions under Rule 5 may be dealt with in Chambers before any Judge of the Court.

   (b) A represented Defendant shall be present at hearings in Chambers unless he elects not to attend.

   (c) Hearings for directions and orders under Rule 6 and the making of orders under Rule 7 shall be held and made in open Court by the Judge allocated to try the case.

   (d) All Defendants shall be present in Court at hearings under Rule 4(c) except with the leave of the Court.

(e) Hearings under Rules 4(a) and (c) shall be attended by Counsel briefed to conduct the case or in special circumstances Counsel specifically instructed to deal with the matters arising under Rules 5 and 6.

5 At a hearing under Rule 4(a) Counsel will be expected to be able to inform the Court:

(a) of the pleas to be tendered on trial;

(b) of the prosecution witnesses required at trial as shown on the committal documents and any notices of further evidence then delivered and of the availability of such witnesses;

(c) of any additional witnesses who may be called by the prosecution and the evidence that they are expected to give; if the statements of these witnesses are not then available for service a summary of the evidence that they are expected to give shall be supplied in writing;

(d) of the facts which can be and are admitted and which can be reduced to writing in accordance with section 10(2)(b) of the Criminal Justice Act 1967, within such time as may be agreed at the hearing and of the witnesses whose attendance will not be required at the trial;

(e) of the probable length of the trial;

(f) of exhibits and schedules which are and can be admitted;

(g) of issues, if any, then envisaged as to the mental or medical condition of any Defendant or witness;

(h) of any point of law which may arise on trial, any question as to the admissibility of evidence which then appears on the face of the papers and of any authority on which either party intends to rely as far as can be possibly envisaged at that stage;

(i) of the names and addresses of witnesses from whom statements have been taken by the prosecution but who are not going to be called, and in appropriate cases, disclosure of the contents of those statements;

(j) of any alibi not then disclosed in conformity with the Criminal Justice Act 1967;

(k) of the order and pagination of the papers to be used by the prosecution at the trial and of the order in which witnesses for the prosecution will be called;

(l) of any other significant matter which might affect the proper and convenient trial of the case.

6. At a hearing under Rule 4(c) in open Court, the Judge who is to try the case may hear and rule upon any application by any party relating to the severance of any count on any Defendant and to amend or provide further and better particulars of any count in the indictment. The Judge may order particulars relating to any count to be delivered within such time as he may direct.

7. The Judge may make such order or orders as lie within his powers as appear to him to be necessary to secure the proper and efficient trial of the case.

8. Subject to the provisions of sections 9 and 10 of the Criminal Justice Act 1967, admissions made under Rule 5 may be used at the trial.

DIRECTIONS FOR CASES COMMITTED FOR TRIAL TO THE CROWN COURT IN THE NORTH EASTERN CIRCUIT

The Directions of the Presiding Judges of the North Eastern Circuit for cases committed for trial to the Crown circuit were as follows:

1. (1) Within three weeks from the date of committal, or such longer period as may be specified by the court if notice has been given under paragraph 2 of these directions, it shall be the duty of the solicitor acting for each defendant in a case to give to the court listing information in the form set out in Appendix 1. [Not attached.]

(2) In the absence of such information or if the information indicates that a plea of guilty is likely or that the plea is unpredictable, subject to court vacations and paragraph 3 of these directions, the listing officer will list the case for plea in the course of the fifth week following the week of committal, having taken into account the convenience of all concerned. Such fifth week shall be known as the plea week. The listing officer may list the case earlier with the consent of the parties or where the interests of justice so require.

(3) If such information indicates that a plea of not guilty is likely, the listing officer will list the case for trial in the normal way. Before he does so he may, having regard to the circumstances of the case, the information he has received and the convenience of all concerned, list the case for pre-trial review or require the solicitor and counsel acting for the party to give to the court a signed certificate in the form set out in Appendix 2. [Not attached.]

2. (1) If any party to any proceedings will not be ready or will find it

inconvenient to proceed by the plea week, it shall be the duty of the solicitor acting for him to give to the court and to all other parties, within three weeks from the date of committal, notice in writing stating

(a) the reasons why the party will not be so ready or will find it inconvenient;

(b) the earliest time when he will be so ready and will find it convenient;

(c) whether the case is likely to proceed as a plea of guilty or not guilty.

(2) A solicitor acting for a party receiving notice in accordance with sub-paragraph (1) above may within 24 hours of its receipt (excluding Saturday and Sunday) give to the court and to all other parties a counter-notice in writing opposing or seeking to vary the adjournment sought.

(3) Any notice and any counter-notice given under the preceding sub-paragraphs shall be considered by the court who may order that the case shall remain in the list for the appointed plea week or that it shall be listed at some other time. The court will notify the parties and other interested persons of the decision.

3. Where the interests of justice so require the court itself may take a case out of the plea week list. The court will notify the parties and other interested persons of its action and will inform them of the day when the case will be listed.

4 If on arraignment in a case listed for plea a defendant:

(a) pleads guilty to the whole of the indictment, or pleads guilty to a lesser charge or to part of the indictment and such plea to the lesser

charge or part of the indictment is acceptable to the court, he will be dealt with at the time he pleads subject to:

(i) the interests of justice;

(ii) any application from a party to the proceedings;

(b) pleads not guilty, a pre-trial review will be held, unless the Judge otherwise orders.

5. If a case proceeds to pre-trial review under paragraph 4(b) of these directions or is listed for pre-trial review, counsel, who should be counsel briefed to conduct the case at the trial or counsel otherwise appropriately instructed, should be in a position to assist the court in estimating the probable length of the trial, and, subject to his duty to his client, to inform the court of such of the matters set out below as are relevant:

(a) the name and availability of any prosecution witness who will be required at the trial and whose evidence is contained in the committal documents or in any notice of further evidence already delivered;

(b) any additional witness who may be called by the prosecution, his availability and the evidence which he is expected to give;

(c) the order in which it is intended to call the prosecution witnesses;

(d) any alibi not disclosed in accordance with section 11 of the Criminal Justice Act 1967;

(e) any fact which is likely to be admitted in accordance with section 10 of the Criminal Justice Act 1967;

(f) the availability of any defence witness;

(g) any question which may arise at the trial as to the admissibility of evidence;

(h) any issue which may arise at the trial as to the mental or medical condition of any defendant or witness;

(i) any point of law which may arise at the trial and any authority which relates to it;

(j) any other significant matter which may affect the trial of the case.

Unless the judge otherwise orders the above matters (a) - (j) shall be dealt with in chambers and unless he elects not to attend the defendant shall be present whether the judge sits in open court or in chambers.

6. At a pre-trial review the judge may deal in open court with any application for

(a) the severance or amendment of any count in the indictment;

(b) further and better particulars of any count in the indictment;

(c) the separate trial of any defendant;

and may make such orders as appear to him necessary to secure the proper and efficient trial of the case. If the judge on the application refuses to make an order such refusal shall not preclude a further application on the same matter to the trial judge, if different.

7. In these directions "judge" means a judge of the High Court, a Circuit Judge or Recorder.

LESLIE BOREHAM
A presiding judge of the
North Eastern Circuit

Dated 3 December 1977

NOTICE SENT TO PARTIES BY THE CROWN COURT IN RELATION TO PRE-TRIAL HEARINGS

DRAFT NOTICE

In the Crown Court at

Regina v.

Indictment No.

Take note that under Rule XX (3) of the Crown Court Rules 1982 counsel and solicitors for the prosecution and defence and the defendants in the above-mentioned case are required to attend at the Crown Court at

on

at am/pm

for a hearing at which directions will be given for the just expeditious and economical conduct of the proceedings. Counsel are requested to obtain instructions and to be prepared at the hearing to deal with the following matters:

(1) The pleas to be tendered;

(2) Whether those pleas are acceptable to the Crown;

(3) The counts on which the Crown intends to proceed;

(4) (a) Any application or agreement to try counts or defendants separately;

(b) Any application for further and better particulars of the indictment;

(5) Which prosecution witnesses, as shown on the committal papers or on any notice of further evidence delivered by the time of hearing, will be required to give evidence;

(6) Whether the prosecution intend to adduce any additional evidence, and when the notice of additional evidence will be served. Prosecution counsel must supply a summary in writing of such evidence at or before the hearing;

(7) What evidence can be read or dispensed with altogether;

(8) Facts which are admitted and can be reduced to writing in accordance

with s.10(2)(6) of the Criminal Justice Act 1967, and when such formal admissions will be forthcoming;

(9) What exhibits and schedules can be agreed;

(10) Any difficulties with the availability of witnesses for either side;

(11) Any difficulties arising from the mental or medical condition of any defendant or witness;

(12) The probable overall length of the case;

(13) Any difficulties with reports for the purpose of sentencing;

(14) Any unusual point of law which may arise, including authorities which may be cited;

(15) Any question as to the admissibility of any evidence, including whether it is anticipated there will be a trial-within-a-trial on any point;

(16) Any alibi not disclosed in conformity with the Criminal Justice Act 1967 by the time of the hearing;

(17) The order and pagination of statements, exhibits and all other papers to be used by the prosecution at the trial;

(18) the date by which all pre-trial preparation will be complete;

(19) the date of commencement of the trial;

(20) Any other matter which might affect the efficient trial of the case.

Dated Approved by Judge

Notes:

1. The hearing will be in chambers unless the judge directs otherwise.
2. All defendants must attend unless the court directs otherwise.
3. Arrangements must be made at the time when the date of this review is fixed to ensure that the parties are represented by counsel who will appear at the trial, or, if two counsel are instructed, by one of them.
4. At the discretion of the judge, defendants pleading guilty may be arraigned and sentenced in open court immediately after the hearing.
5. The clerk of the court will make a note of the judge's directions at the appropriate points on this form and a copy will be sent to the solicitors for each party.

PROPOSALS OF THE CANADIAN LAW REFORM COMMISSION FOR EVIDENCE BY SOLEMN DECLARATION, AND COMMENTARY

Evidence by Solemn Declaration

Ordinarily proof of ownership, or of an owner's lack of consent to the moving of a chattel, or the entering of any premises or other place is not a matter in dispute, no matter how essential such proof may be. How often, for example, are witnesses summoned to describe the make, model and colour of their cars, to read off a provincial Motor Vehicle registration card a long unmemorizable manufacturer's serial number, to answer a few desultory questions -- or not to be asked any questions -- and then to go away, wondering why it takes the loss of a day's, or a half-day's, wages to recite or read facts which are not disputed? It is clear that this kind of scenario is staged all too often, all throughout Canada.

The proposals for admitting this certain kind of evidence by solemn declaration are designed simply to give a system a chance to eliminate many if not most of these silly charades. If defence counsel knows he or she is not really going to cross-examine that sort of witness, why should the witness have to be present in the flesh? To this question, too, there is no reasonable answer.

The Commission thinks that it is no answer to the question to note that the proposal would require the prosecution to engage in the extra paper-work of preparing solemn declarations. Prosecutors are virtually always public servants remunerated from public moneys to serve the public. Requiring members of the public to attend court unnecessarily in the tens, probably even hundreds, of thousands each year in Canada is obviously no public service! So long as cross-examination of such witnesses is not sought by defence counsel, it is an appallingly mindless waste to cause a legion of witnesses to lose their individual wages, only to be inadequately compensated collectively at substantial cost to the state. A prosecutor who is alert may, under the

proposal, avoid serving written notice of intention to make proof by solemn declaration, by giving notice early and orally in court. It is foreseeable, if the proposal be enacted, that Attorneys-General and judges alike would (and we surely hope, will) demand explanations for unnecessary attendance of witnesses whose evidence could have been given through solemn declarations.

The same observations expressed above can be made with regard to the parade of witnesses called for no other purpose than to demonstrate the sequence and continuity of possession of a proposed exhibit or other article. Having squinted at and testified about the presence of their initials or some other identifying mark on the article, they are only rarely cross-examined. Therefore they should only rarely be called in person so to testify.

These proposals are designed frankly to exploit the fact that criminal cases almost invariably involve the participation of licensed, professional counsel. While nothing should fetter the professional judgment of counsel in any particular case, nevertheless counsel who are seen persistently to do public disservice by permitting or requiring witnesses to attend court unnecessarily may well be called to account for it by their Law Society. This ramification of the proposal is, of course, a local matter of concern and that, we think, is appropriately where it belongs. The participation of professionals in this regard, like so many others, makes it possible to streamline the system, and to retain fair procedures.

Evidence by Solemn Declaration

Section 1.

Where an accused is charged with an offence in relation to property, a place or a dwelling house, under sections 283, 295, 298, 301.1(1)(a), (b) and (c), 306, 307, 387, 388, 389, 390, or, with an attempt, counselling or conspiracy thereof, of an offence under section 312 in relation to property under the aforementioned sections, proof by the prosecutor of

(1) ownership or of a special interest in that property and of its value other than proof of ownership or a special interest vested in the accused,

(2) the absence of consent, by the owner or person having a special interest, to, as the case may be, the alleged

(a) taking, conversion, moving of or causing to be moved of property under sections 283 and 295,

(b) whatever is alleged having been done and described in section 298(1)(a) and (b)

(c) taking, possession or using, under section 301.1(1)(a) and (c),

(d) accused's entering or being present in a place, under section 306, or a dwelling-house under section 307,

may, at trial, pre-trial, or at a preliminary inquiry be made by producing the solemn declaration of the owner or person having a special interest.

Section 2.

(1) If it is intended to make proof by solemn declaration, as provided in section 1, the prosecutor shall,

(a) upon the earliest occasion at which the date for the preliminary inquiry, or for the pre-trial, or for the trial is set by the judge, and in any event, not later than during the following day,

(b) either orally in court, in the presence of the accused or counsel for the accused, and for the record, or

(c) by notice in writing to counsel for the accused or if the

accused be without counsel of record, then to the accused personally,

communicate in clear specific language the intention to make proof of any of the matters described in section 1 by producing the solemn delcaration of the owner by name, or of any person, by name, having a special interest;

(2) The accused may, as of right, require the presence of the witness at the proceedings for the purpose of cross-examination but only if he has given notice of same in writing to the Crown;

(3) Notice, under subsection (2) shall be given

(a) in the case of a preliminary inquiry at least 24 hours before the first date set for the inquiry,

(b) in the case of a trial, at least six clear days before the first date set for trial and, if a pre-trial hearing has been hald, at the hearing,

(c) in the case of evidence adduced at a pre-trial hearing, at least 48 hours before the hearing.

Section 3.

A justice, magistrate, judge or pre-trial judge, at any time after the limitation periods of section 2, subsection (3) have expired and where during the proceedings, at the request of the accused, upon cause being shown and after having offered the prosecutor an opportunity to be heard, may order a witness to attend the proceedings for the purpose of cross-examination and, in determining whether to grant such a request, he may inquire into the nature of the questions to be put to the witness.

Section 4.

Where a person has, under the authority of this Act, seized and then given possession of anything to another person or other persons, proof of the sequence and continuity of possession of that thing

(a) by those other persons or that other person,

(b) including its having been committed to the post by the sender and having been received by the addressee,

may be made in accordance with sections 1, 2 and 3 to identify it as the very thing seized, except

(c) by the person who effected the seizure, and

(d) by the person in actual last possession of it at the time the thing is tendered in evidence.

APPENDIX VIII

TABLE 38

DELAY AND OTHER CHARACTERISTICS IN FIVE COURTS, 1965-66

	Pittsburgh Common-Pleas Court	District of Columbia District Court	Chicago Criminal-Division Court	Chicago Preliminary Hearing Court	Minneapolis District Court
Median Delay (in days)	160	144	81	27	14
Caseload per Judge	1,263	260	450	2,666 (to 7,000)	700
% of Cases with Continuances	60	44	70	46	10
% of Cases with Motions	5 to 10	69	12	...	10
% of Cases with Full-Length Trial - Total	5	31	23	No Full-Length Trials	13
% of Cases with Jury Trials only	3	28	4	No Jury Trials	8
% of Defendants with Private Defense Attorneys	40	38	42	20	10
% of Defendants on Bail (or equivalent)	40	48	58	20	40
% of Total Cases Convicted	62	76	80	26	92
% of Convicted Cases Granted Probation	49	32	24	45	37

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MORTUARY INDUSTRY AND CEMETERIES ADMINISTRATION COMMITTEE

First Report

METROPOLITAN CEMETERY LAND NEEDS AND A CREMATORIUM AT GEELONG

Ordered to be printed

D.23

73051/84—(F1)

EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

FRIDAY, 2 JULY, 1982

38 MORTUARY INDUSTRY AND CEMETERIES ADMINISTRATION COMMITTEE - The Honourable W.A. Landeryou moved, by leave, That the Honourables C.J. Kennedy and R. Lawson be members of the Mortuary Industry and Cemeteries Administration Committee.

Question-put and resolved in the affirmative.

EXTRACTED FROM THE VOTES AND PROCEEDINGS OF THE LEGISLATIVE ASSEMBLY

Thursday, 1 July, 1982

37 COMMITTEE APPOINTMENTS - Motion made, by leave, and question - That, contingent upon the Legislative Council concurring with the Resolutions of this House dated 1 July 1982 establishing the respective committees-

* *

(b) Mr Culpin, Mr Kirkwood, Mr Lieberman and Mr Ross-Edwards be appointed members of the Mortuary Industry and Cemeteries Administration Committee-

-(Mr. Fordham)-put and agreed to.

TERMS OF REFERENCE

JOINT RESOLUTION OF LEGISLATIVE ASSEMBLY AND LEGISLATIVE COUNCIL - 1 JULY 1982

---

1 That a Joint Select Committee be appointed to inquire into and report upon all aspects of the mortuary industry and related industries in Victoria, including both private and Government operations, together with any aspect of cemeteries administration, funding or provision of land encompassed by the Cemeteries Act 1958, the Trustees Act 1958, or any other provision relating thereto.

2 That the Committee shall give priority to such investigations referred to it by resolution of the Legislative Council and the Legislative Assembly.

3 That the Committee be required to present its Final Report to the Parliament no later than 31 December, 1983.

4 That the Committee consist of six Members, comprising not more than four Members of the Legislative Council nor more than four Members of the Legislative Assembly.

5 That four members of the Committee constitutes a quorum of the Committee but a quorum of the Committee shall not consist exclusively of Members of the Legislative Council or Members of the Legislative Assembly.

6 That the Committee shall elect one of its members to be Chairman who, in the event of an equality of votes, shall also have a casting vote.

7 That the Committee may elect a Deputy Chairman who shall exercise all the powers and peform the duties of the Chairman at any time when the Chairman is not present at a meeting of the Committee.

8 That the Committee may sit and transact business during any adjournment or recess of the Houses in the period for which it holds office but the Committee shall not sit during the sittings of either House of Parliament except by leave of that House.

9 That the Committee may sit at such times and in such places in Victoria or elsewhere as seems most convenient for the proper and speedy despatch of business.

10 That the Committee may send for persons papers and records and report the minutes of evidence from time to time.

11 That the Committee have power to authorize publication of any evidence given before it and any document presented to it.

12 That, contingent upon the enactment of the Parliamentary Committees (Joint Investigatory Committees) Bill, the Committee be a Committee to which section 51A of the Parliamentary Committees Act 1968 applies.

13 That the foregoing provisions of this resolution, so far as they are inconsistent with the Standing Orders and practices of the Houses, shall have effect notwithstanding and anything contained in the Standing Orders.

73051/84—2

TERMS OF REFERENCE

JOINT RESOLUTION OF LEGISLATIVE ASSEMBLY

AND LEGISLATIVE COUNCIL - 11 OCTOBER 1983

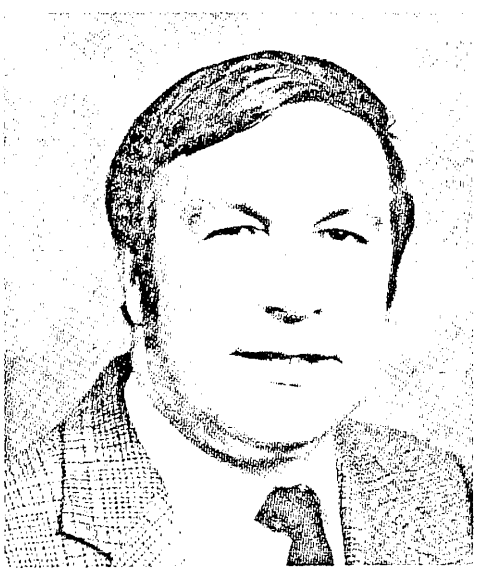
That the resolution of the House of 1 July 1982 appointing the Mortuary Industry and Cemeteries Administration Committee and providing that the Committee be required to present its Final Report to the Parliament no later than 31 December 1983, be amended so far as to require the Final Report to be presented to the Parliament no later than 31 March 1985.

MEMBERSHIP

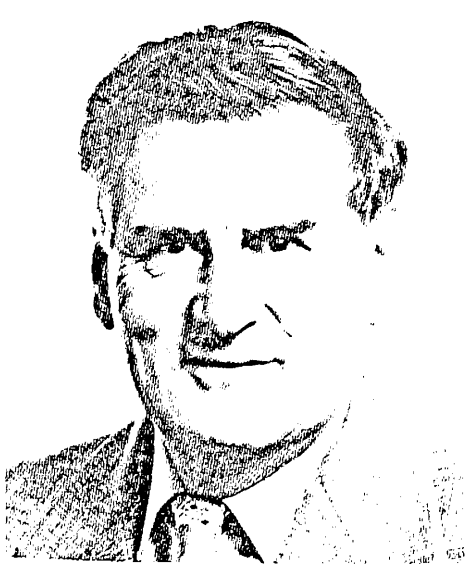
Chairman:
Mr. Carl Kirkwood, M.P.

Deputy Chairman:
The Hon. L.S. Lieberman, M.P.

Mr. J.A. Culpin, M.P.



The Hon. C.J. Kennedy, M.L.C.



The Hon. Robert Lawson, M.L.C.

Mr. P. Ross-Edwards, M.P.

Secretary: Mr. M. Bromley

REPORT

The JOINT SELECT COMMITTEE ON THE MORTUARY INDUSTRY AND CEMETERIES ADMINISTRATION, appointed by Resolution of the Legislative Council and the Legislative Assembly, has the honour to report as follows:

INTRODUCTION

1 Since its inception the Committee has devoted much of its time to conducting preliminary investigations to familiarise itself with the various areas of the mortuary industry, namely funeral directors, monumental masons and the administration of cemeteries, as well as other associated branches.

2 Advertisements were placed in the daily newspapers on 27 November 1982, setting out details of the Committee's appointment and Terms of Reference and seeking comments from interested persons and organisations on any aspect of the mortuary industry and cemeteries administration. Response to these advertisements was disappointing (See Appendix 1).

3 Further advertisements were placed in the daily newspaper on 12 and 16 March 1983, requesting comments on specific questions relating to funeral directors and monumental masons. Response to these advertisements was better than the earlier ones, but still only in small numbers (See Appendix 2).

4. The Committee has advised all funeral directors and monumental masons in Victoria of the Inquiry and offered them the opportunity to forward comments on specific questions relating to their own industry. In addition, the Australian Funeral Directors' Association (Victorian Branch) and the Master Stone Masons Association, Victoria, circulated their members in relation to the Inquiry and both organisations have forwarded comprehensive submissions on their behalf. Individual responses from funeral directors and monumental masons were reasonable in number and all the submissions have been examined in this regard. Evidence is currently being taken from relevant organisations and interested persons. However the Committee is not yet in a position to report upon the matters of funeral directing, monumental masonry or associated industries. (Minutes of Evidence taken so far by the Committee will be tabled with later report)

CEMETERIES

5 In Victoria the administration of cemeteries is vested in the Health Commission under the powers contained in the Cemeteries Act 1958. Health Commission involvement with cemeteries dates back to the earliest colonial days when it was necessary to ensure that in the development of cemeteries sources of water supply were not polluted, drainage not adversely affected, and general conditions of sanitation and propriety preserved.

6 The Committee has visited The Necropolis, Springvale; Fawkner Crematorium and Memorial Park, Fawkner; The Memorial Park, Altona, and Ballarat Crematorium to gain first hand knowledge of the operations of crematoriums. In addition, the Committee has also visited 26 cemeteries throughout Victoria and met and held discussions with representatives of all these trusts to gain a better understanding of the workings of a cemetery, as well as the problems encountered by the trusts, particularly in the case of the older, inner city cemeteries.

7 Several discussions have been held with officers of the Health Commission of Victoria to gain a greater understanding of the problems involved in the administration of cemeteries together with the background of the Working Party on Cemeteries and Crematoria. This Working Party was established by the Health Commission in March 1980, at the direction of the then Minister of Health, the Honourable W.A. Borthwick, with the following Terms of Reference:

"1. Consider and report on ways and means of caring for those cemeteries which are reaching the end of their economic life;
2. Consider the role of the State Government in matters relating to cemeteries and crematoria and the resources necessary to undertake that role;
3. Advise on steps that might be taken to provide adequate facilities for burial and cremation;
4. Advise on procedures aimed at ensuring the efficient management of cemeteries and crematoria;
5. Review of the Cemeteries Act 1958."

8 In July 1982, the Working Party presented an interim report to the Health Commission of Victoria for circulation to all interested groups to seek their comments for further consideration. The Committee has examined the interim report with interest and it has provided the Committee with an excellent foundation for its work in the cemeteries area.

9 The Committee is not yet in a position to make comment upon the Working Party's report, but one of its recommendations is of such an urgent nature that the Committee has centred its immediate attention on this aspect, namely, the purchase and/or reservation of new major sites for cemeteries within the metropolitan area.

10 In its report, the Working Party noted "that some metropolitan cemeteries had very little land available for use as ground sites and have reached or are reaching the end of their viable life, with insufficient funds to finance their continuing operations. Because cremation is still not as common as earth burials, the most urgent need is the provision or reservation of some major sites for cemeteries within the metropolis."

11 The study of cemeteries within the metropolitan area revealed to the Working Party that there is a critical shortage of burial space in most existing cemeteries and an alarming shortage in the east and north-east sectors (See Appendix 3). Officers of the Health Commission indicated to the Committee that within five to seven years most of the land available for burials in the east of Melbourne will be utilized. There is in fact no cemetery left in the east where large sections of land remain. The Committee points out that Springvale is regarded as being in the south east of Melbourne.

12 Consequently the Working Party recommended that immediate steps be taken to secure the purchase and/or reservation of the following parcels of land for future cemetery use to serve the Melbourne metropolitan area, namely:

Lilydale	-	82 hectares - Victoria Road, Lilydale.
Melton	-	162 hectares - between Bulmans and Harkness Roads, Melton.
Bundoora	-	162 hectares - Eastern part of the Janefield Colony.
Pakenham	-	162 hectares - Princes Highway, Pakenham.
Fawkner	-	56.3 hectares - North of the existing Northern Memorial Park.

13 Accordingly, in view of the urgent land situation in Victoria, the Committee has followed on from the recommendations of the Working Party and examined each of these five propositions. (The summary of recommendations from the Working Party's Interim Report is included as Appendix 4)

LILYDALE

14 The Victoria Road site named at Lilydale was owned by the Commonwealth Government at the time of selection, but has since been sold to a private purchaser. The Health Commission advised the Committee that the loss of this site resulted from numerous objections from local residents, complications with rezoning proposals and the complete change of attitude of the Shire of Lilydale which had previously supported the proposal. The failure of the State to purchase this land meant the loss of an opportunity to overcome the problem of insufficient burial space in existing cemeteries in the eastern sector of Melbourne.

15 New alternatives are presently being examined by the Health Commission including three sites nominated in recent months by the Shire of Lilydale for a regional cemetery. However, one has since been sold, another is totally unsuitable and part of the third site has been developed as a school complex.

16 Consequently the Committee is not in a position to recommend a particular location in this vicinity. It is obviously essential for a new cemetery to be established to the east of Melbourne to meet future needs and therefore the Committee stresses the urgency of acquiring a suitable site. It will report on further developments at the earliest opportunity.

MELTON

17 The Melton land recommended by the Working Party is north of the Western Highway. The land is a section of the surplus Housing Commission land-holdings and is to be disposed of by the Urban Land Authority. The land totals 265 hectares in area and the recommendation is for the purchase of 162 hectares.

18 In discussions with officers of the Authority it was indicated that one section of this land has been subdivided into small farms, but the majority is still untouched. Officers of the Health Commission advised the Committee that this land was suggested for purchase because of the large area in the one site which would overcome the shortage of land available for burials in that area.

19 The Committee was advised that no valuation has been placed on this site yet by the Urban Land Authority. The Committee has inspected the land, but noted that it is in a sink hole plain and as such is subject to subsidence. The Committee is concerned that land in such a location may not be geologically suitable for a cemetery bearing in mind the inevitability that monumental headstones will be erected on the site. Whilst in the area the Committee also viewed the Melton Cemetery (some kilometres away), where it saw evidence of headstones and graves at irregular angles.

20 Accordingly, following its inspection on 29 September 1983, the Committee requested the Department of Minerals and Energy to conduct a geological assessment of the land so that the Committee could determine whether the area is a suitable cemetery site.

21 By letter dated 25 October 1983 the Honourable D.R. White, M.L.C., Minister for Minerals and Energy, advised the Committee that the Geological Survey Division of the Department of Minerals and Energy is currently finalising field investigations and associated laboratory testing of the Melton Corridor as part of its programme to produce engineering geology maps of the growth corridors of the Melbourne Metropolitan Planning Scheme. This programme aims to show the distribution and engineering properties of the geological formations occurring in those corridors, as they affect excavation, foundations, engineering construction and land use planning.

22 The Department indicated that the land of the Urban Land Authority is within the Melton Corridor and has, together with the remainder of the Corridor, been mapped,

drilled, sampled and tested. The field work for the study of the Melton Corridor has been completed and will presently be the subject of a report. Meanwhile, notes and descriptions of materials encountered in fourteen drill holes pertaining to the Urban Land Authority area within the Melton Corridor were provided for the Committee's information. (This information is contained in Appendix 5)

23 The Committee was informed that the work of the Department of Minerals and Energy has elucidated both the surface and sub-surface nature of the area. On the basis of its study the Department was able to advise the Committee not only on the subject land of the Authority but on the Melton Corridor as a whole. In its letter, the Department was able to make the following notes in relation to the Committee's queries:

> "1. Back hoe trenching of some 'sink hole' features in the U.L.A. land is recommended to clarify their nature.
>
> 2. The disturbed nature of some monuments in the Melton Cemetery is probably due to expansive clays rather than 'sink holes'."

24 Further detailed testing of the area would be necessary in order for the Department to establish the land's suitability for cemetery purposes. The Department stated that in addition to the back hoe work already recommended, some additional drilling might be necessary and a contractor would be needed for the back hoe. The Department's drilling rigs could provide any drilling required but in both cases the Department would require reimbursement of the costs involved.

25 The Committee does not see its role as instigating this type of physical testing. It believes the Health Commission should arrange the necessary investigation to determine the site's suitability for burials. The Commission's officers have the experience and expertise to determine cemetery requirements.

26 There is definitely a need for a new cemetery to be established in the Western region of Melbourne. However, the Committee cannot support the purchase of the land at Melton until comprehensive testing is conducted by the Department of Minerals and Energy, as outlined in paragraph 24 of this report. The Department advised the Committee that all investigational work would be accomplished within one month.

27 The Committee therefore recommends that the Government allow the Health Commission to negotiate with the Department of Minerals and Energy for detailed testing and drilling to be done to determine the suitability of the Urban Land Authority site at Melton for cemetery purposes. The Committee hopes to report on the results of this testing in its next report.

BUNDOORA

28 An area of approximately 162 hectares at the rear of the Janefield Colony, Bundoora, was considered suitable by the Working Party for development as a major cemetery. The land is cleared and presently serves merely as grazing paddocks.

29 The Committee has inspected the land and believes it is an excellent location for a cemetery. It is almost totally land-locked with a limited residential frontage on one boundary. Importantly, the land is already Crown land under the control of the Health Commission Mental Retardation Division.

30 The Health Commission advised the Committee that the Fawkner Crematorium and Memorial Park Trust has been approached with a view to accepting responsibility for Bundoora. In evidence to the Committee the Fawkner Trust advised that it was prepared to give its expertise to the proposal and accept trusteeship of the Bundoora site, provided Government financial assistance was forthcoming for preliminary development works.

31 No detailed costs of these development works have been received although these works are estimated to include the following:

(a) Construction of entrance roadway;

(b) Surveying and planning of the cemetery layout;

(c) Fencing the site and provision of suitable entrance gates;

(d) Landscaping of areas with planting of trees and shrubs;

(e) Connection of electricity and other services;

(f) Provision of water, either through storage dams or M.M.B.W. supply and reticulation; and

(g) Construction of buildings and storage sheds.

32 On 6 September 1983 the Honourable T.W. Roper, M.P., Minister of Health, announced that the proposal to establish a major cemetery complex at Bundoora had been

approved. Mr. Roper advised the Government's intention that the site be the eastern half of the Janefield Colony, as recommended by the Working Party. Although planning of the new cemetery is in its very early stages, full consultation will take place with other government departments, local government authorities, adjoining residents and local interest groups. Preliminary plans for the overall development of the site will soon be prepared for public inspection.

33 The Committee welcomes the Minister's recent announcement of the Government's intention to acquire the land at Bundoora. It agrees it is essential that a new cemetery be established in this area. Hopefully, when fully developed the new cemetery will be able to adequately cater for the future needs of Melbourne's north-western suburbs.

PAKENHAM

34 This land is another area of surplus Housing Commission land-holdings and is being disposed of by the Urban Land Authority. The site was inspected by the Committee and is situated south of the Princes Highway and west of the Pakenham High School with a frontage to the Princes Highway. It totals 249 hectares in area, of which the Working Party recommended that approximately 162 hectares be purchased.

35 Officers of the Health Commission indicated to the Committee that the Working Party had not defined any particular area, but in retrospect, have now suggested that the entire area be purchased. The Committee endorses the suggestion that the whole area be purchased for cemetery purposes.

36 Furthermore, the Urban Land Authority advised the Committee that it would prefer the Health Commission to purchase the entire area, because the site has natural boundaries, namely the Princes Highway, the railway line, a creek and a major road.

37 The Committee was informed that no tests have been done as yet as to the suitability of the land for burials. However the area is known not to be rocky and is considered ideally suitable by the Working Party.

38 The Urban Land Authority indicated in discussions that this particular site is ready to sell and tentative plans have been drawn up for it to be subdivided into 12 hectare farmlets.

39 The Committee sought the assistance of the Authority and the Honourable I.R. Cathie, M.P., Minister of Housing, to ensure that this land was not subdivided until after the Committee had reported to Parliament on the matter. This assurance was given by the Minister, but the Committee stresses the urgency with which action must be taken if this land is to be purchased for cemetery purposes.

40 The Urban Land Authority advised the Committee that the State Valuer General had placed a value of $510,000 on the Pakenham site, whilst a private valuer had estimated its worth as $675,000. In its Interim Report, the Working Party estimated it would cost $600,000 to purchase the 162 hectares it recommended. The Committee recommends that the matter be resolved as soon as possible.

FAWKNER

41 Inquiries by the Committee have revealed a stalemate on the situation with the 56.3 hectares of land recommended for purchase at Fawkner. The land is presently owned by the Commonwealth Serum Laboratories and abuts the existing Northern Memorial Park at Fawkner.

42 Negotiations for the sale of this land have been in progress for some years, but have failed due to a vast discrepancy in the valuations provided by the State and Commonwealth Valuers General, namely $1,462,500 and $2,574,500 respectively.

43 In view of the Fawkner Crematorium and Memorial Park Trust being approached to accept trusteeship of the proposed Bundoora Cemetery, negotiations for the purchase of the Fawkner land lapsed for some time. However, the Committee has recently been advised that negotiations are proceeding again and new valuations have been sought. The Committee recommends that the Minister of Health and the Minister for Property and Services seek to resolve the question of the acquisition of this land at an early date.

ALTONA

44 In addition to the land purchases or reservations recommended by the Health Commission Working Party in its Interim Report, the Committee has also considered two possible sites at Altona North for cemetery purposes, which were brought to its attention and warrant immediate comment.

45 The Trustees of The Memorial Park, Altona made a submission to the Committee in a letter dated 31 May 1983, requesting it to give consideration to the purchase and/or acquisition of additional land for cemetery purposes. A similar submission was forwarded by the Trustees to the Health Commission Working Party.

46 The Trustees advised that two parcels of land opposite The Memorial Park were available for sale. Being mindful of the Working Party's Interim Report referring to the urgent need to provide for additional burial facilities in the metropolitan area, the Trustees felt obligated to bring the Committee's attention to the fact that land in close proximity to the existing cemetery was for sale.

47 The Trustees advised that the first site is located on the south west corner of Grieve Parade and Dohertys Road, Altona North and has an area of approximately 50 acres. Preliminary inquiries revealed an asking price of $360,000.

48 The second site abuts the first in Dohertys Road, Altona North and has an approximate area of 50 acres. The site is presently owned by Hoyts Theatres Ltd. and the Trustees indicated to the Committee that a 'For Sale' notice is displayed on this property and that the asking price is $500,000, though an offer may be considered. The Committee was informed that the Trust's initial inquiries were focused on the Hoyts site.

49 The Trustees believe the approximate potential of the two parcels of land would be 60,000 new burial allotments, based on 800 allotments to the acre with approximately 75 acres being used for burial purposes. The remainder of the area would be used for beautification, gardens, roads and maintenance buildings.

50 The Trustees advised the Committee that although no tests have been made it was assumed that the land under consideration must be regarded as having a similar rock content to that presently experienced at The Memorial Park. Accordingly, it would be necessary to raise the level of lawn cemetery areas to avoid the necessity of blasting.

51 In its submission the Trustees stated that if 75 acres of the total 100 acre area is raised by an average of one metre, then a total soil fill of 303,514 cubic metres would be required.

52 The Trustees in evidence to the Committee advised that in developing The Memorial Park to date it has been necessary to purchase considerable amounts of land fill. Unfortunately for The Memorial Park Trust good digging can only be obtained in the cemetery to approximately one metre and so to obtain the necessary depth for burial sites the level of soil has always had to be raised by one metre. The Trust has completed this task most successfully, but naturally the soil that has had to be obtained has not been cheap.

53 The Committee was informed that the last soil fill used at The Memorial Park was $4.00 a cubic metre plus the hire of compaction equipment. Therefore, using that figure as a basis, the Trustees estimated the cost of fill for 75 acres as follows:

Soil Fill	$1,214,056
Compaction Equipment	$ 46,000
Total	$1,260,056

54 The Trustees advised that The Memorial Park's reserves are not great enough for the Trust to contemplate purchasing the land itself at this stage. It is looking ahead and as there is a need for extra land in the metropolitan area the Trustees believe the Government would have to give financial assistance to enable the purchase to take place.

55 It was advocated to the Committee that one of the biggest advantages of the land was its close proximity to the existing administrative facilities, as compared with the establishment costs of a new alternative cemetery site.

56 Health Commission officers inspected the Hoyts Theatre land and discussed the proposal with members of the Trust and a detailed report was prepared and considered by the Working Party. (The adjacent 50 acre block which is for sale was not considered by the Health Commission as part of the immediate proposal.) Copies of the Health Commission's reply to The Memorial Park's proposition and the report were supplied to the Committee for its information.

57 As part of its consideration, the Working Party noted that the land was topographically similar to that of the existing cemetery and would require a large quantity of soil fill and other capital works before the land could be used for burials. In addition, the Working Party also noted that The Memorial Park Trust still has to repay $507,903 to the Treasury for loans given many years ago to purchase land and establish the present cemetery/crematorium complex.

58 In view of these factors, the Working Party decided to refuse The Memorial Park Trust's application and resolved that the proposed purchase of land in Dohertys Road, Altona North, should not proceed.

59 The Committee has given a great deal of consideration to The Memorial Park's submission and is pleased that the Trustees brought its attention to the fact that the land was for sale. The Committee appreciated the opportunity to examine the proposal, but believes the proposition is too costly. The purchase price of the two sites is $860,000 plus an estimated soil fill cost of $1,260,056 resulting in a total cost in excess of $2,000,000 to establish the area as a cemetery. Accordingly, the Committee does not give its support to the purchase of either parcel of land at Altona North.

CREMATORIUM FOR GEELONG

60 The Committee would also like to take this early opportunity to report upon whether a crematorium should be established in Geelong. This issue has been debated since 1944 but it has always been considered that a crematorium in Geelong was not a viable proposition. The establishment of crematoriums in Ballarat in 1958 and Altona in 1961 further reduced the chances of one being established in Geelong.

61 The purchase by the Government in 1981 of 39 hectares of land in Burville's Road, Mount Duneed, to be vested in the Trustees of the Geelong Western Public Cemetery and to be known as The Geelong Regional Memorial Park, once again raised the question of whether or not a crematorium should be available to serve Geelong and the Western District.

62 At a public meeting in Geelong on 23 February 1982 a Committee of citizens was formed "to make a submission to the Government for the necessary funds to erect a crematorium on the Burville's Road land or on any other suitable site and that the Committee seek the support of municipalities, Geelong Regional Commission and other interested bodies in the Geelong region".

63 Subsequent advice to the Committee indicates that the Crematorium for Geelong Committee now maintains that the Burville's Road site is the only suitable location in the Geelong region for a crematorium.

64 The Working Party on Cemeteries and Crematoria considered the possibility of establishing a crematorium in Geelong and reported upon the issue in its Interim Report of July 1982 in the following terms:

> "It was noted that the Geelong area is serviced by crematoria at Altona and Ballarat and accordingly a high priority should not be allocated for this area. The Working Party considers that the establishment of a crematorium at Geelong would divert a considerable volume of business away from the Ballarat and Altona crematoria to the extent that each of these would be made uneconomic operations."

65 As a result of this recommendation by the Working Party, the Crematorium for Geelong Committee placed before this Committee its submission for permission to

construct a crematorium at Mount Duneed. This submission had previously been to the Health Commission and considered by the Working Party during its deliberations on the matter. In addition the Committee received a number of submissions supporting the establishment of a crematorium in Geelong (See Appendix 6).

66 The Committee has visited Geelong and inspected the land at Mount Duneed in the company of members of the Crematorium for Geelong Committee and Trustees of the Geelong Western Public Cemetery.

67 The Crematorium for Geelong Committee in its submission advised that people in Geelong who choose a cremation for their relatives are in most cases ordering "Non-Attendance" cremations. This means that remains are committed in Geelong and then transported either to Ballarat or Altona. The submission indicated that this is done to reduce the costs involved with having a mourning coach make the journey and to save friends from losing a day's work and also incurring the additional costs of travelling to either crematorium. It was advocated that this treatment is not good enough for a city the size of Geelong.

68 The submission completely rejected the suggestion that both Ballarat and Altona Crematoria rely on Geelong business to make them viable. It maintains that Ballarat Crematorium operated quite successfully for approximately 17 years without the support of Geelong. Furthermore, its current charge of $170 is far below any other crematorium in Victoria.

69 The Geelong Committee advocated that as a result of these charges "the Community of Ballarat is being subsidised by Geelong but at a great cost to the Community of Geelong". Consequently it was submitted that the Ballarat Crematorium would only need to increase its fee by $50 per cremation to cover the loss of Geelong cremations.

70 In the case of The Memorial Park, Altona, the Geelong Committee maintain that as this Crematorium is only receiving approximately 25 per cent of Geelong cremations, it is unreasonable to state the viability of this Trust could be affected by the loss of such a small number.

71 In evidence before the Committee the Trustees of The Memorial Park, Altona, advised the Committee that in 1981 Altona received 138 cremations from Geelong, which

was 13.75 per cent of the total; in 1981 151 cremations, which was 13.07 per cent; and in the six months to 30 June this year 53 cremations were received from Geelong, which was 10 per cent of the total. The Trustees informed the Committee that Altona's percentage of Geelong cremations had dropped because it was unable to compete with the prices at Ballarat.

72 The Geelong Committee submitted that funeral directors in the Geelong region have stated that if cremation facilities were available in Geelong the cremation rate would rise from the present 24 per cent of advertised deaths in Geelong to at least 50 per cent. The Committee was advised that the nearest comparable city to Geelong, Wollongong, shows a cremation rate of 65 per cent.

73 The Geelong Committee maintain that the cremation rate increases considerably when a crematorium is available within a reasonable distance and people have a choice. It believes that once a crematorium was established in Geelong it would become self supporting.

74 The Committee has examined the proposition as to whether a crematorium should be established in Geelong with great interest and believes it should be decided upon immediately.

75. During its deliberations the Committee has certainly taken into account the views of the Health Commission Working Party which, whilst it did not reject the idea of a crematorium, did not give it a high priority. Its conclusion was based on the resultant effect a Geelong crematorium would have on Ballarat and Altona Crematoria.

76 The Committee believes viability of a crematorium is the key to whether one should be established anywhere. It notes that the Working Party in its Interim Report stated it had "received expert advice that any proposal to establish a crematorium should be based on a cremation fee of $300 and a through-put of approximately 400 cremations annually. This should enable a small crematorium to operate viably taking into account wages, operating costs, loan repayments and servicing, development works etc."

77 Taking this expert advice given to the Working Party into account, the Committee is of the opinion that a crematorium should be established in Geelong. Geelong is Victoria's largest provincial city and as such would be able to support a crematorium.

78 The actual deaths in Geelong per year are approximately 1200 and the average cremation rate throughout Victoria is 40 per cent, which based on these figures means a probable cremation number in Geelong of at least 480 per year. The close proximity of the crematorium to the City of Geelong would no doubt increase that figure quite considerably.

79 The Committee acknowledges that cremation numbers will drop at Ballarat and The Memorial Park, Altona Crematoria but believes this is not sufficient reason to reject Geelong's submission. Ballarat Crematorium must be encouraged to raise its prices to a more realistic level. It should no longer be subsidised by Geelong and other surrounding areas. There is little justification for its price being so much less than the three metropolitan crematoria.

80 In the case of The Memorial Park, Altona, Geelong cremations now only account for 10 per cent of its business and the Committee considers the loss of this amount, whilst having an effect, would certainly not make it an uneconomical operation. On 1982 statistics The Memorial Park conducted 1155 cremations, of which only 151 came from Geelong, leaving 1004 cremations from other areas. This figure, whilst not large when compared with cremation numbers at Fawkner Crematorium and The Necropolis, Springvale, is still quite sufficient to make the The Memorial Park a viable proposition.

CONCLUSIONS

81 Available burial areas in cemeteries around Melbourne are rapidly being used and the acquisition of new cemeteries must be a high priority. The days of the little cemetery in the Melbourne metropolis are gone and it is therefore essential that large portions of land be purchased and/or reserved for cemetery purposes at the earliest opportunity.

82 The Committee is of the opinion that the land described at Bundoora and Pakenham is in each case ideally situated for cemetery purposes. The Committee is aware that it is Government policy to sell off surplus land. However, land prices close to Melbourne are expensive and any profit to the Government from the sale of the Pakenham land will be more than absorbed if other land has to be purchased for a cemetery.

RECOMMENDATIONS

83 The Committee recommends that:

(a) the eastern section of the Janefield Colony at Bundoora be immediately developed for cemetery purposes in line with the Minister of Health's recent announcement;

(b) the Urban Land Authority land at Pakenham be purchased immediately for future development as a cemetery;

(c) the Urban Land Authority site at Melton be tested to determine its suitability for cemetery purposes before any consideration is given by the Government to purchase; and

(d) a crematorium should be established in Geelong.

Committee Room,
24 November 1983

SUBMISSIONS RECEIVED AS A RESULT OF THE ADVERTISEMENT ON 27 NOVEMBER 1982

BOTTOMLEY, Mr. J.K.

ELVISH, Mr. K.J.

GABRIEL, Mr. G.N.

HALL, Mr. P.J.T.

KENNEDY, Mrs. E.M.

SCOTT, Mr. G.L.

SUBMISSIONS RECEIVED AS A RESULT OF ADVERTISEMENTS APPEARING ON 12 AND 16 MARCH 1983

BAKER, Mr. T.C.

BAMBRA S.J., Pty. Ltd.

BOAK, Mr. M.R.

BOWLER, Mr. H.J.

BRICK, Mr. P.J.

BROWN, Mrs. A.M.

CHESSER, Mr. J.

FINCH, Dr. L.

JUDD, M.

KRONBERGER, P.

MORGANTI, Mr. E.

RANKIN, Mrs. D.

RETURNED SERVICES LEAGUE

SKIDMORE, Miss. R.

"WONDERING WOMEN" (Anonymous)

EXTRACT FROM THE INTERIM REPORT

July 1982, Working Party on

CEMETERIES AND CREMATORIA (HEALTH COMMISSION)

APPENDIX "B"

STATISTICS ON CEMETERY LAND

IN THE MELBOURNE METROPOLIS.

SUMMARY OF INFORMATION DETAILED ON NEXT THREE PAGES.

	NO. OF CEMETERIES	TOTAL AREA GAZETTED (ACRES)	TOTAL AREA USED (ACRES)	TOTAL AREA REMAINING (ACRES)	POPULATION (AS AT 30.6.80)
WEST	7 (13%)	187½ (11%)	101 (9%)	86½ (18%)	376,000 (14%)
NORTH	15 (27%)	623 (39%)	485 (43%)	138 (29%)	700,700 (25%)
NORTH-EAST	7 (13%)	72 (5%)	54½ (5%)	17½ (4%)	285,030 (10%)
EAST	5 (9%)	71 (4%)	62 (5%)	9 (2%)	517,600 (19%)
SOUTH-EAST	13 (23%)	571 (36%)	390½ (35%)	180½ (38%)	748,560 (27%)
SOUTH	8 (15%)	73 (5%)	32½ (3%)	40½ (9%)	149,200 (5%)
TOTAL MELBOURNE METROPOLIS	55	1597½	1125½	472	2,778,090

WEST -

CEMETERY	AREA GAZETTED	AREA USED	AREA REMAINING
FOOTSCRAY	27	26	1
KEILOR	14	9	5
MELTON	10	5	5
MEMORIAL PARK, ALTONA	91	31	60
TRUGANINA	4	½	3½
WERRIBEE	13	9½	4
WILLIAMSTOWN	28	20	8
	187½ ACRES	101 ACRES	86½ ACRES

Covering the Municipalities of:-

ALTONA	31,300
FOOTSCRAY	51,000
KEILOR	79,700
MELTON	20,100
PORT MELBOURNE	9,100
SOUTH MELBOURNE	20,200
SUNSHINE	95,800
WERRIBEE	41,300
WILLIAMSTOWN	27,500
	376,000

NORTH -

CEMETERY	AREA GAZETTED	AREA USED	AREA REMAINING
ARTHUR'S CREEK	6	1	5
BULLA	4	2½	1½
COBURG	23	23	0
DIAMOND CREEK (NILLUMBIK)	2	2	0
DONNYBROOK	10	1	9
EPPING	4	4	0
FAWKNER	400	305	95
GREENS-BOROUGH	½	½	0
MELBOURNE	100	100	0
NORTHCOTE	1	1	0
PRESTON	23	21½	1½
SUNBURY	27½	6½	21
WARRINGAL (HEIDELBERG)	8	8	0
WILL WILL ROOK	4	4	0
YAN YEAN	10	5	5
	623 ACRES	485 ACRES	138 ACRES

Covering the Municipalities of:-

BROADMEADOWS	102,900
BRUNSWICK	44,000
BULLA	18,000
COBURG	56,300
COLLINGWOOD	15,600
DIAMOND VALLEY	50,000
ESSENDON	58,700
FITZROY	20,300
HEIDELBERG	66,800
MELBOURNE	65,100
NORTHCOTE	52,400
PRESTON	87,300
WHITTLESEA	63,300
	700,700

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NORTH-EAST -

CEMETERY	AREA GAZETTED	AREA USED	AREA REMAINING
ANDERSON'S CREEK (WARRANDYTE)	6	2	4
BOROONDARA (KEW)	31	31	0
ELTHAM	12	7	5
KANGAROO GROUND	4	1	3
QUEENSTOWN	4	4	0
TEMPLESTOWE	10	7½	2½
YARRA GLEN	5	2	3
	72 ACRES	54½ ACRES	17½ ACRES

Covering the Municipalities of:-

CAMBERWELL	88,300
DONCASTER & TEMPLESTOWE	90,300
ELTHAM	34,000
HAWTHORN	32,000
HEALESVILLE	9,730
KEW	30,700
	285,030

EAST -

CEMETERY	AREA GAZETTED	AREA USED	AREA REMAINING
BOX HILL	31	31	0
BURWOOD	15	15	0
EMERALD	10	2	8
FERNTREE GULLY	5	5	0
LILYDALE	10	9	1
	71 ACRES	62 ACRES	9 ACRES

Covering the Municipalities of:-

BOX HILL	48,700
CROYDON	36,700
KNOX	85,600
LILYDALE	61,000
NUNAWADING	96,000
RINGWOOD	38,100
SHERBROOKE	29,600
WAVERLEY	121,900
	517,600

../3

SOUTH-EAST -

CEMETERY	AREA GAZETTED	AREA USED	AREA REMAINING
ADASS ISRAEL	5	2	3
BERWICK	8	4	4
BRIGHTON	29	29	0
CHELTENHAM NEW	42	37	5
CHELTENHAM OLD	9	9	0
CHEVRA KADISHA	22	10	12
CRANBOURNE	10	3	7
DANDENONG	10	8½	1½
HARKAWAY	3	2	1
OAKLEIGH	5	5	0
THE NECROPOLIS, SPRINGVALE	403	258	145
ST. KILDA	20	20	0
PAKENHAM -	5	3	2
	571 ACRES	390½ ACRES	180½ ACRES

Covering the Municipalities of:-

BERWICK	36,000
BRIGHTON	34,700
CAULFIELD	74,000
CHELSEA	27,400
CRANBOURNE	34,220
DANDENONG	55,800
MALVERN	45,500
MOORABBIN	102,200
MORDIALLOC	29,400
OAKLEIGH	55,700
PAKENHAM	17,640
PRAHRAN	47,200
RICHMOND	25,500
SANDRINGHAM	32,300
SPRINGVALE	80,000
ST. KILDA	52,000
	748,560

SOUTH -

CEMETERY	AREA GAZETTED	AREA USED	AREA REMAINING
CRIB POINT	11	3	8
DROMANA	9	5	4
FLINDERS	7	3	4
FRANKSTON	8	6½	1½
MORNINGTON	20	8	12
RYE	4	2½	1½
SORRENTO	8	3	5
TYABB	6	1½	4½
	73 ACRES	32½ ACRES	40½ ACRES

Covering the Municipalities of:-

FLINDERS	26,300
FRANKSTON	81,600
HASTINGS	17,600
MORNINGTON	23,700
	149,200

RECOMMENDATIONS OF THE INTERIM REPORT

July 1982, Working Party on

CEMETERIES AND CREMATORIA (HEALTH COMMISSION)

TERMS OF REFERENCE:

The Working Party on Cemeteries and Crematoria was established by the Health Commission of Victoria in March 1980 at the direction of the then Minister of Health (The Hon. W.A. Borthwick, M.P.),with the following Terms of Reference -

1. Consider and report on ways and means of caring for those cemeteries which are reaching the end of their economic life;

2. Consider the role of the State Government in matters relating to cemeteries and crematoria and the resources necessary to undertake that role;

3. Advise on steps that might be taken to provide adequate facilities for burial and cremation;

4. Advise on procedures aimed at ensuring the efficient management of cemeteries and crematoria;

5. Review the Cemeteries Act 1958 No. 6217.

../3

URGENT RECOMMENDATIONS:

It is apparent that overall, there are shortcomings in the present administrative operations of cemeteries within Victoria. A major observation by the Working Party indicates that the financial obligation of cemetery trusts for future maintenance of their cemeteries has already created, or will create a major problem very soon.

The Working Party has also noted that some metropolitan cemeteries have very little land available for use as gravesites and have reached or are reaching the end of their viable life, with insufficient funds to finance their continuing operations.

Because cremation is still not as common as earth burials (see later in this report), the most urgent need is the provision/reservation of some major sites for cemeteries within the metropolis. Concurrently, action should be taken to close some cemeteries. The Working Party opposes the construction of graves on cemetery roads and paths and recommends that this practice should cease immediately. These and other points will be elaborated on in the Final Report.

Appendix A shows the location of cemeteries in the Melbourne metropolis referred to in this Interim Report.

The most urgent recommendations of the Working Party are: -

1.1 that immediate steps be taken by the Government to secure the purchase and/or reservation of the following parcels of land for use as future cemeteries to serve the Melbourne Metropolitan Area (in priority of burial needs) -

(a) Lilydale	- 82 hectares - Victoria Road, Lilydale.
(b) Melton	-162 hectares - Between Bulmans and Harkness Roads, Melton.
(c) Bundoora	-162 hectares - Eastern part of the Janefield Colony.
(d) Pakenham	-162 hectares - Princes Highway, Pakenham.
(e) Fawkner	-56.3 hectares - North of the existing Northern Memorial Park.

1.2 that steps be taken by the Government to secure a 7.3 hectares parcel of land situated south of the existing Keilor Public Cemetery. This is seen as a logical extension to the present Cemetery and may overcome short term land problems in that region.

2. that the following cemeteries be closed to sales of new gravesites, as soon as practicable -

Boroondara (Kew), Box Hill, Brighton, Coburg, Nillumbik (Diamond Creek), Ferntree Gully, Footscray, Frankston, Lilydale, Preston, St. Kilda, Templestowe, Warringal (Heidelberg) and Werribee.

This procedure is possible under Section 44 of the Cemeteries Act 1958. Burials in graves where rights of burial have already been sold or can be exercised would still be allowed. In the light of recent experiences, e.g., at Melbourne General Cemetery, some sites should be retained within these cemeteries to cater for possible shortcomings of previous Cemetery Trusts.

RECOMMENDATIONS: -

(i) that the cemeteries listed on Page 3, Item 2 be closed to all burials, as soon as practicable, except where rights of burial already sold are still valid. This will have no direct cost to Treasury but will cause a loss of revenue to the respective cemetery trusts. Preliminary steps are being taken in this regard.

(ii) that legislation be prepared to enforce a limited tenure on rights of burial. The effect of this would be to prohibit any burials fifty years after a date proclaimed for each cemetery : the land would then be transferred to the local municipal council for use as a passive recreation area.
There would be no direct cost to Treasury.

(iii) that financial assistance be provided by the Government to maintain the cemeteries over this fifty year period. This will be necessary because of the decreasing revenue of the Trust and in most cases, the lack of adequate financial reserves. The cost to Treasury is impossible to assess but there may be some scope for rationalisation and economy if the proposal for Regional Cemetery Trusts (see Page 9 Item 2.1.4) is accepted.

RECOMMENDATIONS: -

(i) That the Cemeteries Act 1958 be re-written. (See Page 19)

(ii) That cemeteries and crematoria be operated as business propositions, financially responsible for both daily operations and future maintenance. This can be done: -

(a) by introducing a standard fee for all Rights of Burial purchased;

(b) by providing for a variable interment fee which accurately mirrors the costs of such operation; and

(c) by providing that a small levy be added to each interment fee and cremation fee to be placed in a Trust fund which can be distributed to impoverished cemeteries on an established needs basis.

There should be no on-going cost to Treasury but some specific grants may be necessary initially. It is impossible to assess this latter amount.

(iii) that a Regional Cemetery Trust be established, in the following twelve areas and that the Regional Trust be provided with sufficient staff and facilities: -

Barwon, Central, Gippsland East, Gippsland West, Mallee, North, North-East, Western and Wimmera plus three Regional Cemetery Trusts in the Melbourne Metropolitan Area.

A map showing the proposed regions is attached as Appendix E.

The estimated cost of operating a Regional Cemetery Trust is $30,000 per year making a total annual operating cost of $360,000.

(iv) that a Central Cemeteries Board be established as a government body responsible to a Minister and with adequate staff to enable proper oversight of the operations of Regional Cemetery Trusts. The estimated annual cost to Treasury would be $100,000.

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3.4 POSSIBLE FUTURE CEMETERY LAND - (Cont'd)

RECOMMENDATIONS: -

(i) that the Government consider establishing crematoria at Traralgon, Shepparton, Bendigo, Horsham, Hamilton and Geelong and that the necessity for the provision of crematoria at other centres be kept under review.

Funding for the proposed Traralgon crematorium has already been arranged. The estimated cost of establishing a crematorium is $600,000 making a total establishment cost of $3.0 million to which should be added maintenance grants until each crematorium becomes self-sufficient.

(ii) that immediate steps be taken to secure the purchase and/or reservation of the following parcels of land for future cemetery use as detailed on Item 3.4, the estimated costs being: -

		Approx. Purchase Price:
Lilydale	-	$450,000
Melton	-	$600,000
Bundoora	-	NIL
Pakenham	-	$600,000
Fawkner	-	$1,463,000
Keilor	-	$81,000
		$3,194,000

The preliminary development costs at each of these sites would vary tremendously.

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TERMS OF REFERENCE:

ITEM 4.

4. "To advise on steps that should be taken to ensure the efficient management of cemeteries and crematoria".

The following options are identified -

4.1. Divide Victoria into regions each with a Regional Cemetery Trust responsible for the operation and management of cemeteries and crematoria within its region. Full details of this option are contained in Item 2.1.4 on page 9 of this Report.

4.2. Formulate a Code of Ethics for cemetery trustees and trust officers, including information on powers and duties of trustees, recommended procedures for costing scale of fees, basic accounting and bookkeeping requirements, tendering for goods and services, recording and storage of information on burials and cremations, rules and regulations, requirements of trustees under the different sets of legislation involved with cemetery administration. Full details will be provided in the Final Report.

4.3. The options identified for those cemeteries that have reached or were approaching the end of their economic life are contained in Items 1.1 to 1.5 on page 6 of this Report.

RECOMMENDATIONS:

1. That Regional Cemetery Trusts be established with sufficient staff and expertise to administer the cemeteries as previously detailed on Page 9, Item 2.1.4 (d).

2. That a Central Cemeteries Board be established with sufficient staff and expertise to oversee the operations of the Regional Trusts.

3. That a mandatory Code of Ethics for cemetery trustees and trust officers be introduced.

.../18

TERMS OF REFERENCE:

ITEM 5.

5. "To propose recommendations for revision of the Cemeteries Act 1958".

This item is still under consideration and details of recommendations made will be included in the Final Report of the Working Party.

NOTES ON RELEVANT PARTS OF THE MELTON CORRIDOR BY MR P G DAHLHAUS, DEPARTMENT OF MINERALS AND ENERGY

1 GEOLOGY

Qpe — Quaternary "Darley gravels" from work done in area recently for Engineering Geology Mapping. The current theory is that this is probably overbank type deposits rather than the Darley gravels described at Darley.

Qvn — Basalt (Newer Basalt). Underlies the Qpe.

2 GOVERNMENT BORES IN THE AREA

2.1 Bores Numbers

Djerriwarrh 2, 73, 74, 75, 76, 77, 89, 90, 91, 92, 93, 94, 95, 96

2.2 Details of Bores

Djerriwarrh 2, Drilled 1894

3' 2"	surface clay
100' 5"	basalt
14' 6"	yellow clay
3' 11"	gravel and clay
4' 6"	gravel

Sandstone at 126' 6"

2.3 Bore Number (Parish of Djerriwarrh)

73	1.7 m clay)	Drilled along Bulmans Road (East boundary of site) in 1983
74	1.6 m ")	
75	0.8 m ")	
76	0.8 m ")	
77	2.7 m ")	

2.4 Bore Number (Parish of Djerriwarrh)

89	3.2 m clay, sandy clay)	Drilled along Harkness Road (West Boundary) 1983
90	3.4 m " " ")	
91	4.2 m " " ")	
92	1.1 m ")	
93	> 4.25m " " ")	
94	> 4.25m " " ")	

2.5 Bore Number (Parish of Djerriwarrh)

95	> 4.25 m clay, clayey sand, clayey silt)	Drilled along Porteous Road 1983
96	> 2.72 m " & scoria (eruption point to north)	

3 "SINKHOLES"

Area in question is pockmarked with subsidence features generally thought to be derived from collapse of soil pipes formed by dispersion of soil in percolating groundwater/rainwater. More work needs to be done to substantiate this possible problem, which could rule out the site for cemetery development.

SUBMISSIONS RECEIVED IN RELATION TO GEELONG CREMATORIUM ISSUE

BOROUGH OF QUEENSCLIFFE

CITY OF BARWON

CITY OF GEELONG

CITY OF NEWTON

CREMATORIUM FOR GEELONG COMMITTEE

GEELONG CHAMBER OF COMMERCE

GEELONG REGIONAL COMMISSION

GEELONG TRADES HALL COUNCIL

HENSHAW, The Hon. D.E., M.L.C.

SHIRE OF BANNOCKBURN

SHIRE OF BELLARINE

SHIRE OF CORIO

SHIRE OF WINCHELSEA

UNITING CHURCH IN AUSTRALIA - Presbytery of Barwon.

F D Atkinson Government Printer Melbourne

MORTUARY INDUSTRY AND CEMETERIES ADMINISTRATION COMMITTEE

Second Report

THE ADMINISTRATION OF CEMETERIES IN VICTORIA

Ordered to be printed

D.38

EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

FRIDAY, 2 JULY, 1982

38 MORTUARY INDUSTRY AND CEMETERIES ADMINISTRATION COMMITTEE - The Honourable W.A. Landeryou moved, by leave, That the Honourables C.J. Kennedy and R. Lawson be members of the Mortuary Industry and Cemeteries Administration Committee.

Question-put and resolved in the affirmative.

EXTRACTED FROM THE VOTES AND PROCEEDINGS OF THE LEGISLATIVE ASSEMBLY

Thursday, 1 July, 1982

37 COMMITTEE APPOINTMENTS - Motion made, by leave, and question - That, contingent upon the Legislative Council concurring with the Resolutions of this House dated 1 July 1982 establishing the respective committees-

* *

(b) Mr Culpin, Mr Kirkwood, Mr Lieberman and Mr Ross-Edwards be appointed members of the Mortuary Industry and Cemeteries Administration Committee-

-(Mr. Fordham)-put and agreed to.

TERMS OF REFERENCE

JOINT RESOLUTION OF LEGISLATIVE ASSEMBLY AND LEGISLATIVE COUNCIL - 1 JULY 1982

1 That a Joint Select Committee be appointed to inquire into and report upon all aspects of the mortuary industry and related industries in Victoria, including both private and Government operations, together with any aspect of cemeteries administration, funding or provision of land encompassed by the Cemeteries Act 1958, the Trustees Act 1958, or any other provision relating thereto.

2 That the Committee shall give priority to such investigations referred to it by resolution of the Legislative Council and the Legislative Assembly.

3 That the Committee be required to present its Final Report to the Parliament no later than 31 December, 1983.

4 That the Committee consist of six Members, comprising not more than four Members of the Legislative Council nor more than four Members of the Legislative Assembly.

5 That four members of the Committee constitutes a quorum of the Committee but a quorum of the Committee shall not consist exclusively of Members of the Legislative Council or Members of the Legislative Assembly.

6 That the Committee shall elect one of its members to be Chairman who, in the event of an equality of votes, shall also have a casting vote.

7 That the Committee may elect a Deputy Chairman who shall exercise all the powers and peform the duties of the Chairman at any time when the Chairman is not present at a meeting of the Committee.

8 That the Committee may sit and transact business during any adjournment or recess of the Houses in the period for which it holds office but the Committee shall not sit during the sittings of either House of Parliament except by leave of that House.

9 That the Committee may sit at such times and in such places in Victoria or elsewhere as seems most convenient for the proper and speedy despatch of business.

10 That the Committee may send for persons papers and records and report the minutes of evidence from time to time.

11 That the Committee have power to authorize publication of any evidence given before it and any document presented to it.

12 That, contingent upon the enactment of the Parliamentary Committees (Joint Investigatory Committees) Bill, the Committee be a Committee to which section 51A of the Parliamentary Committees Act 1968 applies.

13 That the foregoing provisions of this resolution, so far as they are inconsistent with the Standing Orders and practices of the Houses, shall have effect notwithstanding and anything contained in the Standing Orders.

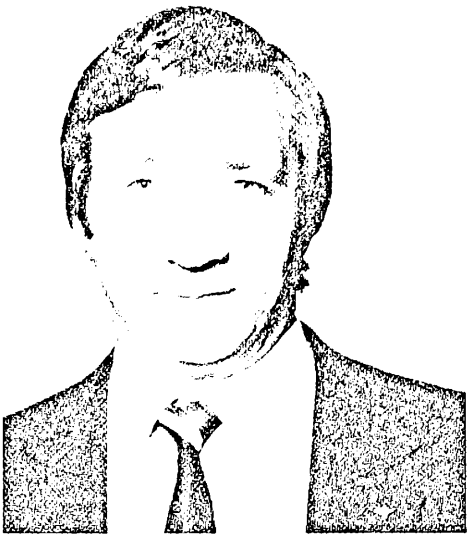
TERMS OF REFERENCE

JOINT RESOLUTION OF LEGISLATIVE ASSEMBLY AND LEGISLATIVE COUNCIL - 11 OCTOBER 1983

That the resolution of the House of 1 July 1982 appointing the Mortuary Industry and Cemeteries Administration Committee and providing that the Committee be required to present its Final Report to the Parliament no later than 31 December 1983, be amended so far as to require the Final Report to be presented to the Parliament no later than 31 March 1985.

MEMBERSHIP

Chairman:
Mr. Carl Kirkwood, M.P.



Deputy Chairman:
The Hon. L.S. Lieberman, M.P.

Mr. J.A. Culpin, M.P.

The Hon. C.J. Kennedy, M.L.C.

The Hon. Robert Lawson, M.L.C.

Mr. P. Ross-Edwards, M.P.

Secretary: Mr. Gordon Tippett.

INTRODUCTION BY THE CHAIRMAN

This Second Report to Parliament by the Mortuary Industry and Cemeteries Administration Committee, is an examination of the overall system by which cemeteries are administered in Victoria and the problems associated with that system.

The Committee in looking at the topic of cemeteries, decided that its investigation should take two parts, firstly an appraisal of the overall structure and management systems which apply and secondly, an examination of a number of individual problems which may apply to particular cemetery trusts or all of them collectively, and will include detailed comment on the Cemeteries Act 1958.

This report questions the effectiveness of the current cemeteries system and calls for a re-organisation of the make-up of the basic components of the system, the cemetery trusts. If this re-organisation takes place the Victorian people will have a system which incorporates levels of accountability and effectiveness not achieved in the past.

I do not want to discount the value of the voluntary work carried out by the thousands of Victorians who have served on cemetery trusts, as the Committee feels that the restraints placed on those trustees by the system, made their work very difficult.

The Committee is encouraged by the reaction to its First Report, tabled in December 1983, which examined the situation in relation to the need to expand or establish new cemeteries in Melbourne and the need for a crematorium at Geelong.

Since the tabling of that report the Minister of Health has advised the Committee that progress is being made with the Bundoora proposal, including a current budget allocation of $150,000. Consultation with community groups and interests surrounding that property is now taking place.

Geological testing of the Melton area recommended in the Report is being conducted at the request of the Health Commission and I understand that investigations are about to commence at the Pakenham site. Local public reaction to the Geelong Crematorium recommendation has been favourable.

Finally, I would like to express the gratitude of the Committee to its Secretary, Mr. Gordon Tippett, for his advice and guidance during this examination and also to thank Mrs. Jennifer Hutchinson and Miss Karen Day for their help in the preparation and production of this report.

Carl Kirkwood,
Chairman,

RECOMMENDATIONS

THE COMMITTEE RECOMMENDS THAT:

(A) THE COUNCILS OF MUNICIPALITIES REPLACE THE TRUSTEES OF ALL EXISTING CEMETERY TRUSTS WITHIN THEIR BOUNDARIES, AS PERMITTED BY SECTION 3(2) OF THE CEMETERIES ACT 1958; EXCEPT FOR THE NECROPOLIS TRUST, SPRINGVALE, THE FAWKNER CREMATORIUM AND MEMORIAL PARK TRUST, ALTONA; WHICH SHOULD REMAIN AS CONSTITUTED AT PRESENT. THE QUESTION OF LOCAL GOVERNMENT REPRESENTATION ON THE THREE MAJOR METROPOLITAN TRUSTS HAS BEEN SUGGESTED BUT THE COMMITTEE WOULD NOT RECOMMEND THIS UNTIL FURTHER DISCUSSIONS HAVE BEEN HELD WITH THESE TRUSTS;

(B) ALL ACCOUNTING, MANAGEMENT, MAINTENANCE AND ENGINEERING FUNCTIONS BE CARRIED OUT IN ACCORDANCE WITH THE STANDARDS SET AND SUPERVISED BY THE LOCAL GOVERNMENT DEPARTMENT;

(C) THE HEALTH COMMISSION MAINTAIN ITS CURRENT RESPONSIBILITIES UNTIL SUCH TIME AS THE COMMITTEE REPORTS ON ITS REVIEW OF THE CEMETERIES ACT 1958; AND

(D) THE HEALTH COMMISSION SHOULD DEVELOP AN EFFECTIVE FORWARD PLANNING MECHANISM TO PREDICT WELL IN ADVANCE THE NEED FOR NEW CEMETERY LAND PURCHASES.

INDEX

APPROACH TAKEN BY THE COMMITTEE

1. The Committee commenced activities on 19 July 1982 and after its initial appraisal of the situation decided that as the Terms of Reference cover a wide variety of topics, some of which are unrelated, the Inquiry would take the form of a number of individual investigations, each the subject of one or more report, together with a final summary report.

2. The topics determined by the Committee are self-contained but in some aspects will interlink. They are:

- cemeteries;
- funeral directors;
- monumental masons; and
- mausoleums.

3. In the period since the formation of the Committee it has not confined itself to a sequential study of these topics but has gathered information on all topics using the following techniques:

- public submissions;
- industry questionnaires;
- departmental records;
- formal evidence;
- independent research;
- discussions before the Committee; and
- a number of inspections throughout the State.

4. The Health Commission working party on Cemeteries and Crematoria established by the then Minister of Health (The Hon. W.A. Borthwick) in March 1980, reported in its interim report in July 1982 that there were critical shortages of cemetery land in the metropolitan area. This problem was seen by the Committee as being the most urgent area for initial consideration.

5. This resulted in the tabling of the First Report of the Committee on 1 December 1983, on Metropolitan Cemetery Land Needs and a Crematorium at Geelong.

6. The Committee has agreed that the next area of concern for the Government of Victoria is the overall system by which cemeteries are operated in the State, and is the theme of this Second Report.

REASONS FOR AN INQUIRY INTO CEMETERIES ADMINISTRATION

7. The Minister of Health, the Honourable T. Roper, M.P., in moving the motion in the Legislative Assembly on 1 July 1982 which led to the establishment of this Committee detailed a number of reasons for the Inquiry.

8. In respect to cemeteries in Victoria he indicated that there were three major matters of concern:

   (a) the inadequate level of resources committed by the Health Commission of Victoria to fulfill the obligations imposed on it by the Cemeteries Act 1958;

   (b) the overall system by which cemeteries are operated in Victoria; and

   (c) the planning for and the management of individual cemeteries .

9. Falling within these areas were a number of instances related to specific cemetery trusts which in recent times had required examination by Health Commission officials and/or the Victoria Police.

   Those trusts named were for the:

   - Melbourne General Cemetery;
   - Lilydale Cemetery; and
   - Templestowe Cemetery.

10. The attention of the Committee has been subsequently drawn to the circumstances surrounding the removal or resignation of members of the Ferntree Gully Cemetery Trust and their replacement by the Councillors of the City of Knox.

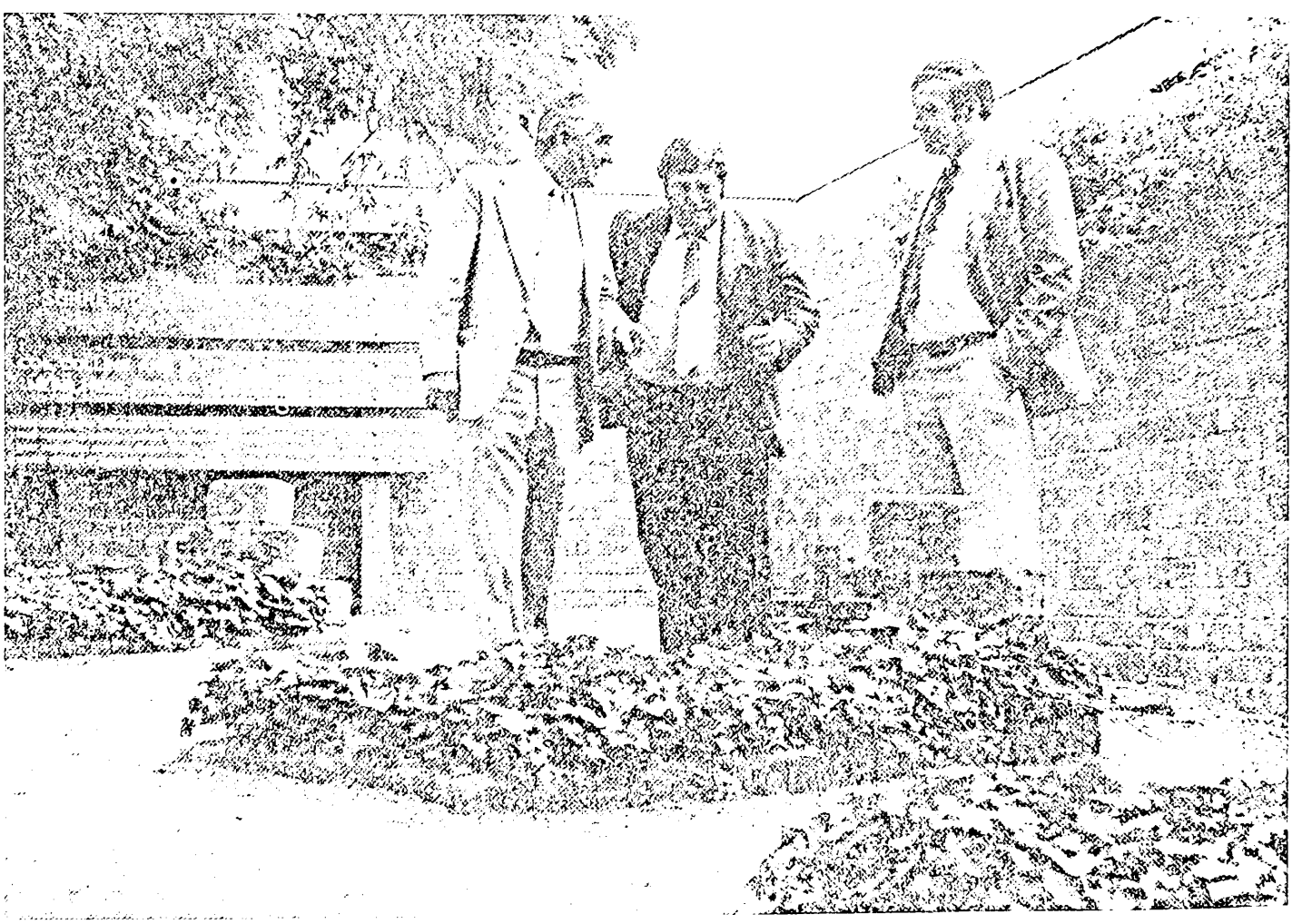
11. A number of other matters related to the mortuary industry and monumental masons were referred to by the Minister and these will be addressed in future reports.

THE VICTORIAN CEMETERY SYSTEM

12. The Cemeteries Act 1958 is the latest consolidation of a number of statutes dating from 1825 which relate to the administration of cemeteries in Victoria. This Act gives responsibility for cemeteries to the individual trusts with the Minister taking a supervising role.

13. There are today 551 public cemetery trusts and a small number of private cemeteries usually operated by religious orders. Most of the trusts have been created by order of the Governor-in-Council.

14. Four of the trusts as well as providing traditional earth burials, operate crematoriums. In the last statistical period available, 1981, the percentage of cremations to deaths registered was 40.51%.



Messrs. Kirkwood, Culpin & Kennedy inspect the early settlers graves at Sorrento.

(a) Historical Background

15. The first recorded European death was that of a free settler with the 1803 expedition led by Lt. Col. David Collins which landed at Sorrento in an attempt to establish a British settlement in Port Phillip. John Skilhorne who had been ill during the voyage, died on 10 October 1803, the day following the landing.

16. In the short period of that settlement, there were 29 known deaths, and most burials took place on the eastern of two hills at Sullivan's Bay called the "Two Sisters". Four graves are preserved in a small reserve on this site today, however the origin of their occupants is uncertain as it is known that early peninsula settlers from the next period of settlement were also buried in this area.

17. As Collins was not impressed by the potential of Port Phillip for the purposes of settlement in January 1804 he gained authority to remove the settlement, first to Risdon on the northern coast of Van Dieman's Land and eventually the party went on to found Hobart.

18. Some deaths also occurred at the short-lived Corinella Settlement on Western Port Bay in 1826 but it was not until 1835 when Melbourne was permanently settled by the John Batman/John Pascoe Fawkner parties that there was a need to select a permanent burial area.

19. No deaths occurred in the first year 1835, but on 13 May 1836, the body of Willie Goodman, a child, was buried on "Burial Hill", now part of the Flagstaff Gardens. There were three burials on Burial Hill in 1836, one in 1837 and twenty in 1838.

20. By 1837 it was apparent to Robert Hoddle, when he was preparing the surveys of the township, that this site was not suitable for the expanding settlement and so an area of ten acres was assigned as a public burial ground (part of the present site of the Queen Victoria Market). This was ratified during the visit by the Governor Richard Bourke and the first burial took place there in that year.

21. This cemetery was divided into sections as follows:

- Church of England .. 2 acres
- Church of Scotland .. 2 acres
- Roman Catholic .. 2 acres
- Independent .. 1 acre
- Jews .. 1 acre
- Society of Friends .. 1 acre
- Wesleyean .. 1 acre

Later half of the sections allocated to the Society of Friends was set aside for aborigines. Convicts were buried outside the northern boundary in no-mans land.

22. Individual trusts were given Crown Land grants for each of the religious areas in the cemetery. This was a new concept for burial grounds, departing from the English tradition of burial within Church yards.

23. The Old Cemetery as it became known was proclaimed closed in 1854 following the opening of the new Melbourne General Cemetery in 1853. It re-opened again in 1864 for the period until October 1867 when it was finally closed to all burials except for those who held land there.

24. In 1877 pressure to expand the market area resulted in part of the Jewish area and the whole of the Quaker and Aboriginal areas being taken over. The forty five known bodies were exhumed from this area and re-interred in the Melbourne General Cemetery.

25. In 1917 it was decided that all of the remaining cemetery would be taken over by the Queen Victoria Market and a further 914 bodies were exhumed and transferred to fifteen suburban cemeteries, the major number to Fawkner.

26. During the 80 years existence of the Old Cemetery it was noted for its neglected state and this has been blamed on the fragmented administration, the change from the churchyard concept (the English did not adopt General Cemeteries until the passing of an act in 1855), and the rapid growth of the colony fed by the gold fever of the 1850's.

27. Because of this neglect, records of burials were not well kept and it is difficult to estimate the number of burials which took place although Isaac Selby(1) believes the figure to be approximately 10,000. As mentioned records indicate that only 959 bodies were exhumed before the area was taken over by the Market.

28. Legislation passed in New South Wales in 1850 allowed the establishment of the Melbourne General Cemetery on 40 acres, one mile north of the town, and this Cemetery opened for public use on 1 June 1853.

29. In 1854 an Act for the Establishment and Management of Cemeteries in the Colony of Victoria(2) was passed forming the basis for the Cemetery Administration as we know it today.

The Mayor of Frankston Cr. Holland and Mr Kirkwood during the inspection of the Frankston Cemetery.

(b) Basic Statistical Information

30. Each year in Victoria there are approximately 30,000 deaths from a population of 3.8 million people, a rate of 13 deaths per 1,000 people. This rate when compared over the previous five years as shown in Table 1 is remarkably constant.

TABLE 1

Births, Deaths and Marriages in Victoria

Year	Number registered			
	Marriages	Live births	Deaths	Infant deaths (a)
1977	27,558	59,518	29,478	653
1978	27,178	58,861	29,096	616
1979	27,019	57,767	29,078	652
1980	27,724	58,206	29,374	592
1981	28,648	58,513	29,034	562

(a) Included in deaths. An infant death is the death of a live born child under 1 year of age. (Victorian Year Book, 1983)

31. This table is reproduced here as it appears in the 1983 Victorian Year Book. The Committee has noted that the rate of live births is approximately double the current death rate and believe that this has implications for the future planning of cemeteries which are discussed later in this report.

32. An important yardstick for this inquiry is a comparison with the practices adopted by other States in approaching cemeteries administration and the figures shown in Table 2 are relevant in determining their compatibility with the Victorian situation.

TABLE 2

Comparison of the Number of Deaths State by State

Year	N.S.W.	Vic.	Qld.	S.A.	W.A.	Tas.	N.T.	ACT	Aust.
1981	39,959	29,034	17,175	9,706	7,993	3,320	854	962	109,003
%	36.7	26.6	15.8	8.9	7.3	3.0	0.8	0.9	100.0

(Victorian Year Book, 1983)

33. The Victorian rate of cremation is approximately 40% of the total deaths as shown in Table 3. It was also indicated that the figures for the five year period are remarkably stable.

TABLE 3

Cremations and Deaths

Year	Total Cremations	Total Deaths registered	Percentage of cremations to deaths registered
1977	11,699	29,478	39.69
1978	11,644	29,096	40.02
1979	11,683	29,078	40.18
1980	11,805	29,374	40.19
1981	11,762	29,034	40.51

(Victorian Year Book, 1983)

34. The location of deaths in Victoria is divided in proportion to the population as shown in Table 4, approximately two-thirds in the metropolitan area and one-third for the rest of the State.

TABLE 4

Locations of Deaths, 1981

	Deaths	Population	Rate per 1000
Melbourne	19,971	2,722,817	13.6
Rest of Victoria	9,104	1,109,626	12.1
	29,075	3,832,443	13.2 (7)

35. The 551 Public Cemeteries generated a total income in 1982 (the last published figures) of $M11 and at 31 December 1982 held reserves of $M18.5.

36. The figure for the reserves held represents a wide range of balances held by the individual trusts but in the main represents the funds held by the 13 metropolitan and 9 country trusts that hold in excess of $50,000.

(c) Cemetery Administration

37. The 551 public cemeteries in Victoria are administered directly by the system of trusteeship. Of this total 56 are located in the metropolitan area, with the remaining 495 spread throughout the rest of the State.

38. Consolidated records are not kept by the Health Commission of the overall number of trustees so it is difficult to estimate how many Victorians are undertaking this public spirited community activity. The Cemeteries Act 1958 S.3(1) allows the Governor in Council to "... appoint so many trustees not fewer than three in number as he thinks fit for any public cemetery ...". There are also 86 municipalities where the entire Council has been appointed to be the trustees of a cemetery.

39. To get an order of magnitude the Committee has estimated that if the average number of trustees per trust is six, then there must be at least 3,300 people involved in voluntary cemetery administration in this State.

40. The first trusts were created to administer the individual religious sections of the Old Melbourne Cemetery starting in 1843.

41. Trusts are independent within the bounds of the provisions of the Cemeteries Act 1958 and the overall requirements for trustees as set out in the Trustee Act 1958.

42. As trusts have the ability to set the level of their own charges (with the approval of the Governor in Council) the system is expected to be self sustaining although this has not always occurred.

43. Administrative supervision of cemetery trusts is exercised by the Minister of Health through the Health Commission. The Public Health Division of the Commission has a Cemetery Officer and two other administrative officers who are employed to directly supervise the activity of the trusts.

44. Each trust is required by the Statute to furnish the Health Commission with the annual financial details of their activities together with a statement of the physical conditions of the cemetery. The Health Commission

consolidates the financial information and this is published each year in the Government Gazette.

(d) Legislation

45. The administration of public cemeteries is regulated in the main by two statutes, the Cemeteries Act 1958 and the Trustee Act 1958.

46. The Cemeteries Act defines the role of cemetery trusts, the method of establishment and operation, and their accountability to the Government.

47. The Trustee Act does not refer to the cemetery trusts specifically, but defines the parameters for the conduct of all trusts under Victorian law.

48. The first legislation to apply to cemeteries here was the New South Wales Legislative Council Act for "... better regulatory and preserving Parish and other Registers of Births, Baptisms, Marriages and Burials in New South Wales and its Dependencies, including Van Diemen's Land", dated 1st November, 1825.

49. This Act as its title indicates related to the keeping of the registers of the milestones in the lives of the inhabitants of the colony, but it also contained the following section:

> "X. And be it further enacted, That from and after the First of January, One Thousand Eight Hundred and Twenty Six, No burial shall take place within the limits of any Town, otherwise than in any burial ground which must be set apart for such purposes, and which burial ground must be distant one mile at least from any Town or Township."(3)

50. This was the current statute applying when Hoddle and Burke laid out the infant settlement of Melbourne in 1837. However, the Old Cemetery site (the current Victoria Market) was certainly not "distant one mile at least" from Latrobe Street, the Northernmost point.

51. In September 1850, the New South Wales Legislature passed "An Act for the establishment and regulation by trustees of a general cemetery near the City of Melbourne."(4) This was the first legislation which related specifically to Melbourne and it incorporated a section allowing for the closure of the Old Cemetery.

52. The first legislation relating to Victoria as a whole was "An Act for the establishment and management of Cemeteries in the Colony of Victoria"(4) passed in March 1854.

53. It is interesting to note and aspects of this are discussed in detail in other parts of this report, that the methods of appointment of the trustees and the accountability to the Government that are laid out in the 1850 Act are word for word (with minor adjustment for the change of status of the colony) those used in the Cemeteries Act 1958.

54. The Health Commission Working Party on Cemeteries and Crematoria has recognised that the current Act has shortcomings and has produced a draft for a Revised Cemeteries Act. This has been released for comment to interested groups, and this Committee will make its detailed comments in its next report.

55. A trust has been defined as "... an equitable obligation which binds a person (called a trustee) to deal with some specific property (the trust property) for the benefit of persons (called the beneficiaries) or for the advancement of some specific purpose."(5)

56. The use of the trust was a fashionable British tool for public administration right up until the wave of nationalisation which followed World War II. Donald P. Gracey in his consultant report for the Public Bodies Review Committee on "Ministerial Responsibility and Public Bodies in Victoria" makes the following comment, "The trust concept requires that the Government have no continuing interest in policy, operation or financial control. Funding would best be managed through funds generated by the trust itself or from private sources. It continuing government financial support is required, an endowment fund, a one-off grant or "untied" periodic grants are best suited to the purpose."(6)

57. It is difficult to find a reason for the choice of the trust concept for cemeteries other than the fact that at the time of the establishment of the first cemeteries the other forms of Government were not well developed. Government officials were directed from Sydney and it appears that much of the revenue from the colony, such as that from land sales, was channeled in that direction.

58. Local Government commenced in 1841 with the establishment of the Town of Melbourne but once again revenues were low. There is evidence of a long and protracted argument between the Councilors and the Government over the responsibility for the parklands surrounding the township. La Trobe had set aside the large breathing spaces which we enjoy today, and the Government set up trusts to administer them such as the Albert Park Trust and the Royal Park Trust. There is no direct information that this was also the case with cemeteries but it is indicative that in the early 1800's trusts were seen as an effective form of self-help public administration.

59. It is also interesting to examine the types of Government functions that are subject to administration by trusts today. The following list is derived from the Touche Ross study commissioned by the Public Bodies Review Committee in 1981[7], which revealed the existence of over 9,000 public bodies in the Victorian system of Public Administration. It is ironic to this inquiry that the 550+ Public Cemetery Trusts, the subject of this report, were not included in the compilation of that figure.

Exhibition Trustees;
Geelong Harbour Trust;
Melbourne Wholesale Fruit and Vegetable Market Trust;
Portland Harbour Trust;
Shrine of Remembrance Trustees;
Victorian Conservation Trust;
Victorian Arts Centre Trust;
Trustees of the Library Council of Victoria;
Trustees of the National Gallery;
Trustees of the National Museum;
Trustees of the Science Museum;
Yarra Bend Park Trust;
River Improvement and Drainage Trust (31);
Waterworks Trusts (188).

(e) Government Involvement

60. Victorian Public Cemetery Trusts are created by order of the Governor-in-Council. Administrative responsibility is vested in the Minister for Health and this is supervised by the Health Commission.

61. The Hon. Tom Roper, M.P., Minister for Health was critical of the level of supervision given by the Health Commission, when he spoke to the motion which created this Committee.

62. The Committee agrees with the view of the Minister that current resources are inadequate and this is reflected in the overall state of the system of Cemetery management. The basic fact is that it is impossible for three officers to over-sight the activities of 551 independent organisations effectively.

63. The Health Commission vets the creation of new trusts, the appointment of new or replacement trustees and changes to the level of fees charged prior to their submission to the Governor-in-Council for approval.

64. The underlying concept in respect to the financing of the operation of Cemeteries is that the level of fees charged should be sufficient to cover the level of expenditure. This principle works for the majority of trusts although the resources available for the ongoing maintenance of cemetery ground is consistently the greatest concern of the trustees of the Cemeteries visited by the Committee.

65. Each year a budgeted allocation is made to the Health Commission for distribution to trusts for maintenance purposes. The current allocation of $18,000 appears to the Committee to be token and is selectively distributed to the trusts with the greatest need.

66. Specific grants are also made from time to time usually for establishment costs or for the purchase of land where expansion. In the current budget $89,000 has been given to the Trustees of The Necropolis, Springvale to cover expenditure incurred in the restoration of the Melbourne General Cemetery, and an amount of $150,000 has been allocated for development costs for a new cemetery at Bundoora.

67. The Government is also a source of loan funds for trusts and currently are making repayments on amounts totalling $709,000. The Treasurer has the ability to act as guarantor for privately funded loan borrowings and $120,947 is presently guaranteed in this manner.

68. Individual trusts are required by the Act to provide to the Health Commission each year an extract of their financial activities and a report on the state of the trust properties. The financial extracts are summarised by the Commission and published in the Government Gazette.

69. The Commission has the prerogative to recommend to the Governor-in-Council that trusts be ordered to undertake works to correct necessary maintenance or repair using surplus reserves held by the relevant trust.

MAJOR MATTERS FOR CONCERN

70. As indicated earlier in the discussion on the reasons for an inquiry into Cemeteries Administration, the Minister of Health, the Hon. Tom Roper, M.P., outlined three main areas of concern to the Parliament.

71. The Committee has examined these areas and they are discussed in the following section.

(a) OVERALL SYSTEM BY WHICH CEMETERIES OPERATE

Accountability

72. Much has been said in recent times on the need for Government bodies to have direct links with the areas which they serve.

73. Cemetery trusts are with few exceptions composed of members of the communities which are serviced by the Cemetery. In early years trusts mirrored the original Melbourne trusts with members nominated by the religious groups represented in that area. In many cases this has now changed but some do follow this practice.

74. The trusts are independent within the statutory requirements, which are supervised by the Health Commission.

75. Cabinet responsibility rests with the Minister of Health who in turn answers to the Parliament and to the people of Victoria.

76. Thus the accountability chain can be illustrated in the following manner:

Cemetery Trusts
(551 Individual Trusts)
↓
Health Commission
(3 Officers)
↓
Minister of Health
↓
Parliament
↓
People of Victoria

77 The Committee is concerned, not that the linkages in this chain are obscure or broken, but that the chain is too long for what should be a local Government responsibility.

78 It should be said that in the main the Cemetery system in Victoria works effectively despite the role of Government not because of it. The number of instances of maladministration are minor given the total number of organisations involved, possibly because of the shoestring manner in which most trusts are forced to conduct their business.

79 Although the primary function of trusts, the provision of facilities for the burial or cremation of the dead is accommodated, the secondary functions related to the manner in which Cemeteries are maintained, including the state of records, is a major area of complaint by the public to the Committee.

80 For members of the public to normally voice their complaint if a trust is unresponsive, they must approach the Minister. The trustees cannot be called to account as occurs in Local Government.

Messrs. Kirkwood, Kennedy & Culpin together with Lt. Col. W. Titley and Mr. G. Tippett, Committee Secretary show interest in the historic graves located in Quarantine Station Cemetery at the Officer Cadet School, Portsea.

Trust System

81. The trusts have been created by Order-in-Council in accordance with the Cemeteries Act 1958 Section 3.

82. Prior to the first statute specific to the situation in Melbourne, 14 Victoria, No. 19 (19 September 1980) - "An Act for the establishment and regulation by trustees of a general cemetery near the City of Melbourne", the trustees of cemetery lands were authorised under the General Land Grant Legislation relating to all grants of Crown Land.

83. The methodology used to create the Melbourne General Cemetery Trust, appoint trustees, define their responsibility and spell out their accountability to the Government has not changed in essence in any of the reviews of legislation from that Act up to the current statute. In fact, much of the language used in 1850 has not been altered but for minor changes relating to the status of the governing body.

84. The Public Bodies Review Committee in its third report to the Parliament on "Audit and Reporting of Public Bodies", referred to the creation of bodies by Order in Council as one of the main reasons for the large number of public bodies in this State. The Committee went on to state:

"Bodies created by order, while providing the Executive with considerable flexibility and versatility, do have disadvantages, at least for the Parliament and the community. Firstly, there is the difficulty of locating the statutory powers by which the body may have been created and of then identifying whether the powers have been exercised ...

... Secondly, the creation of a public body severely restricts Parliament's ability to scrutinise the Executive".(8)

85. The Committee does not agree that the first point is relevant to cemetery trusts as the section creating them is clearly identified at the start of the Act. Tracing the actual creation date of a particular trust is more difficult as it means a search of the pages of the Government Gazette dating from 1850.

86. The second point is valid as the only statutory contacts between the Government and trusts, those matters relating to appointment of trustees, the reporting of financial activities and of the physical state of cemeteries, are not reported to the Parliament but require an Order in Council or publication in the Government Gazette.

Audit

87. Another matter of concern to the Committee is the fact that there is no legal requirement for trusts to subject details of their financial activities to audit.

88. It should be said that of the trusts visited by the Committee, most accept the responsibility of their position and do submit their financial activities to independent scrutiny, however there should be a universal obligation for audit.

Finance

89. As indicated in an earlier part of this report, the Cemetery system is based on the concept that it be self sustaining. That is that the level of fees received should be set at such a level as to provide sufficient finance to cover the cost of the burial plot, the digging cost, administrative costs and to provide for the ongoing maintenance of the Cemetery.

90. Although the Health Commission vets all applications to vary fees prior to their transmission to the Governor-in-Council, officers of the Commission have advised the Committee that processing is cursory and very little analysis of the effect is carried out.

91. The overall result of this type of policy is that fees vary considerably between cemeteries for like services. It is understandable that there will be local differences because of the soil types, the level of community involvement in maintenance of grounds and the annual throughput however the Committee feels that there should be an equalisation factor built into the management structure.

92. The Health Commission Working Party recommended a common State-wide charge for the purchase of land with variable interment fees. Response to this recommendation from the trusts has not been favourable.

93. Most trusts, particulary those in small communities appear to favour the least cost principle and are resistant to any external pressures to force increases. The Committee feels that in these situations it then becomes a community responsibility for the physical state of the cemetery and if this means a state of overgrowth or disrepair then the community, not the Government, should accept that responsiblity.

94. The Government does provide an annual maintenance grant for distribution to trusts but the current level of $18,000 appears to be token and does not make a marked difference to the overall appearance of cemeteries throughout the State.

95. Specific grants are made on a needs basis by the Treasurer where large capital amounts are required. Recent examples of such grants are:

Memorial Park, Altona - $100,000 for repayment of earlier loans.
Traralgon Crematorium - $100,000 for establishment costs.
New Bundoora Cemetery - $150,000 allocated for establishment costs.
The Necropolis Trust, Springvale - $89,000 re-imbursement of restoration costs at the Melbourne General Cemetery.

96. In the past repayable loans have been made by the Treasurer and currently seven trusts are indebted in this manner.

97. The Treasurer also has the ability to act as guarantor for loans raised privately.

98. The Committee feels that this is a strange mixture of techniques and has some doubt as to the effectiveness of the system. While the overall cost to the Government is small in comparison with the services provided by a system which is essentially self-supporting, the ad hoc manner in which Government support has been given in the past points out the lack of a regularised forward planning process. This aspect is discussed in more detail in a later section.

(c) Health Commission:

- supervision of the issue of permits for:
  - burials
  - installation of vaults and memorials.

- approval for the removal or repair of dangerous monuments;

- receipts of annual abstracts of receipts and expenditure from trusts and the publishing of this information in the Government Gazette;

- receipt of annual statements of the conditions of cemeteries prepared by the trusts;

- inspections of cemeteries to ascertain their state and condition and that regulations are being observed.

105. As indicated there are three levels of approval necessary for the different functions however all of these actions are either vetted or processed by the three officers mentioned.

106. The Committee in its discussions with various trust members have received numerous comments of praise for the work of these officers, however it is difficult to imagine that these officers could undertake this large range of activity for 551 individual organisations and still be able to provide the Government with an effective management overview of the cemetery system. It should also be noted that since the Health Commission Working Party was set up in 1981, the Cemeteries Officer has acted as Secretary to that body also.

107. To illustrate the overloaded situation at the Health Commission, the Committee cites the situation with the only major annual publication which indicates to the public the effectiveness of the management of the individual trusts.

108. The Abstract of Accounts of Trustees for public cemeteries is a summary of the statements submitted by the trusts and published annually in the Government Gazette as required by Section 34 of the Act.

109. The latest edition was published on the 19 January 1984 for the period ending on 31 December 1982. This 12 month delay is in itself disturbing from the point of view of public accountability however the Committee has discovered a number of other factors which are indicative of the failure of this process:

(a) The document of 10 pages lists in alphabetical order the trusts and the details of their receipts and expenditure. The 12 columns of figures are totalled horizontally for receipts and expenditure to produce a balance carried forward for each trust, however the individual columns for each page are not totalled to allow cross checking. The only way in which the total balances held by all trusts throughout the State can be determined is for that column on each page to be added and the total for the ten pages aggregated.

(b) Anyone undertaking such a process as happened with the Committee would find that this process will not produce a representative figure as 134 trusts or 24% of the total number have not submitted returns while another seven have submitted "Nil Returns". The Act provides a penalty of up to $500 for trustees who do not produce this information (Section 38).

(c) Details published for the larger metropolitan trusts are not in the overall format but take the form of reproduction of their individually styled financial statements. This process does provide more information about these organisation, particularly levels of assets, however the statements for The Necropolis Trust show only net operating account results. It is therefore impossible to ascertain the total income or expenditure of the largest cemetery operation in Victoria from the statements. The Committee has been supplied with this information however it feels that if a standard format is specified it should be consistently applied.

(d) The Committee in trying to determine the overall income and balances held by trusts soon became aware that the published summary of abstracts is riddled with basic accounting errors. Examples of this are shown in appendix (ii), included to illustrate this point, but the effect of this hasty preparation for publication without accounting oversight has meant that any meaningful attempt to analyse these results cannot be done.

110. The Committee is disturbed by this situation but not surprised. The Public Bodies Review Committee in its First Report in 1980 commented, "Most reports made to Parliament (usually on an annual basis) are in a form that has little relevance even comprehensibility, to the Member of Parliament".(10)

This is an example of such a report, not because of its complexity but because of the lack of attention to detail in its preparation. The fact that this point was discovered by the Committee and not brought to its attention is indicative of the depth of analysis such documents receive from the public.

111. Part of the problem could stem from the fact that the relevant sections relating to the preparation and publication of abstracts in the current Act mirror word for word the effective sections of the 1850 legislation setting up the Melbourne General Cemetery.

Whereas the basic function of cemeteries has not changed over the past 133 years, modern management skills have, and no appropriate improvements have taken place.

112. Allied with this complaint is the fact that the Health Commission has not issued detailed instructions or manuals to trusts informing them of their obligations and the expectations of the Commission.

113. Counsel for several of the previous Trustees of the Ferntree Gully Cemetery Trust made the point during Commission investigations of that Trust, that as trusts are self-perpetuating, poor or bad practices are retained without the presence of instruction to the contrary.

114. It is obvious to the Committee that the level of management supervision and advice given by the Government agencies supervising cemeteries must be improved.

(c) PLANNING FOR AND MANAGEMENT OF CEMETERIES.

Forward Planning

115. A factor which the Committee became aware of very early in the inquiry and which was the major theme of the First Report was the prospect of a critical shortage of cemetery land in the metropolitan area.

116. The Government as mentioned earlier is taking action on those recommendations in relation to Bundoora and testing of land at Melton, however during the country inspections the Committee has been made aware that the expansion of cemeteries is a problem not only confined to the metropolitan area.

117. A major part of the problem is that in many areas cemeteries are not seen by existing land owners as compatible neighbourhood activities. Resistance to any proposal can be expected in the planning tribunals.

118. The effect this inevitably has is to extend the period between awareness of the need for expansion and the actual development.

119. The attention of the Committee was drawn to the problem through the information prepared by the Working Party on Cemeteries and Crematoria in its Interim Report. That report provided good basic information on the amount of land remaining for burial purposes but did not predict the projected life of those cemeteries based on current land holdings and rates of burial.

120. There has not been any evidence put to the Committee of longer term planning taking place on either an individual trust or an overall state basis. In fact, Committee suggestions to Trusts visited that they should be now plannng their longer term expansions, particularly in situations where land will be exhausted within 7-10 years, has usually brought a shrug of shoulders.

121. The Committee believes that the current rate of cremation of approximately 40% will not change in the near future and this should be used as a factor in forward estimates.

122. Examination of Table 1 shows that the current rate of births is approximately double the death rate. This prompted the suggestion that at some time in the future we will be faced with double the current rate of burials all factors being equal.

123. The following two tables were produced to give an indication of both the death and age profiles of the population.

Table 5:

Age at Death (1981)	No.	%
Infant (under 1 year)	562	1.9
1-4 years	123	0.4
5-14	154	0.5
15-17	99	0.3
18-24	426	1.5
25-34	545	1.9
35-44	712	2.5
45-54	1,851	6.4
55-64	4,173	14.4
65-74	7,281	25.0
75-84	8,254	28.4
85-94	4,415	15.2
95+	417	1.4
Not Stated	22	0.1
	29,034	100.0 (Source ABS)

Table 6:

Population Distribution by Age

0-4	292,393	7.4
5-14	686,195	17.4
15-17	204,887	5.2
18-20	212,408	5.4
21-44	1,392,802	35.3
45-64	766,752	19.4
65+	393,118	9.9
	3,948,555	100.0 (Source ABS)

124. This comparison indicates that while 70.7% of the population as at the 1981 census were below the age of 44, 90.9% of deaths occur in the above 45 year age group.

125. To explain this further the following information has been prepared by the Department of Management and Budget from ABS population forecasts:

Table 7:

ABS Population and Death Projections
1981 to 2021

	Population Series A '000	Population Series C '000	Deaths Series A '000	Deaths Series C '000
1981	3948.6	3948.6	29.0	29.0
1986	4136.1	4201.4	30.4	30.5
1991	4324.9	4461.2	33.8	34.2
1996	4500.5	4712.5	36.8	37.5
2001	4653.1	4945.2	39.6	40.6
2006	4777.4	5154.0	42.2	43.5
2011	4886.4	5351.9	44.6	46.4
2016	4990.5	5548.8	47.0	49.4
2021	5086.7	5740.4	49.7	52.7

(SOURCE ABS)

Table 8:

	--------5 year Growth Rates %--------			
1981				
1986	0.9	1.2	0.5	1.0
1991	0.9	1.2	2.1	2.3
1996	0.8	1.1	1.7	1.9
2001	0.7	1.0	1.5	1.6
2006	0.5	0.8	1.3	1.4
2011	0.5	0.8	1.1	1.3
2016	0.4	0.7	1.1	1.3
2021	0.4	0.7	1.1	1.3

(SOURCE Dept. of Management & Budget)

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126. These projections based on two series of assumptions on external migration (present and high levels) indicate in both cases a gradual rate of increase. What is significant is that in both scenarios the overall increase in burials

per year at the end of the forty year period will be approximately 60% more than the current level.

127. Given this situation the Committee believes that longer term planning is essential to the better management of the cemetery system.

Management

128. The Committee is well aware, given the independence of trusts and the lack of central advice on management, that there is a wide divergence in the organisational styles of trusts, such as that at The Necropolis, chaired by an ex-Auditor-General of the State, and the smaller country trusts. Such variances have been publicly exposed by the problems with the trusts at Lilydale, Ferntree Gully, Templestowe and the Melbourne General Cemetery.

129. It has been decided that these individual practices should be examined in more detail than is possible at this time, and this be incorporated in the Committee's next report, however the following general opinions have been formed during the discussions and inspections undertaken by the Committee:

- Trustees have emphasised how difficult it is to maintain cemeteries properly when they perceive that the community would be reluctant to accept the higher charges needed to achieve such conditions. This reluctance has resulted in many cemeteries being overgrown and poorly maintained,

- The trusts for the larger metropolitan and provincial city cemeteries are well managed, but rely on higher levels of utilisation to maintain cash flow,

- The lack of management guidelines and supervision has led to the development of unorthodox business practices in some cemeteries,

- Cemeteries operated by municipalities are markedly better maintained and operated due to the greater support available in areas such as accounting standards, maintenance, civil works, digging and engineering standards.

OPTIONS AVAILABLE

130. This report to date has examined the system by which cemeteries are administered in Victoria and problems that both the Minister and the Committee have found with that system. The question now is if the system is to be improved what options are available?

131. The Working Party on Cemeteries and Crematoria in its Interim Report examined a series of "supervision and oversight" options and they were:

(a) Present system with additional Health Commission support.
(b) Private industry.
(c) Municipal councils.
(d) Regional cemetery trusts.
(e) Central Cemeteries Commission.
(f) Central administration.

132. The Working Party recommended that 12 regional trusts be established and that oversight be given by a Central Cemeteries Board. Annual cost to the Government of this new structure was estimated at $360,000 for the Trusts and $100,000 for the Board.

133. The reaction from cemetery trusts to these recommendations has been one mainly of disagreement with 31 trusts responding against the proposal for regionalisation and six for. There was a more favourable reaction to the proposed Central Cemeteries Board.

134. The Committee in its discussions with Trusts were informed that feeling was that regional bodies could not provide the level of service that local organisations could.

135. In its assessment of the situation the Committee has identified what it feels are the following workable options.

(a) Present trust structures with revamped and upgraded Health Commission supervision;

(b) Central Cemeteries Board with regional advisory bodies, trusts remain as at present;

(c) Municipalities would take over present trusts except for the three major metropolitan cemetery trusts (Springvale, Fawkner and Altona). Local Government Department would supervise management standards, Health Commission would set and supervise health standards and oversee the overall system.

136. Option (a) Present trust structures with revamped and upgraded Health Commission supervision.

Advantages
- No disruption to present system;
- Health Commission experience is used as basis for expanded supervision overall.

Disadvantages
- Overall system is still large and unwieldy;
- Minimal finance levels will mean maintenance of closed cemeteries becomes a Government function.

137. Option (b) Central Cemeteries Board with Regional Advisory Bodies, Trusts remain as at present.

Advantages
- New central organisation with sole responsibility for cemeteries;
- Minor disruption for trusts;
- Closer management/trust links through Advisory Bodies.

Disadvantages
- System still very big;
- Extra annual costs to Government;
- Problem of closed cemeteries remains.

138. Option (c) Municipalities to take over all present trusts except three major metropolitan trusts. Local Government and Health Commission supervision.

Advantages

- Change with minimum of fuss (86 trusts are already managed by the municipality);
- no extra costs to ratepayers;
- Extra resources of municipal staff available if required;
- Existing system of Government supervision;
- Higher management levels;
- Accountability to local community;
- Maintenance of closed cemeteries becomes a community responsibility;
- Number of responsible bodies will be reduced.
- Can be effected with present legislation.

Disadvantages

Resistance from municipalities over the fear of extra expenditure.

CONCLUSIONS

139. Each year in Victoria there are approximately 30,000 deaths, half the current birth rate. Two-thirds of these deaths occur in the metropolitan area, the rest in country areas.

140. Of these deaths 40% of the bodies are cremated at four crematoria within the State, the remainder are buried in one of the 551 public cemeteries or one of the the few private cemeteries.

141. Public Cemetery Trusts are established and administered by legislation which is directly related and little changed to that enacted in the early days of the Victorian Colony.

142. This system was seen as an alternative form of public administration when it was adopted but provides little accountability to the communities the trusts serve, has minimal Government supervision, does not require audit of trust finances, and is supported by insignificant levels of financial subsidy from the Government.

143. The size of the system and the responsibilities required of the Government in the legislation have not been adequately serviced by successive Governments possibly from the earliest days of the Colony. This has resulted in the current administration component in the Health Commission being overwhelmed by the task it has been given - three officers to oversee 551 trusts.

144. The current cemetery land shortage problems in the metropolitan area and the subject of the Committee's First Report are only indicative of what is to come. Projections indicate that the death rate in 40 years will be approximately 50,000 per annum, an increase of 60% on the current rate. The Committee has found little evidence of forward planning on a State wide basis to meet these increases and in some areas shorter term local problems are too hard for trusts to address.

145. Evidence indicates that there are numerous instances where individual trusts have acted with little sensitivity, business acumen, and in some cases

disregard for legislative requirements. The Committee is undertaking a detailed examination of these instances and will be making a separate report to the Parliament on its findings.

146. The Committee has been impressed by the overall ability of municipal trusts to reflect the attitude of the local community towards its dead. These cemeteries, while being financially self supporting have the ability to call in levels of support from the municipal organisation which only the large metropolitan trusts have the ability to maintain on a regular basis.

147. The Committee is also aware of the problems which the non-income producing aspects of closed cemeteries present to individual trusts. Local municipalities should become involved with these cemeteries before they reach this stage but when it is reached the maintenance of such areas should be treated as an addition to their normal Parks and Gardens expenditure. Cemeteries should not be treated as an independent community function but should be accepted as an integral component of the local community.

148. The Committee having examined the cemeteries administration system and made the preceding comments, believes that the system has become too large to allow the effective supervision required to achieve standards acceptable to the 1980's. To remedy this, the Committee feels that the overall system should be reduced in size, be made more accountable to the public, be self-supporting, and achieve the normal levels of financial and management responsibility expected from the public utilities.

149. The three options identified by the Committee have been subjected to this criteria and the third option (c) (Municipalities as Trusts) is preferred for the following reasons:

- Option (a) (Reinforced Present Situations) and (b) (Central Cemeteries Board) would not reduce the overall number of trusts, however (c) would result in municipal trusts and the existing three major metropolitan trusts (Springvale, Fawkner and Altona).

- Option (a) would require an upgrading of the Health Commission's supervisory role with its attendant costs.

- Option (b) would also incur the extra costs associated with the introduction and the activities of a Central Cemeteries Board, with little alteration to the nature and problems of the current system although the Regional Advisory Bodies would allow more consultation than exists at present.

- Option (c) shifts the responsibility for the day to day operation of cemeteries from isolated bodies to the mainstream service organisation within the local community. Cemeteries in most instances, if operated properly with realistic levels of changes, should be self-supporting, not be a drain on ratepayers' funds. However, because of reasons such as low usage, the Council, being locally elected, is in a position to ascertain the community attitude and decide whether Parks and Gardens funds should be made available for maintenance or not.

150. The Committee believes that this issue can be resolved without change to the current legislation, and will address the question of the relevance of that legislation and its relationship to the known cases of malpractice of maladministration by trustees in its next report to the Parliament. (Minutes of Evidence taken so far by the Committee will be tabled with a further report).

RECOMMENDATIONS

151. The Committee recommends that:

(a) the Councils of municipalities replace the trustees of all existing cemetery trusts within their boundaries, as permitted by Section 3(2) of the Cemeteries Act 1958; except for The Necropolis Trust, Springvale, the Fawkner Crematorium and Memorial Park Trust, Altona; which should remain as constituted at present. The question of Local Government representation on the three major metropolitan trusts has been suggested but the Committee would not recommend this until further discussions have been held with these Trusts;

(b) all accounting, management, maintenance and engineering functions be carried out in accordance with the standards set and supervised by the Local Government Department;

(c) the Health Commission maintain its current responsibilities until such time as the Committee reports on its review of the Cemeteries Act 1958; and

(d) the Health Commission should develop an effective forward planning mechanism to predict well in advance the need for new cemetery land purchases.

Committee Room
Parliament House
30 April 1984.

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APPENDIX I

Inspections of Cemeteries and Crematoria made by the Committee

Cemetery and/or Crematorium	Date
Melbourne General Cemetery	30 September 1982
Proposed Bundoora Cemetery	30 September 1982
Parade College, Bundoora (Private Cemetery)	30 September 1982
Preston Cemetery	30 September 1982
Warringal Cemetery, Heidelberg	30 September 1982
Eltham Cemetery	30 September 1982
Templestowe Cemetery	30 September 1982
Fawkner Crematorium and Memorial Park	11 October 1982
The Necropolis, Springvale	18 October 1982
St. Kilda Cemetery	18 October 1982
Bacchus Marsh Cemetery	27 October 1982
Gordon Cemetery	27 October 1982
Ballarat Cemetery (Old)	27 October 1982
Ballarat Cemetery (New)	27 October 1982
Ballarat Crematorium	27 October 1982
Western Suburbs Memorial Park, Altona	23 November 1982
Williamstown Cemetery	23 November 1982
Geelong Western Public Cemetery	10 March 1983
Geelong Regional Memorial Park (vacant land on the Mt. Duneed Road)	10 March 1983
Barrabool Hills (Highton) Public Cemetery	10 March 1983
Geelong Eastern Public Cemetery	10 March 1983
Preston General Cemetery, Bundoora	20 May 1983
Harkaway Cemetery	28 July 1983
Urban Land Authority Site at Pakenham	28 July 1983
Pakenham Cemetery	28 July 1983
Drouin Cemetery	28 July 1983
Warragul Cemetery	28 July 1983
Portland Cemetery (Old)	14 November 1983
Portland Cemetery (New)	14 November 1983
Hamilton Cemetery (Old)	14 November 1983
Hamilton Cemetery (New)	14 November 1983
Frankston Cemetery	16 march 1984
Dromana Cemetery	16 March 1984
Portsea Quarantine Station	16 March 1984
Old Settlers' Graves, Sorrento	16 March 1984

APPENDIX II

Extracts taken from
"Abstracts of Accounts of Trustees for Public Cemeteries - 1982"

PUBLISHED BY AUTHORITY

Victoria Government Gazette

No. 5—Thursday, 19 January 1984

Abstracts of Accounts of Trustees for Public Cemeteries 1982

Published in compliance with the requirements of Section 34 of the Cemeteries Act 1958

No. 5—70828/84—Price $1.40

Dr. Abstracts of Accounts of Trustees for Public Cemeteries published in compliance with the requirements of section 34 of the Cemeteries Act 1958 Cr.

Cemetery	RECEIPTS				EXPENDITURE							
	To Balance	Fees for Graves &c.	Other Source of Income	Total	By Salaries	Grave Digging	Office Expenses	Building	Works	Contingencies	Balance	Total
	$	$	$	$	$	$	$	$	$	$	$	$
Aberfeldy	217.20	165.00	..	382.20	..	..	70.15	..	269.72	..	42.33	382.20
* Adass Israel	7 405.35	5 004.89	230.33	12 640.57	..	2 082.07	..	..	..	123.00	10 435.50	12 670.57
Alberton	520.63	157.28	16.53	694.44	50.00	100.00	..	..	150.00	50.00	344.44	694.44
* Alexandra	..	..	..	..	..	..	..	..	..	..	..	..
* Allambee East	Nil Return											
* Alma	Nil Return											
Amherst	5 252.65	592.00	546.78	6 391.43	50.00	520.00	..	257.34	574.50	9.17	4 980.42	6 391.43
Amphitheatre	236.38	150.00	40.53	426.91	54.00	..	..	..	..	33.90	339.01	426.91
Antwerp	492.07	56.00	31.12	579.19	..	..	..	..	..	..	579.19	579.19
Apollo Bay	1 634.16	1 905.00	216.30	3 755.46	..	..	..	..	333.00	320.36	3 102.00	3 755.46
Apsley	276.43	249.00	69.37	594.80	..	..	49.63	..	..	..	545.17	594.80
Ararat	1537.94	17 337.60	909.94	19 835.48	570.00	9 575.47	..	..	6 353.11	2 476.52	860.38	19.835.48
Arthur's Creek	839.62	3 280.00	525.73	4 635.35	130.00	2 990.00	12.08	..	877.45	..	625.82	4 635.35
Avenel	1 546.58	635.00	489.86	2 671.44	106.00	320.00	..	518.60	70.00	504.32	1 152.52	2 671.44
* Avoca	..	..	..	..	..	..	..	..	..	..	..	..
Axedale	991.61	108.00	37.76	1 137.37	50.00	..	..	..	..	..	1 087.37	1 137.37
Bairnsdale	(O.D.)1 767.24	52 320.50	..	49 826.66	43 571.67	4 000.00	..	..	..	20.00	2 234.99	49 826.66
Ballan	814.93	1 724.80	475.30	3 015.03	860.40	762.50	69.38	..	213.50	279.78	829.47	3 015.03
Ballangeich	20.05	..	.38	20.43	..	..	..	..	..	..	20.43	20.43
Ballarat General	154 746.00	170 583.00	16 915.00	342 244.00	29 403.00	49 001.00	6 644.00	..	69 251.00	38 862.00	149 083.00	342 244.00
Ballarat Crematorium	183 636.00	149 754.00	33 545.00	366 935.00	83 675.00	..	6 670.00	4 812.00	7 096.00	42 722.00	221 960.00	366 935.00
* Balmoral	203.74	287.00	63.99	..	..	..	.82	..	..	..	553.91	554.73
Bambra	189.74	..	6.82	196.56	..	..	..	..	170.00	..	26 56	196.56
Bannockburn	389.63	180.00	16.07	585.70	20.00	..	..	..	74.42	49.66	441.62	585.70
Baringhup	37.81	..	1.39	39.20	..	..	..	..	..	..	39.20	39.20
* Barkly	..	..	..	..	..	..	..	..	..	..	..	..
Barmah	259.36	..	8.21	267.57	..	..	..	..	..	..	267.57	267.57
Barnawartha	1 769.64	1 135.00	150.00	3 054.64	125.00	590.00	..	..	496.06	59.15	1 784.43	3054.64
Barrabool Hills	10 341.87	57 128.70	1 626.26	69 096.83	19 565.00	11 465.70	349.25	..	2 868.89	7 067.79	27 780.20	69 096.83
Bealiba	246.33	633.00	9.07	888.40	40.00	423.00	..	..	..	123.00	..	888.40
Beaufort	5 555.69	3 165.00	560.28	9 280.97	200.00	1485.00	88.08	..	245.42	347.95	6 914.52	9 280.97
Beeac	1 255.20	136.00	44.31	1 435.51	50.00	..	..	..	..	..	1 385.51	1 435.51
Beechworth	1 382.31	13 715.04	3 720.13	18 817.48	14 099.27	..	..	..	1 429.82	5 420.49	(O.D.)2132.10	18 817.48
* Beenak	..	..	..	..	..	..	..	..	..	..	..	..
Bellarine	1 048.54	2 338.00	2 056.20	5 442.74	1 261.60	..	474.00	..	2 051.00	..	1 656.14	5 442.74
Bellbrae	507.33	1 324.00	20.04	1 851.37	712.00	..	..	..	422.60	112.37	594.40	1 851.37
Benalla	28 307.03	33 066.30	11 025.65	72 398.98	14 407.94	15 630.75	4 307.62	..	2 506.92	15 363.23	20 182.52	72 398.98
Benambra	1 221.94	155.00	..	1 376.94	..	..	..	..	..	..	1 376.94	1 376.94
* Bendigo	(O.D.)7 857.00	84 056.00	12 004.00	103 917.00	$88,203	58 679.00	6 002.00	24.00	30 654.00	..	(O.D.8 558.00	103 917.00
Berriwillock	435.16	765.00	17.06	1 217.22	50.00	425.00	..	..	..	149.95	149.95	1 217.22
* Berwick	576.88	5 815.00	439.17	11 991.05	450.00	2 520.00	29.98	..	556.00	578.03	7 858.04	11 991.05
Bethanga	629.92	412.00	23.34	1 065.26	$6831.	340.00	21.60	..	61.50	..	642.16	1 065.26
Beulah	1 026.17	1 294.40	68.22	2 388.79	100.00	230.00	..	..	89.00	256.65	1713.14	2 388.79
Birchip	3 940.00	4 843.00	557.54	9 340.54	541.97	1 944.00	129.86	..	379.53	1 861.87	4 483.31	9 340.54
Birregurra	640.00	..	31.00	671.00	50.00	..	..	140.00	..	16.00	465.00	671.00
Black Heath	Nil Return											
Blackwood	475.17	114.50	37.38	627.05	120.00	..	..	..	..	136.72	370.33	627.05
Bleak House	249.07	..	9.34	258.41	..	..	..	..	..	..	258.41	258.41
* Blue Mountain	..	..	..	..	..	..	..	..	..	..	..	..
Boinka	111.85	..	4 16	116.01	..	..	..	..	..	..	116.01	116.01

Dr. Abstracts of Accounts of Trustees for Public Cemeteries published in compliance with the requirements of section 34 of the Cemeteries Act 1958

Cemetery	*RECEIPTS*				*EXPENDITURE*							
	To Balance	*Fees for Graves &c.*	*Other Source of Income*	*Total*	*By Salaries*	*Grave Digging*	*Office Expenses*	*Building*	*Works*	*Con-tingencies*	*Balance*	*Total*
	$	$	$	$	$	$	$	$	$	$	$	$
Cobram	1 545.17	7 138.44	25.95	8 709.56	1 622.85	5 051.00	. .	. .	782.72	1 252.99	1 252.99	8 709.56
* Coghill's Creek	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Cohuna	12 416.69	8 692.40	1 453.87	22 562.96	1 640.00	204.71	. .	225.59	2 330.00	1 493.98	. .	22 562.96
Colac	44 020.39	36 085.00	10 102.55	90 207.94	17 077.94	. .	579.83	. .	8 500.62	5 255.78	58 793.72	90 207.94
Colbinabbin	1 060.51	425.41	9.34	1 495.26	42.00	156.00	6.00	. .	. .	. .	1 291.26	1 495.26
Coleraine	2 358.41	2 742.50	175.86	5 276.77	30.00	1 000.00	36.60	. .	. .	484.00	3 726.17	5 276.77
Concongella	36.50	. .	14.45	50.95	. .	. .	. .	. .	. .	. .	50.95	50.95
Condah	859.44	759.50	42.50	1 661.44	50.00	455.00	. .	. .	48.60	3.00	1 104.84	1 661.44
Coongulmerang	5.68	336.00	1.71	343.39	135.00	. .	. .	. .	136.20	71.95	. .	343.39
* Corack	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
* Corinella	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Corop	489.45	. .	18.34	507.79	. .	. .	. .	. .	. .	. .	. .	507.79
Corryong	8 160.74	9 279.25	1 113.19	18 553.18	. .	1 875.00	. .	. .	7 944.00	226.72	8 507.06	18 553.18
Cowangie	270.30	. .	10.13	280.43	. .	. .	. .	. .	. .	. .	280.43	280.43
Cranbourne	3 214.00	7 511.00	520.45	11 245.45	220.00	3 707.29	54.60	. .	4 929.06	393.15	1 941.26	11 245.45
Cressy	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Creswick	5 747.82	8 931.45	3 519.81	~~18 199.08~~	280.00	1 545.00	. .	. .	8 093.75	4 357.96	3 922.37	18 199.08
* Crib Point	2 964.50	2 091.74	20.58	5 075.82	1 440.01	410.69	. .	. .	120.00	13.00	3 092.12	5 075.82
Crowlands	567.23	34.00	20.94	~~622.17~~	. .	. .	. .	. .	. .	. .	622.17	622.17
* Cudgewa	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Culgoa	794.95	80.00	30.38	905.33	. .	200.00	. .	. .	. .	. .	705.33	905.33
* Dahwedarre (Yanac North)	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
* Dandenong	. .	8 806.77	. .	. .	. .	4 468.33	303.72	. .	2 235.48	922.78	156.48	8 086.77
Dargo	638.92	~~173.00~~	20.86	~~832.78~~	148.00	80.00	. .	. .	80.00	115.90	408.88	~~832.78~~
Darlington	328.58	. .	31.22	359.80	. .	. .	. .	. .	10.60	7.70	341.50	359.80
* Darraweit Guim	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
* Dartmoor	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Daylesford	14 027.32	8 680.25	6 528.74	29 236.31	6 722.00	. .	36.00	. .	531.83	3 154.61	18 791.87	29 236.31
Deep Lead	64.57	. .	2.40	66.97	. .	. .	. .	. .	. .	. .	66.97	66.97
Dergholm	210.30	5.00	15.45	230.75	. .	. .	. .	. .	. .	. .	230.75	230.75
Derrinallum	950.29	867.00	73.35	1890.64	. .	702.00	. .	. .	105.00	3.00	1 080.64	1 890.64
Devenish	2 126.62	415.50	250.07	2 792.19	. .	. .	. .	. .	46.15	32.10	2 713.94	2 792.19
Diamond Creek	2 587.23	4 856.40	142.45	7 586.08	160.00	2 380.50	101.00	. .	2 053.42	446.00	2 445.16	7 586.08
Digby	1 235.60	65.00	777.75	2 078.35	40.00	. .	57.16	. .	813.00	12.60	1 155.59	2 078.35
Dimboola	6 283.61	4 484.88	584.80	11 353.29	361.00	2 381.00	112.43	. .	2 488.88	674.40	5 335:58	11 353.29
* Donald	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Donnybrook	1 791.75	. .	. .	1 791.75	. .	. .	. .	. .	. .	. .	1 791.75	1 791.75
* Dookie	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Dookie East	215.23	. .	33.62	248.85	20.00	. .	. .	. .	. .	25.72	203.13	248.85
Dowling Forest	772.37	20.00	20.14	812.51	. .	. .	. .	. .	613.-85	. .	198.66	812.51
* Drik Drik	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
* Dromana	(O.D.) 955.11	7 231.00	67.13	26 656.98	. .	. .	. .	. .	13 924.03	(O.D.)1263.14	682.13	26 656.98
Drouin	~~7 041.68~~	9 684.35	339.13	~~17 065.16~~	300.00	2 845.00	22.58	. .	7 253.50	3 580.84	3063.24	~~17 065.16~~
* Drouin West	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
* Drysdale	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
* Dunkeld	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .	. .
Dunolly	827.87	690.00	151.85	1 669.72	75.00	400.00	. .	. .	212.00	. .	982.72	1 669.72
Dunolly (Old)	258.46	. .	. .	258.46	. .	. .	. .	. .	258.46	. .	Nil	258.46
Durham Ox.	370.88	65.00	13.21	449.09	. .	. .	. .	. .	. .	. .	449.09	449.09
Eaglehawk	7 195.50	51 414.26	7 513.92	66 123.68	670.00	25 845.25	110.00	. .	27 427.83	12 070.60	. .	66 123.68
Echuca	2 555.73	17 125.90	43.06	19 724.69	1 349.50	3 935.00	. .	. .	1 126.19	6 305.97	7 008.03	19 724.69

THE NECROPOLIS SPRINGVALE

REVENUE & ADMINISTRATION ACCOUNT FOR THE YEAR ENDED 31st DECEMBER, 1982

1981 $		$
429,843	Salaries — Administration	518,197
429,843		518,197
	Administration Charges	
72,191	Data Processing	64,623
54,328	Insurances	87,484
38,991	Long Service Leave	26,983
32,793	Superannuation	36,891
22,314	Printing & Stationery	57,244
22,130	Payroll Tax	30,088
11,484	Rates & Taxes	18,756
11,060	Postage	13,223
9,800	Audit Fees	11,500
7,220	General Expenses	8,701
6,047	Depreciation	30,892
6,235	Telephones	9,552
5,361	Security Expenses	7,807
4,129	Cremated Remains Containers	—
1,106	Office Expenses	12,000
22,118	Sundry Administration Expenses	24,394
327,307		440,138
757,150		958,335
	Less (Net) Administration Charges Allocated to —	
204,666	Cremation Account	260,227
102,333	Interment Account	130,113
204,666	Memorial Gardens Account	260,227
102,333	Cemetery Lawn Gardens Account	130,113
6,281	St. Kilda Cemetery Account	8,674
61,400	Melbourne General Cemetery Account	78,068
682,219		867,422
74,931		90,913

1981 $		$	$
44,760	Collections — Cremated Remains	58,120	
7,705	Surplus on Disposal of Fixed Assets	875	
—	Surplus on Sale of Investments	6,345	
5,691	Transfers & Removals of Memorials	6,500	
5,087	Rents Received	4,780	
2,875	Postages — Cremated Remains	2,930	
1,108	Discounts Received	1,073	
7,705	Sundry Income	10,290	
74,931			90,913

NET REVENUE APPROPRIATION ACCOUNT FOR THE YEAR ENDED 31st DECEMBER, 1982

1981 $		$
25,000	Provision for Maintenance	125,000
262,505	Memorial Gardens Account Deficit	438,357
262,096	Cemetery Lawn Gardens Account Deficit	289,459
32,767	St. Kilda Cemetery Account Deficit	40,392
5,291	Melbourne General Cemetery Account Deficit	49,222
—	Transfer to General Fund	40,771
587,659		983,201

1981 $		$
505,557	Cremation Account Surplus	860,856
46,306	Interment Account Surplus	122,345
35,776	Transfer from General Fund	—
587,659		983,201

NET FIGURES — DO NOT SHOW TOTAL INCOME LEVELS.

Comparison of relevant sections of 14 Victoria, No. 19 - "An Act for the establishment and regulation by Trustees of a General Cemetery near the City of Melbourne", 19th September 1850 with "The Cemeteries Act, 1958".

No. XIX.

An Act for the establishment and regulation by Trustees of a General Cemetery near the City of Melbourne. [Assented to, 19th September, 1850.]

Preamble.

WHEREAS the Cemeteries or Burial Grounds within the City of Melbourne and the suburbs thereof are of limited extent, and insufficient for the increased and increasing population thereof, and it is intended by Her Majesty the Queen to grant certain land in the neighbourhood of the City of Melbourne for the purpose of the same being used as a General Cemetery for burying the dead of all denominations of religious faith, to be called the Melbourne General Cemetery: And whereas it is expedient that the same should be vested in Trustees with perpetual succession, who shall have power to regulate the use thereof, and to do and cause to be done all such acts, matters, and things as may be requisite or proper for the preservation of such Cemetery, and all buildings and erections thereon, and of ornamenting the grounds thereof in a suitable manner: Be it therefore enacted by His Excellency the Governor of New South Wales, with the advice and consent of the Legislative Council thereof, That after the passing of this Act, Trustees not fewer than three in number, to be appointed by the Governor for the time being of the said Colony, and their successors to be appointed as hereinafter is provided, shall have power to hold for ever any such lands as by Her Most Gracious Majesty the Queen may be conveyed to the said Trustees by Deed of Grant from the Crown, for such General Cemetery as aforesaid, upon such Trusts as in the said Deed of Grant shall be declared; and that thereupon the land so granted, together with all erections thereon, and the rights, easements, and appurtenances to the same belonging, shall be and become, remain, and continue vested in the said Trustees and their successors in the said Trust for ever, upon the Trusts in the said Deed of Grant to be declared, and subject to the provisions of this Act.

Trustees to be appointed by the Governor.

3(1)/58

Trustees may hold land, &c.

4/58

II. Whereas by a certain Act of the Governor and Council of New South Wales, passed in the sixth year of the reign of His late Majesty King George the Fourth, intituled, "*An Act for better regulating* "*and preserving Parish and other Registers of Births, Baptisms, Marriages,* "*and Burials, in New South Wales and its Dependencies, including Van* "*Diemen's Land,*" it is amongst other things enacted, that no burial shall take place in any burial ground within the limits of any town otherwise than in any burial ground which may be set apart for such purpose, and which burial ground must be distant one mile at the least from any town or township, and it is expedient to except any land set apart for the purposes of this Act, from the operation of the said Act, as respects the distance from the City of Melbourne: Be it enacted, That nothing in the said Act contained shall be deemed to prevent the use of any land conveyed to the said Trustees for the purposes of this Act, notwithstanding that the said land, or any part thereof, may be within the distance of one mile from the boundaries of the said City.

6 George IV. No. 21.

Section 10 thereof inoperative, as to Melbourne.

III. And be it enacted, That the Governor for the time being of the said Colony shall have power, from time to time, to remove from the said Trust any Trustees of the said Cemetery, as and when he shall think proper; and also upon the death, resignation, or removal of any Trustee appointed under this Act, to appoint another in his place and stead.

Trustees may be removed.

5/58

IV. And be it enacted, That the Trustees of the said Cemetery shall have power to lay out the said land so to be granted as aforesaid, in such manner as may be most convenient for the Burial of the Dead, and to embellish the same with such walks, avenues, roads, trees, and shrubs, as may to them seem fitting and proper, and to enclose the same with

Grounds to be laid out.

7(1)/58

Published as a Supplement to the New South Wales Government Gazette, of Tuesday, 1st October, 1850.

with proper and sufficient walls, rails, fences, pallisades, gates and entrances; and to preserve, maintain, and keep in a cleanly and orderly state and condition, and cause to be so maintained and kept, the whole of the said Cemetery, and its walls and fences, and all monuments, tomb-stones, enclosures, buildings, erections, walls, and shrubberies, therein and belonging thereto; and shall lay out and expend all moneys to be received by them under this Act, in and about the matters aforesaid, and in ornamenting the said Cemetery with trees, shrubs, and plants, and in the erection of such buildings and improvements in and to the said Cemetery from time to time, as they, the said Trustees, shall think proper.

Rules and regulations to be made by Trustees;

9/58

V. And be it enacted, That the Trustees of the said Cemetery shall have power and authority to make such rules and regulations, and to do and perform, and cause to be done and performed, all such acts, matters and things, as may be necessary and proper for any of the purposes aforesaid, and also for determining and directing the order and position of all graves and vaults to be made in the said Cemetery, and for protecting the buildings, monuments, shrubberies, plantations and enclosures, therein and thereof, from destruction or damage; and shall have power to prosecute all persons who shall or may at any time do or cause to be done any damage to any such buildings, monuments, tomb-stones, shrubberies, plantations or enclosures: Provided nevertheless, that the said Trustees shall not by any rule or regulation, or any act, matter or thing, at any time interfere, directly or indirectly, with the performance of any Religious Ceremony in the Burial of the Dead, according to the usage of the communion to which the deceased may have belonged, or with the original distribution of the said land, made or intended to be made by the grant thereof to and amongst separate and distinct religious denominations, or communions: Provided further, that no rite or ceremony shall be performed in any portion of such Cemetery set apart for any particular denomination, except according to the usage of such denomination, and by a duly recognized Minister of the same.

but such rules, &c., not to interfere with the performance of religious ceremonies in the burial of the dead.

15/58

Proviso.

Spiritual functions may be exercised.

16/58

VI. Provided always, and be it enacted, That it shall and may be lawful for the Ministers of any denomination for which any portion of such Cemetery shall be specially set apart, to have free access and admission to such portion of the said Cemetery at all times as they respectively shall think fit, and freely to exercise their spiritual functions therein, without any hindrance or disturbance of the Trustees of the said Cemetery, or any person whatsoever.

Vaults to be dug, and monuments or tomb-stones to be erected.

17/58

VII. And be it enacted, That it shall and may be lawful for the Trustees of the said Cemetery to permit any vault to be dug and made in the said Cemetery, and any monument or tomb-stone to be erected or placed in such parts of the said Cemetery as they may think proper, upon payment to them by the person or persons desiring to dig and make such vault, or to erect and place such monument or tomb-stone, of such charges as shall from time to time be established and varied by the said Trustees, with the concurrence and approval of His Excellency the Governor, and published in the *Port Phillip Government Gazette;* and that any person or persons so digging and making such vault, or erecting and placing such monument in such Cemetery, by and with such permission as aforesaid, and upon payment of the charges aforesaid, shall be entitled to have, maintain, and keep up such vault, monument, or tomb-stone, accordir to the terms of such permission, to and for the sole and separate use of such person or persons, and his and their heirs and near relations for ever: Provided always, that a plan of every monument proposed to be erected and placed, shall be exhibited to the said Trustees before such permission as aforesaid is given; and that the said Trustees shall be at liberty to withhold such permission, and prevent the erection of any monument which shall appear to them inappropriate or unbecoming; and shall determine and fix the position of any unobjectionable monument which may be proposed to be erected, according to the description, size, and character thereof, having reference to the general plan for ornamenting the said Cemetery in an appropriate manner: Provided further, that nothing

Plans of monuments to be exhibited.

20/58

24/58

nothing herein contained shall be deemed to prevent the said Trustees from allowing the burial of any poor person in such Cemetery free of any charge whatsoever. Poor persons to be buried free of charge.

VIII. And be it enacted, That it shall be lawful for the said Trustees to take down and remove any monuments, cenotaphs, tablets, or other erections, which shall have been erected or built contrary to the terms and conditions upon which permission to erect or construct the same was granted; or in case such terms and conditions, as well as the regulations of the said Cemetery, shall not have been complied with. Monuments, &c., may be removed. 28|58

IX. And be it enacted, That if any person or persons shall wantonly or wilfully do, or cause to be done, any damage to any monument, vault, tomb-stone, building, erection, railing, shrubbery, tree, or plant in the said Cemetery, he shall be guilty of a misdemeanor, and being convicted thereof before any two or more Justices of the Peace of the City of Melbourne, (who are hereby authorized to hear and determine in a summary way any complaint thereof made by the said Trustees, or by any officer or servant employed by them in the said Cemetery, or by any person or persons to whom the burial place may belong,) shall be liable for every such offence to a penalty not exceeding twenty pounds, or to be committed by such Justices, at their discretion, to any goal or house of correction in the said City, there to remain for a reasonable time not exceeding three months; and any person or persons who shall do or cause to be done, any injury to any such monument, vault, tomb-stone, building, erection, railing, shrubbery, tree, or plant, whether the same shall have been done wilfully or wantonly, or otherwise howsoever, shall be liable to pay a reasonable sum of money by way of damages and compensation therefor, which said sum of money shall be recoverable in the Supreme Court of the Colony, or in the Court of Requests in the City of Melbourne, according to the amount of damage sustained, either at the suit of the said Trustees, or by the person or persons entitled to any vault or monument, or other such erection so injured, under the provisions of this Act. Injuring monuments, &c., a misdemeanor. 40|58 41|58

X. And be it enacted, That the said Trustees shall and may allow any body of Christians, at their own expense, to erect and build within such part of the said Cemetery as shall be specially set apart for that denomination, a suitable Mortuary Church or Chapel, for the performance of the rites and ceremonies in the burial of the dead, according to the usages of such denomination: Provided that the plans, specifications, elevations, and models thereof, with such lodges, and other buildings, and conveniences thereto, shall be first submitted for the approval of the said Trustees, and shall be approved by them. Mortuary Church or Chapel may be erected. 29|58 Plans, &c., to be submitted.

XI. And be it enacted, That before any corpse shall be permitted to be interred in any vault, brick grave, or in any place of burial, the exclusive right of burial or interment wherein shall have been sold or granted by the said Trustees as a family or private burial place, it shall be lawful for the said Trustees, or any officer employed by them, to require, and they or he shall be entitled to have produced to them or him satisfactory evidence that the person for the time being entitled as owner to the exclusive right of burial or interment in such vault, brick grave, or other burial place, has consented, or would not object, to such interment taking place therein. Private vaults protected. 26|58

XII. And be it enacted, That in all cases in which Justices of the Peace have jurisdiction under the foregoing or other provisions of this law, it shall be lawful for any Justice of the Peace before whom complaint on oath shall be made, to summon before any two Justices the party complained against, and on proof of the service of such summons it shall be lawful, and they are hereby empowered to hear and determine, in a summary way, the matter of such complaint, and on proof of such offence to convict the offender, and to adjudge him to pay a penalty or commit him to prison, although no information in writing shall have been exhibited before such Justices; and all such proceedings by summons without information in writing, shall be as good, valid, and effectual, to all intents and purposes, as if an information in writing had been exhibited; provided Jurisdiction of offences.

vided that in every such summons the general nature of the complaint shall be succinctly stated.

Punishment of offenders.

XIII. And be it enacted, That it shall be lawful for any Trustee, or any officer or servant of said Trustees, and all such persons as he shall call to his assistance, to seize and detain any person who shall commit, or be in the act of committing an offence against this Act, and whose name and place of abode shall be unknown to such Trustee, officer, or servant, and to convey him or her before some Justice of the Peace, without any other warrant or authority than this Act; and in case such offender refuses to satisfy the said Justice as to his name and residence, such Justice is hereby empowered and required either to proceed immediately to the hearing and determining the complaint, in the same manner as if heard by summons, before two or more Justices, or to order such offender to be detained in custody until brought before two or more Justices to be dealt with in the ordinary course.

No *Certiorari*.

XIV. And be it enacted, That no proceeding in pursuance of this Act shall be quashed for want of form, or be removed by *certiorari*, or by any other writ or process whatsoever into the Supreme Court, or other superior Court.

Appropriation of penalties.

XV. And be it enacted, That the money arising from all penalties or forfeitures imposed by this Act, when recovered, shall be paid one moiety thereof to Her Majesty, Her Heirs, and Successors, for the Public uses of the said Colony, and in support of the Government thereof, and shall be applied thereto in such manner as may be appointed by any Act of the said Governor and Council, and the other moiety to the use of the informer or party prosecuting, who shall be entitled to his or her costs and charges over and above such forfeitures or penalties, to be ascertained and assessed by the Justices before whom the case is heard: Provided that in all proceedings under this Act, the person exhibiting the information or complaint shall be deemed and taken to be a competent witness on the hearing or trial thereof: Provided further, that it shall be lawful for the Governor of the said Colony for the time being, to pardon any offender, and to remit the whole or any part of such penalty or forfeiture, as the justice of each particular case may require.

Informer a competent witness.

Governor may pardon offender, and remit the whole or part of penalty.

Meetings to be convened by the rules to be established.

XVI. And be it enacted, That it shall not be lawful for the said Trustees to act, unless at a meeting to be convened according to a rule to be adopted by them for such purpose; and every such meeting shall be presided over by the senior Trustee present, such seniority being determined by the order in which the respective names of such Trustees shall stand in their Commission or Commissions of appointment; and all questions, matters, and things which shall be discussed or considered at any such meeting, shall be decided and determined by the majority in number of the Trustees then present: Provided that the said Trustees shall not be competent to proceed to business, unless there be, at least, three of them present; and that a book be opened and kept in which shall be entered a minute of the proceedings of the Trustees at every such meeting, which minute shall be read and confirmed at the next subsequent meeting, and shall be signed by the Chairman who shall have presided at the time such proceedings were held.

Regulations as to proceedings at such meetings.

Accounts to be kept,

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XVII. And be it enacted, That a book shall be opened and kept by the said Trustees, in which shall be entered a full and particular account, in writing, of all sums of money which shall be received and expended by the said Trustees; and an abstract of such account, made up from the first day of January to the thirty-first day of December, both inclusive, in the year next preceding, shall be transmitted to the Colonial Secretary for the said Colony for the time being, in the month of January in each and every year, and shall be by him forthwith inserted and published in the "*Port Phillip Government Gazette*;" and every such account shall be verified by a declaration to be made and subscribed by such Trustees, in the form or to the effect required by a certain Act of the said Governor and Council, passed in the ninth year of the reign of Her Majesty Queen Victoria, intituled, "*An Act for the more effectual abolition of*

and verified by declaration.

9 Vic. No. 9.

"*oaths*

"*oaths and affirmations taken and made in various Departments of the Go-*
"*vernment of New South Wales, and to substitute declarations in lieu*
"*thereof,' and for the suppression of voluntary and extra-judicial oaths and affidavits;*" and any Justice of the Peace is hereby empowered and required to administer such declaration; and if any Trustee or Trustees shall wilfully make a false statement in any such declaration, to any material matter in such account, he or they shall be deemed guilty of a misdemeanor.

Superintendent of Port Phillip may, by Proclamation, order the present Burial ground to be closed up.

XVIII. And be it enacted, That it shall be lawful for the Superintendent, or Officer administering the Government of Port Phillip for the time being, by Proclamation in the *Government Gazette*, to order that the Burial Ground at present used by the inhabitants of the said City of Melbourne, or such part or parts thereof as it may be considered advisable or expedient to close, shall be henceforth closed, and that thereafter no burial or burials shall be allowed to be made in such Burial Ground, or such part or parts thereof as shall be mentioned in the said Proclamation: Provided always, that nothing in this Act contained shall be construed to extend to any vaults or enclosed portions of land in the said Burial Ground which at the time of the passing of this Act shall be the private property of any person or persons whomsoever.

Proviso.

Passed the Legislative Council, this twenty-seventh day of August, one thousand eight hundred and fifty.

CHARLES NICHOLSON,
Speaker.

WM. MACPHERSON, CLERK OF THE COUNCIL.

In the name and on the behalf of Her Majesty I assent to this Act.

CHS. A. FITZ ROY,
GOVERNOR.

Govt. House, Sydney, 19th September, 1850.

[Reprinted as at 18 May, 1983

No. 6217.

CEMETERIES ACT 1958.

REPRINT (No. 3) incorporating amendments up to Act No. 9660.

An Act to consolidate the Law relating to Cemeteries and Cremation.

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):—

1. This Act may be cited as the *Cemeteries Act* 1958*, and shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the *Government Gazette*, and is divided into Parts and Divisions as follows :— Short title and commencement.

Part I.—Cemeteries &c. ss. 3-60.

Part IA.—Pioneer Memorial Parks ss. 60A—60C. Pt. IA. inserted by No. 8634 s. 3.

Part II.—Cremation ss. 61-81.

Part III.—New Metropolitan Cemeteries.
- Division 1.—The Necropolis, Spring Vale ss. 82–85A. Div. 1 amended by No. 8181 s. 2 (1).
- Division 2.—Fawkner Crematorium and Memorial Park ss. 86–87. Div. 2 amended by No. 7972 s. 2, substituted by No. 8116 s. 2.
- Division 3.—General ss. 88–94.

* The *Cemeteries Act* 1958 was assented to on the 30th September, 1958 and came into operation on the 1st April, 1959 (see *Government Gazette* 18th March, 1959 at page 892).

This reprint incorporates the amendments made to the *Cemeteries Act* 1958 by S.R. 243/1974 and the following Acts :—

Name.	No.	Date of Assent.	Date of Commencement.
Cemeteries Act 1959	6530	12.5.59	1.2.62 : *Government Gazette* 24.1.62 p. 139
Registration of Births Deaths and Marriages Act 1959	6564	24.11.59	1.10.60 : *Government Gazette* 28.9.60 p. 3146
Cemeteries (Investment of Funds) Act 1959	6578	8.12.59	8.12.59
Public Officers Salaries and Allowances Act 1960	6624	1.6.60	21.2.60 : deemed by s. 1 (2)
Subordinate Legislation Act 1962 ..	6886	8.5.62	1.8.62 : *Government Gazette* 4.7.62 p. 2314
Public Lands and Works Act 1964 ..	7228	15.12.64	15.3.65 : *Government Gazette* 11.3.65 p. 557
Cemeteries (St. Kilda Public Cemetery) Act 1967	7638	19.12.67	19.12.67
Cemeteries (Exhumation Licences) Act 1968	7672	18.4.68	18.4.68

same status operation and effect as they respectively would have had if such Acts had not been so repealed;

(*b*) in particular and without affecting the generality of the foregoing paragraph such repeal shall not disturb the continuity of status operation or effect of any rule regulation scale of fees order application decision grant direction permit approval disapproval determination statement authority agreement appointment registration inspection certificate licence condition notice liability or right made effected issued granted given presented passed fixed accrued incurred or acquired or existing or continuing by or under any of such Acts before the commencement of this Act.*

PART I.—CEMETERIES ETC.

Governor in Council may appoint trustees of cemeteries. No. 3652 s. 3. S. 3 (1) amended by No. 9212 s. 2 (2).

3. (1) The Governor in Council may from time to time appoint so many trustees not fewer than three in number as he thinks fit for any public cemetery (including any Crown land reserved either temporarily or permanently for cemetery purposes under section 4 of the *Crown Land (Reserves) Act* 1958) and every such appointment shall be published in the *Government Gazette*.

Municipal councils may be appointed trustees.

(2) The Governor in Council shall have power and shall be deemed at all times to have had power to appoint the council of any municipality to be trustees of any cemetery, and on any such appointment the provisions of section two hundred and forty-one of the *Local Government Act* 1958 shall apply, and so far as the provisions of the said section and of this sub-section are inconsistent with the other provisions of this Part the former provisions shall prevail. The Governor in Council may at any time revoke any order appointing the council of a municipality to be trustees of a cemetery whether such order was made before or after the commencement of this Act.

Power of trustees to hold lands. No. 3652 s. 4.

4. The trustees so appointed and their successors to be appointed as hereinafter mentioned shall have power to hold any lands or hereditaments that may be conveyed to them by deed

* Note: When section 2 of No. 9431 comes into operation, after section 2 there shall be inserted the following section. Section 2 of No. 9431 was not in operation at the date of this reprint.

S. 2A inserted by No. 9431 s. 2.

"2A. For the purposes of this Act—

(*a*) a reference to "vault" includes a reference to a mausoleum; and "Vault."

(*b*) a reference to "bury" includes a reference to the placing of a body in a mausoleum whether the body is placed below, or above, or partly below and partly above the ground and the derivaties of "bury" have a corresponding meaning.". "Bury."

of grant from the Crown or by any other sufficient deed of conveyance in trust for the establishment or purpose of a public cemetery.

Power of Governor in Council to remove trustees and appoint new trustees.
No. 3652 s. 5.

5. The Governor in Council may from time to time as and when he thinks proper remove from the said trusts any trustee of any such cemetery; and also upon the death resignation or removal of any trustee appointed under this Act may appoint another in his stead.

Removal and appointment to be published in *Gazette*.
No. 3652 s. 6.
s. 6 amended by No. 6578 s. 2 (a) (b).

6. Every such removal and appointment shall be published in the *Government Gazette*; and upon the publication thereof without any further conveyance or other assurance the legal estate in all lands and hereditaments and all personal property respectively held by any such trustee in trust for the purposes aforesaid shall vest in such new trustee or trustees solely or conjointly with the continuing trustee or trustees as the case may require.

Trustees' powers.
No. 5025 s. 2; No. 3652 s. 7.

7. (1) The trustees of any such cemetery shall have power to enclose any land so granted or conveyed as aforesaid with proper and sufficient walls rails fences or palisades, and to erect suitable gates and entrances and to lay out and ornament such cemetery in such a manner as may be most convenient and suitable for the burial of the dead, and to embellish the same with such walks avenues roads and shrubs as may to them seem fitting and proper; and to preserve maintain and keep in a cleanly and orderly state and condition and cause to be so maintained and kept the whole of any such cemetery and its walls and fences and all monuments tombstones enclosures buildings erections walks and shrubberies therein and belonging thereto. And the trustees shall expend subject to the directions of the Governor in Council the moneys in their hands from time to time to be received by them under this Act in the exercise of their powers and the discharge of their duties under this Act and in the burial of poor persons.

(2) The trustees of a cemetery may with the consent of the Governor in Council pay out of the moneys received by them under this Act to a council of a municipality a contribution towards the cost of the construction or maintenance of any private street adjoining or abutting on the cemetery and constructed (whether before or after the commencement of the *Cemeteries Act* 1944) under Division ten of Part XIX. of the *Local Government Act* 1958 or any corresponding previous enactment.

6th November, 1944.

Power of trustees to borrow.
No. 4006 s. 2; No. 6076 s. 2 (2).

8. (1) The trustees of any public cemetery may from time to time with the consent of the Governor in Council borrow from any person such moneys as they deem necessary on debentures or

(*b*) may extend to any interest charges and other expenses chargeable by the institution, person or body making the loan and the expenses of enforcing or obtaining or endeavouring to enforce or obtain repayment of the loan and those interest charges and expenses ;

(*c*) shall be subject to the condition that the institution, person or body making the loan shall obtain, take and hold or retain and hold securities of such nature as the Treasurer may require for the repayment of the loan and the payment of interest charges and expenses ;

(*d*) shall be subject to the condition that the institution, person or body making the loan shall not without the prior consent in writing of the Treasurer assign or encumber the benefit of the guarantee ; and

(*e*) shall not be enforceable against the Treasurer unless the institution, person or body making the loan has, to the Treasurer's satisfaction, exercised its or his rights and remedies under all securities held by or for it or him in respect of the loan and any interest charges and expenses.

(5) Any moneys required by the Treasurer in fulfilling any guarantee given under this section shall be paid out of the Consolidated Fund (which is hereby to the necessary extent appropriated accordingly) and any moneys received or recovered by the Treasurer in respect of any moneys so paid by the Treasurer shall be paid into the Consolidated Fund.

(6) The Treasurer shall cause the terms and conditions of any guarantee executed under sub-section (3) to be published in the *Government Gazette*.

(7) The Health Commission shall include in each annual report under section 33 of the *Health Commission Act* 1977 details of all current guarantees relating to cemetery trusts under this Act.

(8) The powers conferred by this section may be exercised notwithstanding anything to the contrary in this Act and are in addition to any powers conferred by any other provision of this Act.

Rules and regulations. No. 3652 s. 8.

9. The trustees of any such cemetery shall have power and authority to make such rules and regulations, and to do and perform and cause to be done and performed all such acts matters and things as may be necessary and proper for any of the purposes aforesaid ; and for directing the positions of all graves and vaults to be made in the said cemetery the depths of the graves and

construction of coffins to be admitted into vaults and the covering of vaults so as to prevent the escape of any noxious exhalation or evaporation in the said cemetery; and for protecting the buildings monuments shrubberies plantations and enclosures therein and thereof from destruction or damage.

10. No rule or regulation shall be in force until the same has been submitted to the Governor in Council and published in the *Government Gazette*.

Rules &c., to be published in *Gazette*.
No. 3652 s. 9.

11. Every person who is guilty of a breach of any rules and regulations made and published in pursuance of the foregoing provisions of this Act or of any corresponding previous enactment shall, on an information being laid against him by the trustees of any public cemetery or by any officer or servant employed by them, be liable for every such offence to a penalty of not more than $500.

Penalty for breach of rules.
No. 3652 s. 10.
S. 11 amended by No. 9431 s. 3.

12. The trustees of any such cemetery shall not be competent to proceed to business at any meeting unless there are at least three of them present.

Quorum of trustees.
No. 3652 s. 11.

13. The trustees of any such cemetery may adopt rules for convening meetings and such other rules and regulations as may be necessary for their own guidance and management.

Trustees to adopt rules.
No. 3652 s. 12.

14. The majority in number present at any meeting of the said trustees shall decide and determine all questions matters and things which may be discussed or considered at such meeting.

Questions to be decided by majority.
No. 3652 s. 13.

15. The trustees of any such cemetery shall not by any rule or regulation or any act matter or thing at any time interfere directly or indirectly with the performance of any religious ceremony in the burial of the dead according to the usage of the communion to which the deceased has belonged; or with the original distribution of lands or hereditaments made or intended to be made by the deed of grant or other conveyance to and amongst separate and distinct religious denominations and communions.

Trustees not to interfere with religious ceremonies or distribution of land.
No. 3652 s. 14.

V | 50

16. The minister of any denomination for which any portion of any such cemetery is specially set apart may have free access and admission to such portion of the said cemetery at all times as he thinks fit; and may freely exercise his spiritual functions therein without any hindrance or disturbance by the trustees of the said cemetery or any person whomsoever.

Ministers of religion to have free access.
No. 3652 s. 15.

VI | 50

Trustees to make and publish scale of fees.
No. 3652 s. 16.
Ss. (1) amended by No. 9660 s. 3 (a) (b).

17. (1) The trustees of every such cemetery may from time to time with the consent of the Governor in Council make and publish in the *Government Gazette* a scale of fees payable on any vault or grave being dug or made and any monument or tombstone being erected or placed in any part of any such cemetery and any inspection of records kept by any person for the purposes of historical research or by an employé of the trustees on behalf of a person for that purpose.

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Ss. (2) inserted by No. 9660 s. 3 (b).

(2) On the request of any person who wishes to inspect any records kept in relation to a cemetery for the purposes of historical research, the trustees may on payment of the appropriate fees fixed pursuant to sub-section (1) permit the person to inspect the records and to take copies thereof or extracts therefrom or permit an employé of the trustees to inspect the records on that person's behalf and to take copies thereof or extracts therefrom and to give those copies or extracts to the person who made the request.

Vaults and monuments.
No. 3652 s. 17.
*S. 18 amended by Nos. 9023 s. 40 (as amended by No. 9052 s. 7), 9052 s. 2 (a) (b). (as amended by No. 9427 s. 6 (1))

18. If such scale of fees has been made and published as aforesaid, the trustees of any such cemetery or any officer of the trustees authorized in that behalf (whether generally or in any particular case) by the trustees and the Health Commission of Victoria may permit any vault or grave to be dug or made in such cemetery and any monument or tombstone to be erected or placed in any part of any such cemetery as they think or he thinks proper, upon payment to them or to him by the person desiring to dig or make such vault or grave and to erect or place such monument or tombstone of the fees named in the scale aforesaid.

No burial in a public cemetery to take place without a permit.
No. 5025 s. 3; No. 5623 s. 4 (2).
*Ss. (1) amended by Nos. 9023 s. 40 (as amended by No. 9052 s. 7), 9052 s. 3.

19. (1) No corpse shall be buried in any public cemetery until a permit to bury such corpse has been signed by an officer of the trustees of the cemetery authorized in that behalf (whether generally or in any particular case) by the trustees and the Health Commission of Victoria.

Permit not to be given without production of certain documents &c.
Paragraphs (a) (b) (c) substituted by No. 6564 s. 2 (1).

(2) Any such officer shall sign or refuse to sign any such permit in accordance with such regulations as are made by the Governor in Council and such general or special directions as are given by the trustees, but in no case shall any such officer sign such a permit until with respect to the corpse—

(*a*) a notice in the form prescribed pursuant to paragraph (*b*) of sub-section (1) of section nineteen of the

* See section 6 of Act No. 9052, which deems sections 18 and 20 of the Principal Act to have been enacted as amended by No. 9052.

Registration of Births Deaths and Marriages Act 1959 signed by a legally qualified medical practitioner ;

(*b*) a certificate of an order for burial in the form set forth in the Second Schedule to the *Coroners Act* 1958 ; or

(*c*) a statutory declaration made by the undertaker or other person conducting the burial stating that owing to special circumstances it is not possible for a notice duly signed by a legally qualified medical practitioner in the form prescribed pursuant to paragraph (*b*) of sub-section (1) of section nineteen of the *Registration of Births Deaths and Marriages Act* 1959 to be produced at the time of burial—

has been produced to such officer :

Provided that in any case where such officer signs a permit on production of a statutory declaration hereinbefore referred to he shall forthwith give notice in writing of that fact to the Minister of Health.

Penalty.

S. (3) amended by No. 9431 s. 4.

(3) Every person who in contravention of the provisions of this section buries a corpse or causes a corpse to be buried or signs any permit shall be liable to a penalty of not more than $2000.

VH 150

Plan of monument &c. to be submitted to trustees.

No. 3652 s. 18.

S. 20 amended by No. 9023 s. 40, substituted by No. 9052 s. 4*, amended by No. 9431 s. 5.

20. When any person desires to erect or place any vault monument or tombstone in any part of any such cemetery, he shall before such permission as aforesaid is given submit a plan of the vault monument or tombstone proposed to be erected or placed to the trustees of such cemetery or an officer of the trustees authorized in that behalf (whether generally or in any particular case) by the trustees and the Health Commission of Victoria who shall be at liberty to withhold their or his permission and to prevent the erection or placing of any vault monument or tombstone which appears to them or him inappropriate unsafe or dangerous.

Brick or stone graves and vaults to be water-tight.

No. 3652 s. 19.

21. (1) Every grave now or hereafter lined with brick or stone and every brick or stone vault now or hereafter constructed in any public cemetery shall be made and kept water-tight by or at the expense of any person having for the time being the exclusive right of burial or interment in any such grave or vault as a family or private burial place.

Coffins therein to be air-tight and water-tight.

Ss. (2) amended by No. 9431 s. 6.

(2) Every coffin now or hereafter deposited in a grave lined with brick or stone or in a brick or stone vault shall be built in and covered with a substantial slab of stone slate or iron cemented in and shall be made and kept air-tight and water-tight,

* See footnote on page 6.

(*b*) with the consent of the Health Commission of Victoria take down and remove any monument tombstone headstone cenotaph or other erection—

and may recover the cost and expenses of so doing from the person to whom the notice was sent before a magistrates' court as a civil debt recoverable summarily.

(4) Where after diligent inquiry the trustees are unable to discover the whereabouts of any person having for the time being the exclusive right of burial or interment in the grave or vault concerned, or where to the trustees there appears to be no person having an exclusive right of burial or interment in such grave or vault, the trustees may with the consent of the Health Commission of Victoria repair such grave or remove such monument or other erection.

(5) In this section any act which may be performed by the trustees may be performed by an officer of the trustees authorized on that behalf by the trustees and the Health Commission of Victoria.

Trustees to fix position of monument &c. No. 3652 s. 22.

24. The trustees of any such cemetery shall determine and fix the position of any monument which is proposed to be erected or placed according to the description size and character thereof, having reference to the general plan for ornamenting the said cemetery in an appropriate manner.

Monuments &c., to be kept up. No. 3652 s.23. S. 25 amended by No. 8634 s. 6 (a) (c).

25. (1) Any person digging or making any vault grave or tombstone or erecting or placing any monument in any such cemetery by and with such permission as aforesaid[a] and upon payment of the fees aforesaid shall save as otherwise expressly provided in this Act be entitled to have maintained and kept up such vault grave monument or tombstone according to the terms of such permission to and for the sole and separate use of such person and his representatives for ever.

Ss. (2) inserted by No. 8634 s. 6 (b).

(2) Where an exclusive right of burial or interment has been in existence for more than 25 years and has never been exercised and the person who is for the time being the holder of such exclusive right cannot after diligent inquiry by the trustees be found, such exclusive right may be cancelled by the trustees and from the date of the cancellation no person shall be entitled to any rights or privileges or subject to any liabilities in respect thereof.

Ss. (3) inserted by No. 8634 s. 6 (b).

(3) At least 14 days before an exclusive right is cancelled under sub-section (2) a notice of intention so to do shall be published by the trustees in a daily or weekly newspaper circulating generally in the district concerned.

Ss. (4) inserted by No. 8634 s. 6 (b).

(4) Where an exclusive right of burial or interment has been cancelled pursuant to this section any person who but for the

(*a*) See section 18.

cancellation would have been the holder of such exclusive right may request the trustees—

(*a*) to refund any fees paid by him pursuant to this Act in respect of such exclusive right ; or

(*b*) to make an alternative site available to him—

and the trustees shall comply with such request.

s. (5) inserted by No. 8634 s. 8 (b).

(5) Any exclusive right of burial or interment acquired after commencement of the *Cemeteries (Pioneer Memorial Parks) Act* 1974 shall be subject to the condition that that right is exercised within 25 years after the acquisition thereof but where the right is not so exercised the person who was the holder thereof may, upon payment of the relevant fees referred to in section 17, acquire a further exclusive right under this Act in respect of the place of burial concerned.

Private vaults protected. No. 3652 s. 24.

26. Before any corpse is permitted to be interred in any vault brick grave or in any place of burial the exclusive right of burial or interment wherein has been sold or granted by the said trustees as a family or private burial place, the said trustees or any officer employed by them may inquire whether and they or he shall be entitled to have produced to them or him satisfactory evidence that the person for the time entitled as owner to the exclusive right of burial or interment in such vault brick grave or other burial place has consented or would not object to such interment taking place therein.

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Power to relinquish right of burial. No. 3652 s. 25.

27. Any person having for the time being the exclusive right of burial or interment as a family or private burial place in any grave vault or place of burial in any public cemetery on producing to the trustees thereof satisfactory evidence of such right and on either delivering up to them the certificate or grant of such right or furnishing satisfactory evidence of the loss or destruction of such certificate or grant shall be entitled to have such grant or certificate cancelled by such trustees, and thenceforth such person shall (notwithstanding anything contained in this Act) be entitled to no rights or privileges whatever and be subject to no liabilities penal or otherwise under any law for the time being in force relating to public cemeteries in respect of such vault grave or other place.

No unauthorized payment to be made for use of any grave, &c. for burial. s. 27A inserted by No. 8431 s. 7.

27A. (1) A person shall not—

(*a*) pay or promise to pay or demand or receive ; or

(*b*) enter into any agreement or transaction or arrangement under or by reason of or in connexion with which he or any other person is to receive—

any consideration in money or money's worth (not being a fee or charge or other consideration provided for by or under this Act) for or on account of or in connexion with—

(*c*) the use;

(*d*) any consent by him or by any other person to the use; and

(*e*) any failure by him or by any other person to object to the use—

of any grave or vault in any public cemetery for the burial or interment or other disposal of any body or the cremated ashes of any body whether the body is or is not the body of some specified or identifiable person or is or is not the body of a person then living.

(2) A person who contravenes any of the provisions of this section shall be liable to a penalty of not more than $2000.

Monuments &c. may be removed.
No. 3652 s. 26.

28. When any monument cenotaph tablet or other erection has been erected or built contrary to the terms and conditions upon which permission to erect or construct the same was granted, or in case such terms and conditions as well as the regulations of the cemetery have not been complied with the trustees may take down and remove such monument cenotaph tablet or other erection.

VIII /80

Mortuary church.
No. 3652 s. 27.
S. 29 amended by No. 8181 s. 2 (1).

29. Where the members of any religious denomination desire at their own expense to erect and build in any such cemetery a suitable mortuary church or chapel for the performance of the rites and ceremonies in the burial of the dead according to the usages of such denomination if the plans specifications elevations and models thereof with lodges and other buildings and conveniences thereto are first submitted for the approval of the trustees of the said cemetery and approved by them the said trustees may permit the same to be erected and built within such part of the said cemetery as is specially set apart for that denomination.

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Governor in Council may direct money to be paid to trustees for establishment and management of cemeteries.
No. 3652 s. 28.

30. The Governor in Council may direct such sums of money as he may think fit to be paid out of any part of the public revenues of Victoria appropriated or to be appropriated for the establishment of cemeteries to the trustees of any cemetery and to their successors in trust for the establishment and management of such cemetery.

Money to be either lent or paid.
No. 3652 s. 29.

31. The Governor in Council may either cause such sum to be lent to such trustees to be repaid out of the fees as herein mentioned ; or when from the situation of the cemetery or any other circumstance it seems improbable that such fees will be sufficient to defray any such loan he may cause such sum to be paid to such trustees in trust for the establishment and management of the cemetery.

Security where money is lent.
No. 3652 s. 30.

32. In case any sum is so lent as aforesaid the Governor in Council may require such security over the fees herein mentioned as is expedient; but such security shall not involve any of the trustees in any personal liability.

XVII 50

Trustee to keep account and abstract.
No. 3652 s. 31.

33. The trustees of every cemetery shall keep a full and particular account of all sums of money received and expended by them, and an abstract of such account made up from the day of their first appointment to the thirty-first day of December in the first year and from the first day of January to the thirty-first day of December both inclusive in each subsequent year.

XVII 50

Trustees to transmit the same to the Health Commission.
No. 3652 s. 32.
s. 34 amended by No. 9023 s. 40.

34. The trustees of every cemetery shall transmit such account and abstract verified respectively by a statutory declaration by three at least of such trustees to the Health Commission of Victoria on or before the first day of March in every year; and every such abstract shall be published in the *Government Gazette*.

Statement.
No. 3652 s. 33.

35. The trustees of every cemetery shall send with such account and abstract a statement of the condition of such cemetery as to repairs order and ornament, and a suggestion as to the alterations necessary or expedient in the ensuing year in such repairs order and ornament, and an estimate of the expense which will probably be incurred in effecting the same.

Governor in Council to direct appropriation of moneys.
No. 3652 s. 34.
s. 36 amended by No. 6578 s. 3.

36. The Governor in Council upon examination of the said accounts statements suggestions and estimates may direct the manner in which the balance of moneys or any part thereof in the hands of such trustees shall be appropriated ; and shall if any sum so lent or advanced as aforesaid is unpaid determine the proportion (if any) to be applied in payment of such sum and the amount to be expended in the laying out or improvement of such cemetery in the ensuing year.

Directions to be published in *Gazette*.
No. 3652 s. 35.
s. 37 amended by Nos. 6578 s. 4 (a), 8181 s. 2 (1).

37. (1) Every such direction shall be published in the *Government Gazette,* and thereupon the trustees shall pay such proportion as aforesaid into the Consolidated Revenue; and if no such sum has been lent or if lent has been paid off the balance (if any) in the hands of the trustees—

(i) shall be expended in the improvement of such cemetery and the interment of poor persons ; or

(ii) to the extent of which any such balance is not required for such purposes or for complying with any direction of the Governor in Council with respect to the appropriation or expenditure of such balance, may be invested by the trustees in any manner for the time being permitted by law for the investment of trust funds and in relation to the making of any such investment and to any such investment when made the trustees shall have the same powers duties and immunities and be subject to the same restrictions as if they were trustees within the meaning of the *Trustee Act* 1958.

(2) So long as any money is so invested the amount thereof and the manner in which it is invested shall be shown each year in the account and abstract referred to in section thirty-three of this Act and in giving any direction under this Act with respect to the appropriation or expenditure of moneys in the hands of the trustees the Governor in Council may direct the money so invested or any part thereof to be called in or any security in which it is invested to be sold.

s. (2) inserted by No. 6578 s. 4 (b).

38. Every such trustee who omits to make and transmit such account and abstract as aforesaid shall for every such offence be liable to a penalty of not more than $500.

Penalty if trustee neglects.
No. 3652 s. 36.
S. 38 amended by No. 9431 s. 8.

39. The trustees of every cemetery shall have power to prosecute all persons who may at any time do or cause to be done any damage to any building monument tombstone shrubbery plantation or enclosure of the said cemetery.

Trustees to prosecute for damage.
No. 3652 s. 37.

40. Every person who wantonly or wilfully destroys or does or causes to be done any damage to any monument vault tombstone building erection railing fence shrubbery tree shrub or plant in any cemetery shall be guilty of an offence; and being convicted thereof on an information by the said trustees or by any officer or servant employed by them in the said cemetery or by any person to whom the burial place belongs shall be liable for every such offence to a penalty of not more than $1000 or to imprisonment for a term of not more than three months.

Malicious injury.
No. 3652 s. 38.
S. 40 amended by No. 9431 s. 9.

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41. Every person who does or causes to be done any injury to any monument vault tombstone building erection railing shrubbery tree shrub or plant whether the same is done wilfully or wantonly or otherwise howsoever shall be liable to pay a reasonable sum of money by way of damages and compensation therefor; which said sum of money shall be recoverable in any court of competent jurisdiction by the trustees of the cemetery or any person injured by such damage.

Injuries to monuments &c.
No. 3652 s. 39.

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42. It shall be lawful for any trustee or for any officer or servant of the trustees and for all such persons as he calls to his assistance to seize and detain any person who commits or is in the act of committing an offence against this Act and whose name and place of abode is unknown to such trustee officer or servant and without other warrant or authority than this Act to convey such person before a justice to be dealt with according to law.

Trustee may seize and detain any person committing an offence against this Act.
No. 3652 s. 40.

43. If at any time before the sixth day of September One thousand eight hundred and sixty-seven any land was set apart or used as a burial ground or was conveyed to trustees for the purpose of the interment of the dead, the Governor in Council

Certain burial grounds may be brought under the law relating to cemeteries.
No. 3652 s. 41.

Listing of Public Cemetery Trusts with reference to the Municipality in which the Councillors of that Municipality are the Trustees of that Cemetery.

CEMETERY LISTING	MUNICIPALITY
Aberfeldy Cemetery Trust	
Adass Israel Cemetery Trust	
Alberton Cemetery Trust	
Alexandra Cemetery Trust	
Allambee East Cemetery Trust	Shire of Mirboo
Alma Cemetery Trust	Shire of Tullaroop
Amherst Cemetery Trust	
Amphitheatre Cemetery Trust	
Antwerp Cemetery Trust	
Apollo Bay Cemetery Trust	
Apsley Cemetery Trust	
Ararat Cemetery Trust	
Arthur's Creek Cemetery Trust	
Avenel Cemetery Trust	
Avoca Cemetery Trust	
Axedale Cemetery Trust	
Bairnsdale Cemetery Trust	City of Bairnsdale
Ballan Cemetery Trust	
Ballangeich Cemetery Trust	
Ballarat General Cemeteries & Crematorium	
Balmoral Cemetery Trust	
Bambra Cemetery Trust	
Bannockburn Cemetery Trust	
Baringhup Cemetery Trust	Shire of Maldon
Barkly Cemetery Trust	
Barmah Cemetery Trust	
Barnawartha Cemetery Trust	
Barrabool Hills Cemetery Trust	
Bealiba Cemetery Trust	
Beaufort Cemetery Trust	
Beeac Cemetery Trust	
Beechworth Cemetery Trust	
Beenak Cemetery Trust	
Bellarine Cemetery Trust	
Bellbrae Cemetery Trust	
Benalla Cemetery Trust	

CEMETERY LISTING	MUNICIPALITY
Benambra Cemetery Trust	Shire of Omeo
Bendigo Cemetery Trust	City of Bendigo
Berriwillock Cemetery Trust	
Berwick Cemetery Trust	
Bethanga Cemetery Trust	
Beulah Cemetery Trust	
Birchip Cemetery Trust	
Birregurra Cemetery Trust	Shire of Winchelsea
Blackheath Cemetery Trust	Shire of Wimmera
Blackwood Cemetery Trust	
Bleak House Cemetery Trust	
Blue Mountain Cemetery Trust	Shire of Kyneton
Boinka Cemetery Trust	
Bonnie Doon Cemetery Trust	Shire of Mansfield
Boolarra Cemetery Trust	
Boorhaman Cemetery Trust	Shire of Wangaratta
Boroondara Cemetery Trust	
Boort Cemetery Trust	
Boram Boram Cemetery Trust	
Bowman's Forest Cemetery Trust	
Box Hill Cemetery Trust	
Branxholme Cemetery Trust	
Briagolong Cemetery Trust	
Birchip Cemetery Trust	
Bridgewater Cemetery Trust	
Bright Cemetery Trust	
Brighton General Cemetery	
Brim Cemetery Trust	
Brimpaen Cemetery Trust	
Broadford Cemetery Trust	
Bruthen Cemetery Trust	
Buangor Cemetery Trust	
Buchan Cemetery Trust	
Buckland Cemetery Trust	
Bulla Cemetery Trust	
Bullarto Cemetery Trust	Shire of Daylesford & Glenlyon
Bumberrah Cemetery Trust	
Bundalong Cemetery Trust	Shire of Yarrawonga

CEMETERY LISTING	MUNICIPALITY
Bung Bong and Wareek Cemetery Trust	Shire of Tullaroop
Bungaree Cemetery Trust	
Buninyong Cemetery Trust	
Bunyip Cemetery Trust	
Burramine Cemetery Trust	Shire of Yarrawonga
Burrum Burrum Cemetery Trust	
Burwood Cemetery Trust	
Byaduk Cemetery Trust	
Byaduk North Cemetery Trust	
Camperdown Cemetery Trust	
Cann River Cemetery Trust	
Cape Bridgewater Cemetery Trust	
Cape Clear Cemetery Trust	
Cape Otway Cemetery Trust	
Caramut Cemetery Trust	
Carisbrook Cemetery Trust	
Carlsruhe Cemetery Trust	Shire of Newham and Woodend
Carlyle Cemetery Trust	Shire of Rutherglen
Carngham Cemetery Trust	
Carwarp Cemetery Trust	
Cassilis Cemetery Trust	Shire of Omeo
Casterton (New) Cemetery Trust	
Casterton (Old) Cemetery Trust	Shire of Glenelg
Castlemaine Cemetery Trust	
Cathcart Cemetery Trust	
Cathkin Cemetery Trust	
Cavendish Cemetery Trust	
Charlton Cemetery Trust	Shire of Charlton
Cheltenham Cemeteries Trust	
Chetwynd Cemetery Trust	
Chewton Cemetery Trust	
Chiltern (New) Cemetery Trust	
Chiltern (Old) Cemetery Trust	Shire of Chiltern
Chinkapook (Eureka) Cemetery Trust	
Clarendon Cemetery Trust	
Clear Lake Cemetery Trust	
Clunes Cemetery Trust	
Cobden Cemetery Trust	
Cobram Cemetery Trust	Shire of Cobram

CEMETERY LISTING	MUNICIPALITY
Geelong Eastern Cemetery Trust	
Geelong Western cemetery Trust	
Gembrook Cemetery Trust	
Gipsy Point Cemetery Trust	
Gisborne Cemetery Trust	
Glen Wills Cemetery Trust	
Glendaurel Cemetery Trust	
Glengower Cemetery Trust	
Glenlyon Cemetery Trust	
Glenmaggie Cemetery Trust	
Glenorchy Cemetery Trust	
Glenpatrick Cemetery Trust	Shire of Lexton
Glenthompson Cemetery Trust	
Glen Wills Cemetery Trust	Shire of Omeo
Gobur Cemetery Trust	
Goornong Cemetery Trust	
Gordon (New) Cemetery Trust	
Gormondale Cemetery Trust	
Goroke Cemetery Trust	
Gowangardie Cemetery Trust	
Granite Flat Cemetery Trust	
Grantville Cemetery Trust	
Granya Cemetery Trust	
Gray's Bridge Cemetery Trust	
Graytown Cemetery Trust	
Great Western Cemetery Trust	
Green Hill Cemetery Trust	Shire of Metcalfe
Greendale Cemetery Trust	
Greensborough Cemetery Trust	Shire of Diamond Valley
Greta Cemetery Trust	
Grovedale Cemetery Trust	
Guildford Cemetery Trust	
Hamilton Cemetery Trust	
Harcourt Cemetery Trust	
Harkaway Cemetery Trust	
Harrietville Cemetery Trust	
Harrow Cemetery Trust	
Havilah Cemetery Trust	
Hawkesdale Cemetery Trust	

CEMETERY LISTING	MUNICIPALITY
Hazelwood Cemetery Trust	
Healesville Cemetery Trust	
Heathcote Cemetery Trust	
Heidelberg Cemetery Trust	
Hexham Cemetery Trust	
Heyfield Cemetery Trust	
Heywood Cemetery Trust	Shire of Portland
Hopetoun Cemetery Trust	Shire of Karkarooc
Horsham Cemetery Trust	
Hotspur Cemetery Trust	
Inglewood Cemetery Trust	
Inverleigh Cemetery Trust	
Inverloch Cemetery Trust	
Jamieson Cemetery Trust	Shire of Mansfield
Jeparit Cemetery Trust	
Joyce's Creek Cemetery Trust	
Jung (Jerro) Cemetery Trust	
Kangaroo Flat Cemetery Trust	
Kangaroo Ground Cemetery Trust	
Kaniva & Lillimur Cemetery Trust	Shire of Kaniva
Jericho Cemetery Trust	
Karnak Cemetery Trust	
Katamitite Cemetery Trust	
Katandra Cemetery Trust	
Katyil Cemetery Trust	
Keilor Cemetery Trust	City of Keilor
Kenmare Cemetery Trust	
Kerang Cemetery Trust	
Kialla West Cemetery Trust	
Kiata Cemetery Trust	
Kiewa Cemetery Trust	
Kilcunda Cemetery Trust	
Kilmore Cemetery Trust	
Kingower Cemetery Trust	
Koondrook Cemetery Trust	
Kooroocheang Cemetery Trust	
Korong Vale Cemetery Trust	
Korumburra Cemetery Trust	
Kyabram Cemetery Trust	

CEMETERY LISTING	MUNICIPALITY
Kyneton Cemetery Trust	
Laen North Cemetery Trust	
Lake Boga Cemetery Trust	
Lake Bolac Cemetery Trust	
Lake Rowan Cemetery Trust	
Lakes Entrance Cemetery Trust	
Lalbert Cemetery Trust	
Lancefield Cemetery Trust	
Landsborough Cemetery Trust	
Lang Lang Cemetery Trust	
Learmonth Cemetery Trust	Shire of Ballarat
Leongatha Cemetery Trust	
Leopold Cemetery Trust	Shire of Bellarine
Lethbridge Cemetery Trust	
Lexton Cemetery Trust	
Lilydale Cemetery Trust	
Linton Cemetery Trust	
Lismore Cemetery Trust	
Loch Ard Cemetery Trust	
Lochiel Cemetery Trust	
Lockwood Cemetery Trust	
Longwood Cemetery Trust	
Lorne Cemetery Trust	
Lorquon Cemetery Trust	
Macarthur Cemetery Trust	
Macedon Cemetery Trust	
Maddingley Cemetery Trust	
Maffra Cemetery Trust	
Majorca Cemetery Trust	
Maldon Cemetery Trust	
Mallacoota Cemetery Trust	
Malmsbury Cemetery Trust	
Manangatang Cemetery Trust	
Mansfield Cemetery Trust	Shire of Mansfield
Marlo Cemetery Trust	
Marong Cemetery Trust	
Maryborough Cemetery Trust,	
Maryknoll Cemetery Trust	
Marysville Cemetery Trust	

CEMETERY LISTING	MUNICIPALITY
Meeniyan Cemetery Trust	
Melbourne Chevra Kadisha Cemetery Trust	
Melbourne General Cemetery	
Melton Cemetery Trust	Shire of Melton
The Memorial Park	
Merbein Cemetery Trust	
Meredith Cemetery Trust	
Meringur Cemetery Trust	
Merino Cemetery Trust	
Merton Cemetery Trust	Shire of Mansfield
Milawa Cemetery Trust	
Mildura Cemetery Trust	City of Mildura
Minimay Cemetery Trust	
Minyip Cemetery Trust	
Miram Cemetery Trust	
Mirboo North Cemetery Trust	Shire of Mirboo
Mitiamo Cemetery Trust	
Mitta Mitta Cemetery Trust	
Moe Cemetery Trust	
Molesworth Cemetery Trust	
Moliagul Cemetery Trust	
Moonambel Cemetery Trust	
Moondarra Cemetery Trust	
Moonlight Head Cemetery Trust	
Moorngag Cemetery Trust	
Mooroopna Cemetery Trust	
Mornington Cemetery Trust	Shire of Mornington
Morrisons Cemetery Trust	
Mortlake Cemetery Trust	
Morwell (Hazelwood) Cemetery Trust	
Mount Cole Cemetery Trust	
Mount Duneed Cemetery Trust	Shire of Barrabool
Mount Egerton Cemetery Trust	
Mount Moriac Cemetery Trust	Shire of Barrabool
Mount Prospect Cemetery Trust	
Moyston Cemetery Trust	
Muckleford Cemetery Trust	
Murchison Cemetery Trust	

CEMETERY LISTING	MUNICIPALITY
Murrayville Cemetery Trust	
Murtoa Cemetery Trust	
Myrtleford Cemetery Trust	
Mysia Cemetery Trust	
Nagambie Cemetery Trust	
Nandaly Cemetery Trust	
Narracan Cemetery Trust	
Narrwong Cemetery Trust	
Nathalia Cemetery Trust	
Natimuk Cemetery Trust	
Natte Yallock Cemetery Trust	
Navarre Cemetery Trust	
Neerim Cemetery Trust	
Nelson Cemetery Trust	
Netherby Cemetery Trust	
Newbridge Cemetery Trust	
Newstead Cemetery Trust	
Nhill Cemetery Trust	
Nirranda Cemetery Trust	
Noradjuha Cemetery Trust	
Northcote Cemetery Trust	City of Northcote
Numurkah Cemetery Trust	Shire of Numurkah
Nurrabiel Cemetery Trust	
Nyah Cemetery Trust	
Nyora Cemetery Trust	
Oakleigh Cemetery Trust	City of Oakleigh
Omeo Cemetery Trust	Shire of Omeo
Orbost Cemetery Trust	
Outtrim Cemetery Trust	
Ouyen Cemetery Trust	Shire of Walpeup
Pakenham Cemetery Trust	
Parmure Cemetery Trust	
Pannoobamawm Cemetery Trust	
Patho and Torrumbarry Cemetery Trust	
Paynewsville Cemetery Trust	Shire of Bairnsdale
Peechelba Cemetery Trust	Shire of Yarrawonga
Phillip Island Cemetery Trust	
Pimpinio Cemetery Trust	

CEMETERY LISTING	MUNICIPALITY
Pine Lodge South Cemetery Trust	Shire of Shepparton
Polkemmet Cemetery Trust	
Pompapiel Cemetery Trust	
Poowong Cemetery Trust	
Port Campbell Cemetery Trust	
Port Fairy Cemetery Trust	
Portarlington Cemetery Trust	Shire of Bellarine
Portland (New) Cemetery Trust	
Portland (Old) Cemetery Trust	Shire of Portland
Preston Cemetery Trust	City of Preston
Pyalong Cemetery Trust	Shire of Pyalong
Pyramid Hill Cemetery Trust	
Quambatook Cemetery Trust	
Quantong Cemetery Trust	
Queenscliff Cemetery Trust	
Queenstown Cemetery Trust	Shire of Eltham
Rainbow Cemetery Trust	
Raywood Cemetery Trust	
Red Cliffs Cemetery Trust	
Redbank Cemetery Trust	
Red Jacket Cemetery Trust	
Rheola Cemetery Trust	
Riddell's Creek Cemetery Trust	
Ripplebrook Cemetery Trust	Shire of Buln Buln
Robinvale Cemetery Trust	
Rochester Cemetery Trust	
Rokewood Cemetery Trust	
Rosebery Cemetery Trust	
Rosedale Cemetery Trust	
Rothwell Cemetery Trust	
Runnymede Cemetery Trust	
Rupanyup Cemetery Trust	
Rushworth Cemetery Trust	
Rye Cemetery Trust	
Sale Cemetery Trust	
San Remo Cemetery Trust	
Sandford Cemetery Trust	
Sandy Creek Cemetery Trust	
Scotts Creek Cemetery Trust	

CEMETERY LISTING	MUNICIPALITY
Sea Lake Cemetery Trust	
Seymour Cemetery Trust	
Sheep Hill Cemetery Trust	
Shelford Cemetery Trust	
Shepparton Cemetery Trust	
Skipton Cemetery Trust	
Smeaton Cemetery Trust	
Smythesdale Cemetery Trust	
Sorrento Cemetery Trust	
Speed Cemetery Trust	
Spring Hill Cemetery Trust	
Spring Lead Cemetery Trust	
Springhurst Cemetery Trust	
St. Arnaud Cemetery Trust	
St. Kilda Cemetery Trust	
Staffordshire Reef Cemetery Trust	
Stanley Cemetery Trust	
Stawell Cemetery Trust	
Steiglitz Cemetery Trust	
Strathdownie East Cemetery Trust	
Stratford Cemetery Trust	
Strathbogie Cemetery Trust	
Streatham Cemetery Trust	
Stuart Mill Cemetery Trust	
Sunbury Cemetery Trust	Shire of Bulla
Sutton Grange Cemetery Trust	
Swan Hill Memorial Park	
Swanwater West Cemetery Trust	
Talgarno Cemetery Trust	
Tallangatta Cemetery Trust	
Tallarook Cemetery Trust	
Taradale Cemetery Trust	
Tarnagulla Cemetery Trust	
Tarrawingee Cemetery Trust	
Tarrayoukyan Cemetery Trust	
Tarwin Lower Cemetery Trust	
Tatura Cemetery Trust	
Tatyoon Cemetery Trust	
Tawonga Cemetery Trust	

CEMETERY LISTING	MUNICIPALITY
Teesdale Cemetery Trust	
Templestowe Cemetery Trust	
Terang Cemetery Trust	
Terrapee Cemetery Trust	
Tharanbegga Cemetery Trust	
The Necropolis	
Thoona Cemetery Trust	
Thorpdale Cemetery Trust	
Timor Cemetery Trust	
Tol Tol Cemetery Trust	
Tongala Cemetery Trust	
Tooan Cemetery Trust	
Toolamba Cemetery Trust	
Toongabbie Cemetery Trust	
Toora Cemetery Trust	
Towaninie Cemetery Trust	Shire of Wycheproof
Tower Hill Cemetery Trust	
Towong Cemetery Trust	Shire of Upper Murray
Trafalgar Cemetery Trust	
Traralgon Cemetery Trust	
Trentham Cemetery Trust	
Truganina Cemetery Trust	Shire of Werribee
Tungamah Cemetery Trust	
Tutye Cemetery Trust	
Tyaak Cemetery Trust	
Tyabb Cemetery Trust	Shire of Hastings
Tylden Cemetery Trust	
Underbool Cemetery Trust	
Upper Regions Cemetery Trust	
Upper Yarra Cemetery Trust	
Vaughan Cemetery Trust	
Violet Town Cemetery Trust	
Waanyarra Cemetery Trust	Shire of Bet Bet
Wahgunyah Cemetery Trust	
Waitchie Cemetery Trust	
Walhalla Cemetery Trust	
Wallan Cemetery Trust	
Walpeup Cemetery Trust	
Walwa Cemetery Trust	

CEMETERY LISTING	MUNICIPALITY
Wangaratta Cemetery Trust	Shire of Wangaratta
Warncoort Cemetery Trust	
Warracknabeal Cemetery Trust	
Warragul Cemetery Trust	
Warrandyte Cemetery Trust	
Warringal Cemetery Trust	City of Heidelberg
Warrnambool Cemetery Trust	
Watchem Cemetery Trust	
Waterloo Cemetery Trust	
Waubra Cemetery Trust	
Wedderburn Cemetery Trust	
Welshman's Reef Cemetery Trust	Shire of Maldon
Welshpool Cemetery Trust	
Werribee Cemetery Trust	Shire of Werribee
Werrimull Cemetery Trust	
White Hills Cemetery Trust	City of Bendigo
Whitfield Cemetery Trust	
Whroo Cemetery Trust	Shire of Waranga
Wickliffe Cemetery Trust	
Will Will Rook Cemetery Trust	City of Broadmeadows
Willaura Cemetery Trust	
Williamstown Cemetery Trust	
Willow Grove cemetery Trust	
Winchelsea Cemetery Trust	Shire of Winchelsea
Winiam Cemetery Trust	
Winton Cemetery Trust	
Wodonga Cemetery Trust	
Wonthaggi Cemetery Trust	Borough of Wonthaggi
Woodend Cemetery Trust	
Woods Point Cemetery Trust	
Woolsthorpe Cemetery Trust	
Woomelang Cemetery Trust	
Woorak Cemetery Trust	
Woorndoo Cemetery Trust	
Woosang Cemetery Trust	
Wunghnu Cemetery Trust	Shire of Numurkah
Wycheproof Cemetery Trust	
Wychitella Cemetery Trust	
Yabba Cemetery Trust	
Yackandandah Cemetery Trust	

CEMETERY LISTING	MUNICIPALITY
Yalca North Cemetery Trust	
Yallourn Cemetery Trust	
Yambuk Cemetery Trust	
Yan Yean Cemetery Trust	
Yarck Cemetery Trust	
Yarra Glen Cemetery Trust	Shire of Healesville
Yarragon Cemetery Trust	Shire of Yarrawonga
Yarram Yarram Cemetery Trust	
Yarrawonga Cemetery Trust	
Yarrayne Cemetery Trust	
Yaugher Cemetery Trust	
Yea Cemetery Trust	Shire of Yea

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MORTUARY INDUSTRY AND CEMETERIES ADMINISTRATION COMMITTEE

REVIEW OF CEMETERY ADMINISTRATION

Third Report
to Parliament

November 1984

Ordered to be printed

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INDEX

SUMMARY OF RECOMMENDATIONS

CHAPTER TWO:

FUTURE GOVERNMENT CONTROL OF CEMETERIES IN VICTORIA.

1. That the Minister for Local Government shall be responsible for administering the Cemeteries Act 1958 and the Cemeteries Regulations 1965;

2. That appropriate arrangements for the physical transfer of cemetery administration be made between the Health Commission and the Local Government Department; and

3. That the Health Commission continue to determine policy and standards affecting public health with respect to cemeteries and crematoria.

CHAPTER FOUR:

THE FUTURE ROLE OF COUNCILS IN CEMETERY MANGEMENT.

4. That the existing cemetery trusts continue in their current role except in circumstances where:

   (i) the trustees resolve to hand over their responsibility to the Local Government; or

   (ii) if in the opinion of the Minister a cemetery is not being administered in a responsible manner the Minister may direct a municipal council or councils to take over responsibility for such cemetery.

5. That municipalities and/or trusts may apply to the Minister for approval to amalgamate and establish a joint cemetery trust.

6. That where a cemetery is situated in one municipality but is generally regarded as serving another or other municipalities the councils concerned may negotiate on the management of that cemetery.

7. That councils of municipalities may appoint committees of management for the administration of cemeteries under their control.

8. That councils be represented on all cemetery trusts not directly administered by a council.

9. That councils nominate at least four persons to act as trustees of cemeteries within their boundaries from lists of names submitted to councils by persons or organisations in the community and at least one person to act as council representative;

10. That councils submit to the Minister the names of these nominees and of the council representatives for appointment by the Minister; and

11. That for the cemeteries specifically excluded from this arrangement (such as Springvale, Fawkner, Altona, etc.) all trustees other than council representatives for such cemeteries be appointed directly by the Minister.

12. That the appointment of all trustees be subject to review by the appropriate council or by the Minister where applicable every three years; and

13. That, if, in the opinion of the council or the Minister a trustee should be replaced new nominations be called for.

14. That Local Government Accounting Standards be adopted by all cemetery trusts not specifically excluded from that provision;

15. That appropriate instruction manuals and guidelines for accounting, budgeting and other areas of administration be developed and circulated to cemetery trusts;

16. That councils assist trusts in the implementation of procedures and give ongoing advice and assistance to trustees as necessary;

17. That a uniform record management system be developed and implemented;

18. That duplicate copies of burial registers, records, maps and plans be located at the council offices; and

19. That old records where available, and current records be microfilmed annually and placed into permanent storage under the care of the Public Records Office.

20. That each cemetery, in consultation with the appropriate council where applicable, set its own fees subject to the approval of the Minister, bearing in mind that fees need to be adequate economically and that cemeteries need to be maintained after closure; and

21. That fees and charges should be reviewed at least once every year and be increased in line with inflation when appropriate.

22. That the end of the financial year for cemetery accounts be the same as for Local Government;

23. That all cemetery accounts be audited and that audited financial statements and management reports be submitted annually to the Minister for inclusion in the Annual Report of the Local Government Department; and that copies of the relevant sections of that report be made available annually to all cemetery trusts.

CHAPTER FIVE:

ESTABLISHMENT OF A CENTRAL CEMETERIES FUND

24. That a Central Cemeteries Fund be established in the Local Government Department;

25. That a service fee be charged on each funeral and cremation unless otherwise provided;

26. That the level of this fee be determined by the Minister; and

27. That this fee be collected by the funeral director on behalf of the Government and be paid into the Central Cemeteries Fund.

28. That separate portions of the Central Cemeteries Fund be set aside annually for each of the areas below:

    (i) closed cemeteries or cemeteries devoid of income;

    (ii) conversion of cemeteries to historical, pioneer or memorial parks and preservation of historical graves and monuments; and

    (iii) ongoing maintenance and administration of cemeteries with insufficient income to be self-sufficient;

29. That the amount to be allocated to each area be determined annually by the Minister;

30. That cemetery trusts may apply to the Minister for a grant from the appropriate section of the fund;

31. That grants be allocated on a needs basis; and

32. That the application or use of such grants be included in the annual management report of the cemetery.

CHAPTER SIX:

ETHNIC OR RELIGIOUS BURIAL REQUIREMENTS

33. That provisions be made in cemetery legislation to empower trustees to set aside separate sections of cemeteries for specific ethnic or religious groups where a demand has been established.

34. That Section 4A of the Cemeteries Regulations 1965 be repealed as soon as possible and that Section 4 be amended to provide that all bodies have to be buried in coffins of suitable material and that anyone wishing to bury a body in any other manner can only do so by special permit to be issued by the Minister administering cemetery legislation.

35. That the Melbourne Chevra Kadisha and the Adass Israel Chevra Kadisha Cemeteries be operated as private cemeteries by trustees nominated by the two sacred societies of the same name and the Jewish Community;

36. That these two cemeteries be managed and maintained according to the provisions of the Cemeteries Act 1958 and the Cemeteries Regulations 1965 except in circumstances where these provisions are contrary to Jewish burial customs; and

37. That the trustees of these cemeteries be empowered to make by-laws for these cemeteries, but that caution should be exercised that such by-laws do not discriminate against any member of the Jewish community.

TERMS OF REFERENCE

JOINT RESOLUTION OF LEGISLATIVE ASSEMBLY AND LEGISLATIVE COUNCIL - 1 JULY 1982

1 That a Joint Select Committee be appointed to inquire into and report upon all aspects of the mortuary industry and related industries in Victoria, including both private and Government operations, together with any aspect of cemeteries administration, funding or provision of land encompassed by the Cemeteries Act 1958, the Trustees Act 1958, or any other provision relating thereto.

2 That the Committee shall give priority to such investigations referred to it by resolution of the Legislative Council and the Legislative Assembly.

3 That the Committee be required to present its Final Report to the Parliament no later than 31 December, 1983.

4 That the Committee consist of six Members, comprising not more than four Members of the Legislative Council nor more than four Members of the Legislative Assembly.

5 That four members of the Committee constitutes a quorum of the Committee but a quorum of the Committee shall not consist exclusively of Members of the Legislative Council or Members of the Legislative Assembly.

6 That the Committee shall elect one of its members to be Chairman who, in the event of an equality of votes, shall also have a casting vote.

7 That the Committee may elect a Deputy Chairman who shall exercise all the powers and perform the duties of the Chairman at any time when the Chairman is not present at a meeting of the Committee.

8 That the Committee may sit and transact business during any adjournment or recess of the Houses in the period for which it holds office but the Committee shall not sit during the sittings of either House of Parliament except by leave of that House.

9 That the Committee may sit at such times and in such places in Victoria or elsewhere as seems most convenient for the proper and speedy despatch of business.

10 That the Committee may send for persons papers and records and report the minutes of evidence from time to time.

11 That the Committee have power to authorize publication of any evidence given before it and any document presented to it.

12 That, contingent upon the enactment of the Parliamentary Committees (Joint Investigatory Committees) Bill, the Committee be a Committee to which section 51A of the Parliamentary Committees Act 1968 applies.

13 That the foregoing provisions of this resolution, so far as they are inconsistent with the Standing Orders and practices of the Houses, shall have effect notwithstanding anything contained in the Standing Orders.

MEMBERSHIP

Chairman:
Mr. Carl Kirkwood, M.P.

Deputy Chairman:
The Hon. L.S. Lieberman, M.P.

Mr. J.A. Culpin, M.P.

The Hon. C.J. Kennedy, M.L.C.

The Hon. Robert Lawson, M.L.C.

Mr. P. Ross-Edwards, M.P.

Secretary: Mr. Gordon Tippett.

Research Officer: Mrs. Elke Barbian

CHAIRMAN'S INTRODUCTION

The Committee in 1982 was given the task to investigate public cemeteries - a utility which had not received any attention by either Governments or the public for decades and was only brought to the notice of the Government after serious mismanagement of one larger cemetery developed into a major scandal. This fact alone is an indication of the difficult and at the same time unglamorous and unthankful task the Committee was asked to undertake.

Already early in the investigations of the Committee it became obvious that major changes would have to be made to a system which virtually had remained unchanged since cemeteries first came under Victorian Government control in 1854. It also became obvious that change would be resisted by many who up to now were responsible for the control and care of cemeteries. This was demonstrated in responses to the Committee's Second Report which canvassed the option of transferring control of all cemeteries to councils of municipalities.

Although the Committee since that report has somewhat amended its earlier recommendations it still believes that ultimately local government is the more appropriate agency for long term administration of cemeteries.

The revised system of administration of cemeteries outlined in this report reflects this view and aims to encourage constructive participation by councils in cemetery management while at the same time preserving the voluntary component of the current trust system.

The content of this report again concentrates on aspects of control and management of cemeteries because time constraints did not allow the Committee to complete its investigations into other important aspects of the disposal of the dead, such as associated legislation or the funeral directing and monumental industries. The Committee hopes to be re-constituted in the new Parliament in 1985 to continue these investigations.

I would like to take the opportunity here to express the Committee's thanks for the enormous co-operation by cemetery trusts, councils, industry organisations, the Health Commission and individuals who supplied much of the information for this Inquiry and responded so constructively, even if at times critically to the Committee's Second Report.

The gratitude of the Committee also goes to the Committee Secretary, Mr. Gordon Tippett, who so enthusiastically guided the Committee through its investigations and to the Research Officer, Elke Barbian, who conducted the research for this report and was responsible for most of its written content.

Last, but not least, the Committee acknowledges the excellent support of the typing staff, Jenny Hutchinson, who assisted the Committee earlier in the investigation, Laurel Keith, who typed the numerous drafts of this report and Karen Day, who produced the final copy on the word processor.

Carl Kirkwood, MP.
Chairman

CHAPTER ONE

1. INTRODUCTION AND PROGRESS REPORT

1.1 PROGRESS OF THE COMMITTEE

Since its inception the Committee has published two Reports to Parliament.

(i) Metropolitan Cemetery Land Needs and a Crematorium at Geelong.

(ii) The administration of Cemeteries in Victoria.

The First Report dealt with the acquisition of land for new Cemeteries in the Melbourne metropolitan area and with the establishment of a crematorium at Geelong.

The Second Report discussed aspects of cemetery administration in Victoria and recommended the replacement of all trustees of cemeteries with the councils of municipalities, except for the Necropolis Trust, the Fawkner Crematorium and the Memorial Park Trust, Altona.

Since the release of the Second Report the Committee has received and analysed 170 submissions from trusts, councils, industry organisations, companies and private individuals (See Appendix I). The majority of the submissions from trusts and councils concerned the issue of recommended council administration of cemeteries. A detailed discussion of their responses is included in Chapters 3 and 4 of this report.

The Committee also held 25 public and seven in-camera hearings on topics such as:

The Committee and the Public Gallery at the Public Hearings Parliament House 24 July, 1984.

- Administration of cemeteries by trusts and councils including a wide range of administrative processes and practices;

- Licencing of funeral directors and the cost of funerals;

- Licencing and regulation of the monumental mason industry and the cost of memorialisation;

- Ethnic burial requirements;

- Activities at Preston General Cemetery and other cemeteries where management problems occurred;

- Legal implications resulting from the mismanagement of Melbourne General Cemetery by the previous trust and its effects on the exercise of rights of burial;

- Conversion of closed cemeteries to memorial and historic parks;

- Consumer issues - costs and complaints.

A number of these topics are covered in sections of this report and a list of Witnesses from Public Hearings is included in Appendix II.

The Committee also visited South Australia, New South Wales and Queensland to discuss cemetery and crematorium management with representatives of Government departments, cemeteries and crematoria. It also looked at the administration of cemeteries at Government level in these States. In addition the Committee obtained and studied information and reports on cemetery administration and crematoria in Western Australia, Tasmania and the Capital Territory. The study of the situation in other States proved most valuable to the Committee in its assessment of future options for the administration of cemeteries in Victoria.

Equally valuable was the survey of all cemeteries in Victoria undertaken by the Committee. This survey provided the Committee with up to date information and statistics on cemeteries not previously available and gave the Committee a useful indication of the different management practices, attitudes and problems experienced by the trustees of cemeteries. The results of this survey are discussed in detail in this report. A sample of the Questionnaire is included in Appendix III.

The Committee in August also received and analysed the final report of the Health Commission Working Party on Cemeteries and Crematoria, a Committee which was established in 1980 by the Minister of Health. The recommendations and content of the second report of the Working Party will be discussed in the relevant chapters of this report and a summary is provided in Chapter 7.

A number of specific investigations into particular cemetery trusts where problems in administration and of a legal or industrial nature had occurred were continued and completed by the Committee. These are summed up in Chapter 8 of this report and detailed findings are set out in Appendix IV.

1.2 AREAS COVERED IN THIS REPORT

The bulk of the present report again covers the administration of cemeteries at Government and local level incorporating the evidence and information collected by the Committee from cemeteries, organisations and from other States. Because of the strong response received by the Committee to its Second Report the Committee considered it necessary to again discuss in detail some of the issues raised in this earlier report.

The current report also deals with additional areas such as financial provisions for cemeteries at Government and cemetery level and ethnic or religious burial requirements. It also touches on aspects of cemetery legislation, regulations, standards and methods and raises matters related to associated industries.

Because of the importance and urgency of some of the above issues and the time and resources required to investigate and analyse these in appropriate detail the Committee found it necessary to give priority in this report to the above mentioned areas. This does not mean that the Committee did not consider other areas of cemetery administration and the mortuary industry of equal importance. But it did mean that the Committee had to defer these areas for investigation and report at a later stage.

1.3 FUTURE INVESTIGATIONS AND REPORTS

1.3.1 Registration and Licencing of the Funeral Directing Industry and Industry Standards.

The Committee had submissions from the funeral directing industry and other individuals and organisations on the subject of registration and licencing of funeral directors and funeral directing premises. The viewpoints expressed in these submissions range from requests for and agreements with registration and licencing to disagreement with any form of registration or licencing.

The Australian Funeral Directors' Association (A.F.D.A.) as the industry's major organisation and advocate considered that fixed minimum standards for the operation of funeral directing businesses and increased mortuary facilities at hospitals and nursing homes were desirable. The Association appeared not entirely certain of the need for registration and licencing of the industry at this stage.

The A.F.D.A. felt that should registration and licencing be recommended the Association should be involved in or manage any registration and licencing authority to be set up.

The Committee is currently not convinced that registration and licencing of the industry is necessary and believes that

further investigation is required before making recommendations in that area.

The Committee is also hesitant about the suggested possible management of any registration and licencing authority by the A.F.D.A. since not all funeral directors in Victoria are members of the A.F.D.A. and because the industry standards proposed by the A.F.D.A. may seriously effect the operation of very small funeral directing businesses and part time funeral directors in the rural areas of Victoria. (Excerpts of the submissions by the A.F.D.A. are provided in Appendix V.)

The Committee has therefore deferred the issue of registration and licencing for inclusion in a future report.

1.3.2 The Cost of Funerals on the Low Income Earner or Pensioner.

A number of submissions to the Committee were concerned with allegations of excessively high levels of funeral directing charges and overall burial costs.

The funeral directing industry itself and the A.F.D.A. have disputed the allegation and provided evidence which indicates to the Committee that overall profits in the industry are not excessively high and that approximately 60% of the overall cost of an average funeral is attributable to charges made by cemeteries for burial rights, interment fees and permits, and for standard costs of certificates, advertisements, fees by ministers for religious services and floral tributes.

The funeral director was seen by the public as having some control over these charges because he was collecting these charges on behalf of the cemetery, the Government and other bodies, but in reality he has no control over the level of these charges.

The Committee at this stage is not convinced that the more common charges of most funeral directors are excessive although it realises that funeral and cemetery charges have risen considerably over the past decade, particularly in the metropolitan area.

The Committee believes that this trend is unlikely to change in the future considering escalating labour, material and equipment costs and that therefore other avenues must be investigated to assist pensioners and low income earners with the cost of funerals. As a first attempt the Committee has approached the relevant Commonwealth Government Ministers responsible for health, social welfare and taxation to ascertain whether consideration has been given to -

(a) re-imbursing the cost of medical death certificates under Medicare;

(b) raising the level of the pensioner funeral rebate; and

(c) raising the level of concessional expenditure for funerals to a more realistic level.

The Committee has to date received two replies. The first is from the Hon. Senator D. Grimes, Minister for Social Security.

His letter advises the Government's attitude to the Committee's request for a review of pensioner funeral rebates.

"The points raised by your Committee regarding the cost of funerals are appreciated, however, it must be remembered that funeral benefit was not meant to cover the cost of the funeral. It was introduced to meet a particular problem at the time in relation to various contributory mortuary funds. Successive governments have not seen the need to make other than minor amendments to this legislation, but at the same time it has not been repealed. The Government has no

present intention to review or increase the rate of funeral benefits."

The Committee is disappointed with the reply of Senator Grimes considering that the level of rebate has remained unchanged since 1965 and the reason for introducing the funeral benefit;-

"..... which was designed to relieve pensioners of anxiety in their declining years [of being buried as paupers] and allow them to devote the full amount of their pension towards their own maintenance."1

is still as relevant today as it was in 1943 when the benefit was first introduced. Particularly since inflation has eroded the value of most of the contributions to mortuary funds that people joined to finance their own funerals.

The second reply is from Mr. T.P. Boucher, Commissioner of Taxation, and deals with the level of concessional expenditure for funerals.

Mr. Boucher outlines the Government's position as follows:-

"The present law provides that, where a taxpayer pays funeral expenses arising from the death of a dependant, those expenses - to a maximum of $100 - form part of the taxpayer's concessional expenditure for income tax rebate purposes. Where total concessional expenditure exceeds $2,000, the taxpayer is entitled to a rebate of tax of an amount equal to 30 per cent of the excess.

Over the years, various requests for an increase in the $100 limit for funeral expenses have been received, but successive Governments had not seen the way clear to raise that limit. Of course, those requests were but some of the numerous competing calls for extended taxation concessions to provide relief for the private and domestic expenditure of taxpayers.

You will appreciate that the question of amending the income tax law to provide new or increased concessions is one of policy for the Government to decide. However, I note that, because of the structure of the personal income

1. **Excerpts from a letter from the Hon. Senator D. Grimes, Minister for Social Security, 9 October 1984.**

tax rate scale, the majority of pensioners and low income earners pay little or no tax, with the result that taxation concessions are unlikely to be of any real benefit to most of them. This situation supports the contention that the income tax system is not the most appropriate avenue for directing assistance to those in greatest need."

The Committee agrees that the lower income earner and pensioner would least benefit from increased tax concessions since the majority of income earners in the lower income brackets submit S-Form tax returns and generally do not qualify for income tax rebates. Those that have concessional expenditure over $2,000 can expect a rebate of 30 cents for each dollar in excess of $2,000 which means that for funeral expenses the maximum rebate in real terms is $30. Considering an average cost per funeral of $1500 this rebate has little impact, even if it were doubled, on reducing the overall burden of funeral expenses.

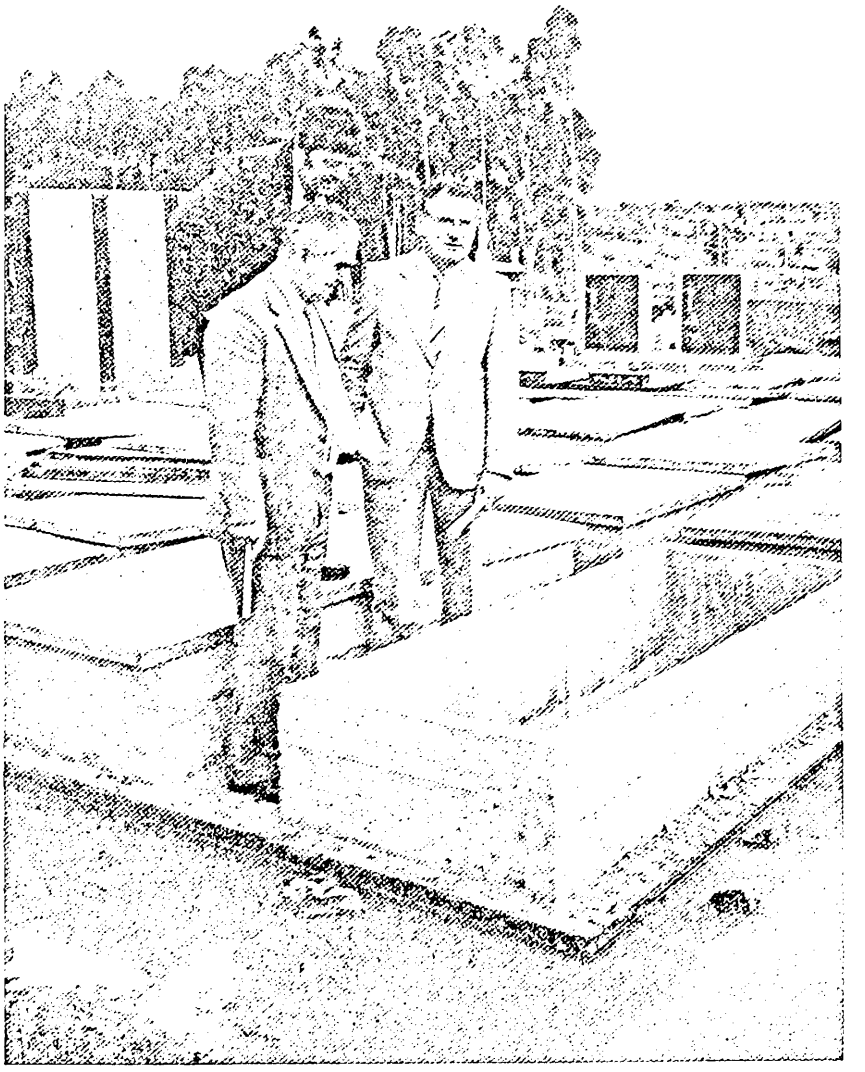
The Committee is convinced that funeral expenses are causing considerable hardship to families on low income and to pensioners and that every effort should be made to investigate all possible areas of cost reduction and assistance to these people. For that reason the Committee intends to devote considerable time to the matter following the release of this report.

1.3.3 Registration and/or Licencing of the Monumental Mason Industry and Industry Standards.

Most submissions to the Committee by monumental masons and the Master Stone Masons Association of Victoria generally favoured the introduction of registration and licencing of monumental masons and their premises.

The majority of submissions also advocated the introduction of guidelines and standards for different types of memorials and monuments and the replacement of percentage monumental permit fees with flat rate fees for different types and sizes of monuments.

A good example of the subsidence problem at Horsham.



Committee members inspect a pre-cast vault at Preston.

Although the standard of workmanship in the industry is generally high the Committee was shown some evidence of inferior workmanship which resulted in foundations sinking, monuments cracking or in partial collapse of memorials. Other incidents pointed to problems of supervision during the construction of vaults and monuments. In both areas the problems seem to be the result of a combination of factors which include the lack of adequate guidelines for masons and trustees, lack of expertise for inspection and supervision at cemetery level and a general misunderstanding of legislative provisions for the erection of vaults and monuments.

Preliminary deliberations on these issues indicated to the Committee that registration and licencing of the monumental masons' industry is desirable and that more adequate guidelines and standards are necessary. Nonetheless, the Committee considers it necessary to seek further evidence and expert advice before making final recommendations on an appropriate framework for regulation of this industry.

With respect to permit fees the Committee realises that the current system of percentage fees as applied by most cemetery trusts is open to abuse and some evidence to that effect has been brought to the attention of the Committee.

Monumental masons currently must apply to the cemetery for a permit to erect a monument which states the value of that monument and the percentage permit fees is calculated on the value stated. The Trustees must take the stated value in good faith as trustees have no power to request copies of contracts and statements of payments made by customers to a monumental mason.

For the Committee to accurately assess the degree and extent of the understatement of the value of monuments to cemeteries, a more detailed investigation is necessary.

The Committee is concerned that in all cases in the past where evidence of breaches of legislation relating to these fees had occurred no charges had been laid or penalties imposed on the offender.

It seems to the Committee that in principle legislation or by-laws serve little purpose if they cannot be controlled or effectively enforced as appears to be the case with legislation relating to the erection of monuments. Any change in the current system and in legislation must bear this in mind.

A flat rate permit fee for different types and sizes of monuments as suggested may overcome some of the problems related to fees.

Some cemeteries already charge flat rate permit fees and these seem to be easier to administer and control but the Committee believes that further evaluation of the application and level of such flat rate fees needs to be undertaken before a general adoption of this system can be recommended. The Committee intends to further cover this area in conjunction with other issues in the monumental masons industry.

1.3.4 Regulation or Standardisation of Burial and Interment Fees

The overall area of the financial administration of cemeteries and the current financial problems of many cemetery trusts is addressed in this report, which will also discuss and recommend some means of improving the financial situation of cemeteries.

Unfortunately, time restrictions have not allowed the Committee to conclude its investigation of an appropriate cemetery fee structure for all Victorian cemeteries and therefore any final assessment of whether burial, interment and associated fees should be regulated or standardised needs to be deferred to a future report.

1.3.5 Certificates, Forms and other Documents

The Committee considers that an extensive review of all certificates and forms in use for disposal of the dead is essential. Many of the current forms and certificates do not in the Committee's opinion meet modern design standards. Information requirements are not adequately met and many of the forms are subject to legislation under the control of Government departments not directly involved in cemetery administration or associated industries.

1.3.6 Coronial Issues

A review of the Coroner's Act is currently being undertaken by the Attorney-General's Department in conjunction with the Coroner's Court and the Committee is awaiting the publication of their report before further addressing issues relating to coronial inquests, autopsies, government contracts and related issues raised in submissions to the Committee.

1.3.7 Erection of Vaults, Above Ground Mausolea, Crypts and Related Issues.

When the Cemeteries (Amendment) Act 1980 was proclaimed, proclamation of Section 2A was deferred pending further enquiry by this Committee. This section reads:

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"2A For the purposes of this Act -

(a) a reference to "vault" includes a reference to a mausoleum; and

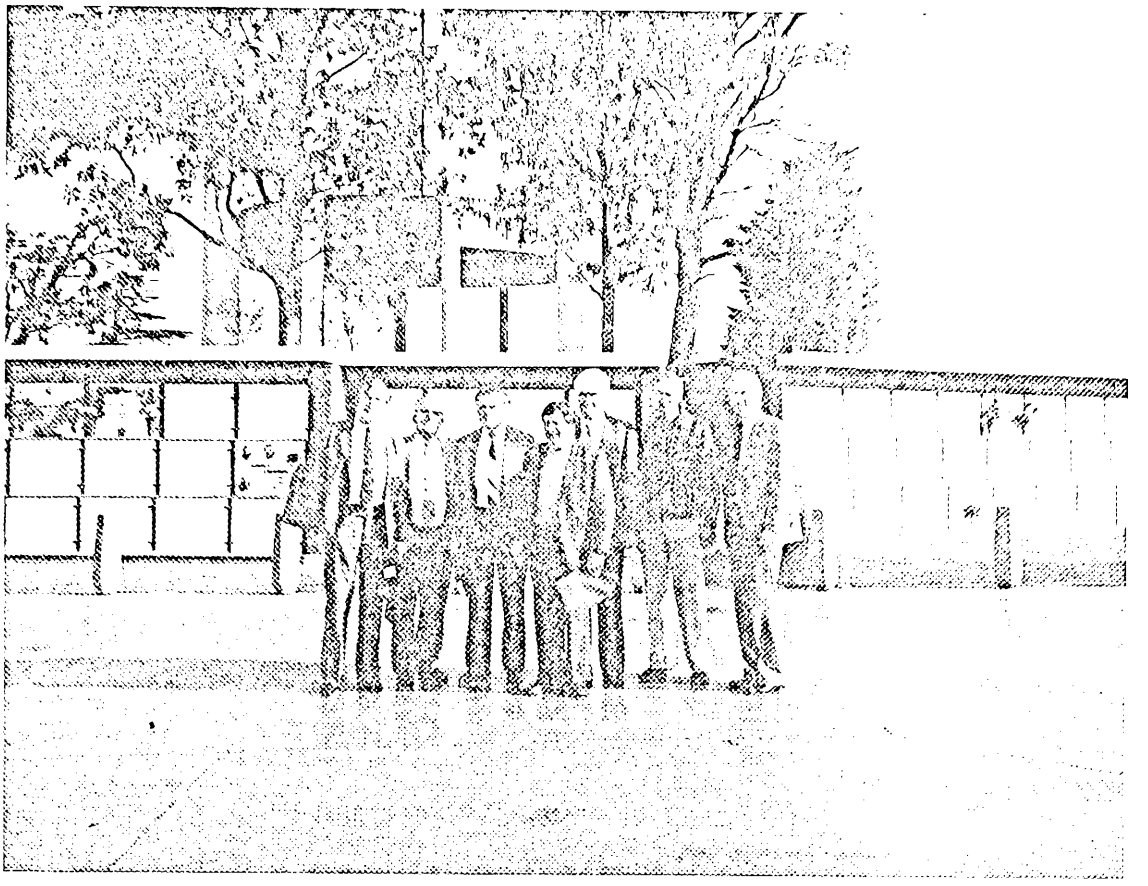
(b) a reference to "bury" includes a reference to the placing of a body in a mausoleum whether the body is placed below, or above, or partly below and partly above the ground and the derivatives of "bury" have a corresponding meaning.".

The Committee has received numerous submissions dealing with the erection of vaults and mausolea. Many of them, particularly those from monumental masons and ethnic community organisations, request the proclamation of Section 2A.

The Committee has studied information on mausolea and other above ground structures from a variety of sources and it has looked at these structures in New South Wales and Queensland.

The Committee is aware of the demand for this type of burial within the ethnic community but it is also aware of the reluctance of cemetery managers to introduce this type of memorialisation at cemeteries where the general trend has moved towards lawn cemeteries with simpler types of memorials, such as plaques or small upright stones set on a beam. Much of the opposition to mausolea arises from the long term maintenance and safety of these monuments. Aesthetic considerations have also been cited as reasons against their erection.

The Committee is not in favour of proclaiming Section 2A at this stage. It feels that firstly this Section does not adequately provide for what the Committee considers to be essential guidelines for the erection of mausolea should they be agreed to, and secondly, the long term consequences of proclaiming any form of legislation for the erection and maintenance of mausolea have not been adequately investigated. The Committee therefore cannot deal with mausolea and other above ground structures in this report but intends to do so in a future report.



Committee Inspection of Mausolea at Rookwood Cemetery, New South Wales

1.3.8 Conversion of Closed Cemeteries into Historic Memorial Parks.

Currently the Cemeteries Act 1958 Part 1A provides for the conversion of closed cemeteries as listed in Schedule 4 of the Act. The Health Commission Working Party in its final report recommended -

"That legislation be introduced to prohibit any burials 20 years after a date proclaimed in respect of those cemeteries reaching the end of their economic life. The land would then be transferred to the local municipal council or other appropriate body for passive recreation and/or historical preservation purposes. It should be the responsibility of the Trust to prepare the cemetery for these purposes."

The Committee is concerned with both the cost of conversion to trusts or councils and the implication of the proposed legislation on rights of burial granted in perpetuity to residents of Victoria since the enactment of the first Cemeteries Acts in 1850 and 1854.

The Working Party report does not provide estimates of costs nor consider the difference in the levels of resources available to trusts and councils, many of which have no financial reserves nor are able to accumulate funds due to the low number of burials at their cemeteries per annum.

The Committee has also received a number of submissions from relatives of families buried in now closed cemeteries in graves for which perpetual rights have been granted in the past. One of these came from a previous Crown Solicitor of Victoria, Mr. J. Downey, whose evidence concerned both the problems in overlay areas at the Melbourne General Cemetery and a possible conversion of parts of this cemetery to alternative uses. The Committee found the following of his statements most applicable to the principles involved in considering the above changes in legislation:-
(Transcript of Evidence 26 July, 1984).

"..... rights that have been created under the present and/or under corresponding previous legislation so as to last forever should not be destroyed or the duration limited by new legislation." (p.235)

"..... many thousands of people in Victoria have, over a very long period of time, purchased exclusive rights of burial or interment including the rights to dig or make graves or vaults, to erect monuments and tombstones and to keep up and maintain those graves, vaults, monuments and tombstones for the sole and separate use of themselves and their representative forever." (p.237)

"The consideration that the enactment of legislation to destroy, or limit the duration of, rights and obligations which the Parliament has repeatedly provided should last forever and upon which many thousands of people have relied and acted would be contrary to honesty and morality, and can be described only as a repudiation of obligations. A Government responsible for such repudiation might be thought to be not worthy of respect.

I do not submit that the Parliament could not destroy those rights but that has nothing to do with the question of honesty or morality.....". (p.245)

The Committee believes that the above views are shared by many people in the State and that therefore serious consideration needs to be given to any changes in legislation which directly or indirectly effect rights granted in perpetuity.

The Committee agrees with the Working Party that more adequate long term provisions need to be made for closed cemeteries but believes that further options need to be considered before such provisions are included in legislation.

1.3.9 Limited Tenure on Rights of Burial and Re-Use of Graves.

This issue has been raised in the report by the Health Commission Working Party and in reports dealing with cemetery administration in Western Australia and South Australia.

Granting rights of burial on a fixed term is widely practised in many western countries and has limited application in South Australia, Western Australia, Tasmania and is possible, but not practised, under legislation applicable to Rookwood Cemetery in New South Wales.

The Committee defers comment on this issue until a further investigation can take place.

1.3.10 Consumer Education and Consumer Complaints

The Committee believes that more extensive consumer education on the subject of burial and cremation, including areas of cost and legislative requirements is highly desirable.

Discussions on the issues have already been undertaken with the Department of Consumer Affairs and industry organisations and these will be continued in 1985.

Discussion of consumer complaints and the most common areas for complaint will also be continued at the same time. The results of such discussions will be included in the Committee's next report.

1.3.11 The Role of Private Industry in the Management of Cemeteries and Crematoria.

Private ownership of cemeteries and crematoria is permitted in a number of States other than Victoria.

Private ownership was raised with the Committee by the Jewish community, funeral directors and monumental masons. The Committee considers that possible future private ownership of cemeteries and crematoria should not be ruled out until a study of the desirability and feasibility of such ownership has been undertaken.

This report will deal with private ownership of cemeteries in relation to ethnic and cultural groups in Victoria but time constraints have not allowed the Committee a thorough investigation of all the aspects. The Committee hopes to further pursue the matter in 1985.

1.4 CONCLUSION

The Committee considers the eleven areas outlined above to be very important components of the process of the disposal of the dead and of overall mortuary industry management in Victoria. This is supported by submissions to the Committee and evidenced in the surveys undertaken by the Committee to date, all of which highlight many of the problems currently existing in these areas. The Committee therefore stresses that its inquiry into cemeteries and the mortuary industry should continue in 1985 and that the Committee should be given appropriate terms of reference to continue operation in the new Parliament to be constituted in 1985.

CHAPTER TWO

2. ADMINISTRATION OF CEMETERIES AT GOVERNMENT LEVEL

2.1 INTRODUCTION

Recommendation (C) of the Committee's Second Report stated that:-

> "The Health Commission maintain its current responsibilities until such time as the Committee reports on its review of the Cemeteries Act 1958".

Since this recommendation was made the Committee has spent considerable time investigating the different options for future administration of cemeteries at Government level. These options included:-

(a) The Cemeteries Act remains committed to the Minister of Health and the Health Commission but the Cemeteries Section of the Division of Public Health at the Health Commission is improved by an increase in staff and financial resources and an upgraded system of supervision and management.

(b) A Central Cemeteries Board or Commission is established to deal with all aspects of cemetery and mortuary industry administration and control.

(c) Cemeteries legislation and responsibility for control and administration of cemeteries is transferred to the Minister for Local Government and the Local Government Department.

In considering these options the Committee has taken into account the past and present performance of the Health Commission within the constraints of given resources. It has closely looked at the administration of cemeteries in other States and from trends in other States has drawn conclusions on the likely future development in Victoria.

The Committee also believes that any decision on the appropriate framework for overall future control and management at Government level cannot be divorced from likely trends and proposed future changes at the local (cemetery) level.

Currently the Cemeteries Act 1958 provides for transfer of cemeteries to councils of municipalities under Section 3(2). In the past this has occurred in cases where cemeteries were closed and where Trustees could either not be found in the community or were unable to manage the cemetery satisfactorily.

In its Second Report the Committee recommended that all cemeteries in Victoria be transferred to the control of councils of municipalities. Although the Committee has modified its views since this recommendation, as will be discussed in the following Chapters, it still believes that in the long term administration of the majority of all cemeteries by local councils is desirable and ultimately inevitable.

Because the Committee believes such development to be inevitable its discussion of the appropriate framework for control and supervision at Government level is not only based on the current situation but encompasses the projected future situation.

Option (b), the establishment of a Central Board or Commission has therefore been rejected. The reasons given in the last report (cost and the problem of closed cemeteries) are still relevant and so is the fact that the Government is not in favour of establishing further public bodies in Victoria. A Central Board or Commission would also be inappropriate for the control of council administered public utilities which is what cemeteries basically are. This Chapter therefore only discusses options (a) and (c).

TABLE 1 - OVERVIEW OF CEMETERY ADMINISTRATION IN AUSTRALIA

	VICTORIA	NEW SOUTH WALES	SOUTH AUSTRALIA	QUEENSLAND	WESTERN AUSTRALIA	TASMANIA	A.C.T.
No. of Cemeteries Public Private Other	551 (85 Council) (466 Trusts) 47 (43 churches) (4 Aboriginal)	16 trusts - rest of Cemeteries Council controlled.	Mostly Public & Council controlled.	346 (270 Council) (76 Trustees) 42 (Churches) 1 (Commonwealth)	377 (177 operating (200 closed	Mostly Public & Council controlled.	
Acts Council operated and Public	Cemeteries Act 1958 (Minister of Health)	Local Government Act 1919 (Minister for Local Government)	Local Govt. Act 1934 (Minister for Local Government)	Local Govt. Act 1936 City of Brisbane Acts 1924-1960 (Minister for Local Government)	Cemeteries Act 1897 (Minister for Local Government)	Local Govt. Act 1962 (Minister for Local Government)	Cemeteries Ordinance 1933 (Minister of State for Territories & Local Govt.)
Trust operated Public	Cemeteries Act (Minister of Health)	Some Local Govt. Act Provisions Some Crown Lands Consolidated Act 1913 Necropolis Act 1902 (Minister for Lands)	Local Govt. Act Enfield General Cemeteries Act 1944 (Minister for Local Govt.) West Terrace Cemetery Act 1976 (Minister of Public Works)	Cemeteries Act 1865 Cemeteries Trustees (Declaratory) Act 1966 (Minister for Lands, Forestry and Police)	Cemeteries Act	Local Govt. Act Southern Regional Cemeteries Act 1982 (Premier)	Cemeteries Ordinance
Private	- not subject to but adhere to Cemeteries Act. All burials subject to Health Commission special permit.	no Govt. control but expected to conform to health standards	Local Govt. Act in parts and The General Cemeteries Regulations under the Act	no Govt. control or legislation but expected to conform to general health requirements	Unknown	no legislation or Government control	Cemeteries Ordinance
Crematoria - Acts	Incorporated in Cemeteries Act	Public Health Act 1902 (Minister of Health)	Cremation Act 1981 (Attorney-General) and input from Central Board of Health	Cremation Act 1913 (Minister for Health)	Cremation Act 1929 (Minister of Health)	Cremation Act 1934 (Minister for Health)	Cremation Ordinance 1966 (Minister of State for Territories & Local Govt.)
Crematoria operation provisions	Public Trusts	Private mostly, but some Trust and Council operated.	Councils, Public Trusts and private possible	Private only, but new Public one planned	3 only - Local Govt. & Trust	2 only - Public	Private and Public poss. - to date 1 private only
Powers re. Setting of fees Cemeteries Crematoria	Trust - approval by Governor-in-Council Trust - approval by Governor-in-	(Local Govt. for Council - controlled cemeteries (Necropolis - trustees with Min. approval Governor via Regulations	Governor - but not exercised - Council sets its own fees for public cemeteries Governor	Local Authorities for Council operated, or Trustees with Gov-in-Council approval Local Authorities with Governor-in Council approval	Trustees Governor via Regulations	The 'Corporation' - Local Govt. by public notice Ministerial approval	Regulations - Minister approves fees Regulations - Minister approves fees

2.2 ADMINISTRATION OF CEMETERIES IN VICTORIA AND OTHER STATES

2.2.1 In all States, other than Victoria, the majority of public cemeteries are operated by councils or local authorities.

Legislation for these cemeteries is committed to the Minister for Local Government and in most States cemetery legislation forms part of the respective Local Government Acts. Exceptions are Western Australia, which has a separate Cemeteries Act administered by the Minister for Local Government and the Australian Capital Territory, which has a Cemeteries Ordinance administered by the Minister of State for Territories and Local Government. Only in Victoria are cemeteries administered by local councils under the control of the Minister of Health and the Health Department. (See Table No. I opposite)

2.2.2 In New South Wales some public trust operated cemeteries are operated under the Local Government Act, some under the Crown Lands Consolidated Act and the Necropolis Trust under the Necropolis Act 1902. The latter two are committed to the Minister of Lands.

In South Australia the majority of public trust operated cemeteries are under the control of Local Government. The two exceptions being the Enfield General Cemetery Trust which is constituted under the Enfield General Cemeteries Act 1944 (this Act is administered by the Minister for Local Government) and the West Terrace Cemetery Trust which is constituted under the West Terrace Cemetery Act 1976 (this Act is administered by the Minister of Public Works).

In Queensland all public trust operated public cemeteries are subject to the Cemeteries Act 1865 which is administered by the Minister for Lands, Forestry and Police.

In Western Australia, Tasmania and the Australian Capital Territory public trust operated cemeteries are under the control of Local Government except for the Southern Regional Cemeteries Trust in Tasmania, which was constituted under the Southern Regional Cemeteries Act 1982 and is under the control of the Premier.

In Victoria public cemeteries operated by public trusts are covered by the Cemeteries Act under the Minister of Health.

2.2.3 Private cemeteries which comprise cemeteries operated by churches or other private organisations are not subject to any Government control in New South Wales, Queensland, Western Australia and Tasmania, but generally in these States private cemeteries are expected to conform with general health standards.

In South Australia private cemeteries are in parts covered by the Local Government Act, and the General Cemeteries Regulations under the Act apply to them.

In the Australian Capital Territory private cemeteries are subject to the Cemeteries Ordinance.

Victoria has 47 private cemeteries most of which are operated by churches. There are also four cemeteries for the exclusive burial of Aboriginal persons. Of these only the cemetery at Lake Tyers is still open for burials. In Victoria private cemeteries generally adhere to the provisions of the Cemeteries Act 1958 and all burials are subject to special permit by the Health Commission. A list of private cemeteries is supplied in Appendix VI and a more extensive description of legislative control of cemeteries in other States is included in Appendix VII.

2.2.4 In all the Australian States where cemeteries were initially administered by public or private trusts a pattern developed which led to a gradual transfer of most of these cemeteries to the appropriate local council or local authority. This change usually occurred because cemeteries were either not managed satisfactorily due to lack of resources or interest, or because attitudes in a community changed so that volunteers could no longer be found for appointment as trustees.

Cemeteries in these States subsequently became an integral and accepted part of Local Government administration. They are administered by councils with a large degree of autonomy and any maintenance costs in excess of income are generally fully funded by the administering councils.

During the Committee's visit to New South Wales and Queensland it was pointed out that since the general transfer of cemeteries to councils had occurred the majority of cemeteries were considerably better maintained and records were greatly improved.

Councils generally found no difficulty with the day to day administration of cemeteries and provided a satisfactory service to the public.

One common criticism of the administration of cemeteries in other States related to fragmentation of control at Government level where more than one Department administered cemetery legislation. This resulted in variations in standards, legislative requirements and pricing policies.

Both the report by the New South Wales Prices Commission of 1979 and the recent still confidential report by the South Australian Committee of Inquiry into the Disposal of Human Remains recommended greater consolidation of legislation and uniformity in standards.

Efficient weed control at Rookwood New South Wales.

Members meet the Chief Librarian at Parliament House Brisbane.

From the systems studied in other States the Committee derived the following conclusions.

- The administration of most cemeteries by councils is inevitable in the long term in Victoria.

- Councils are responsible forms of Government and are able to manage local resources efficiently and with a large degree of autonomy.

- A degree of autonomy is desirable in the management of public utilities where the local authority is best informed and can best respond to the needs of the local community.

- In most areas for which local authorities are responsible the legislative provisions governing these areas are either incorporated in Local Government Acts or committed under separate legislation to the Minister for Local Government. Where considerations of health are part of such legislation reference is usually made to the control of the health authority in the State over the particular matter.

- Direct legislative control by the health authorities is generally only found in the area of crematorium administration.

Assuming increased council management of cemeteries in Victoria it therefore appears that the Local Government Department is the most logical body for overall future control of cemeteries in Victoria.

2.3 FUTURE GOVERNMENT CONTROL OF CEMETERIES IN VICTORIA

The preceding paragraphs outlined some of the Committee's arguments for control of cemetery legislation by the Minister for Local Government and the Local Government Department.

The Committee believes that as more and more cemeteries become subject to council administration it will become increasingly difficult for the Health Commission to retain central control of cemeteries.

Councils are well able to manage local utilities and tight supervision and control of cemeteries by the Health Commission will not only be unnecessary but would also be rejected by councils who now manage other utilities with a great degree of autonomy. This point was made by a number of councils in submissions on council control of cemeteries. Excerpts of such responses are listed below -

Shire of Melton

"If, however, responsibility is passed to municipalities, it is important that they be given the necessary autonomy to administer a particular cemetery as the individual Council sees fit."

City of Moorabbin

"That the Committee be advised that Council agrees in principle with the administration of cemeteries by Councils subject to a detailed examination of and Local Government comment on:

(a) the suggested role of the Health Commission and its relationship with the responsible municipalities, in the light of the State Governments stated intention of increased autonomy to Local Government;"

Shire of Daylesford and Glenlyon

"For your information, Council is of the opinion that Local Government should not provide an agency to collect taxes for the State Government, but would more appropriately respond to additional responsibilities and services in areas such as health, welfare, cemetery administration, etc., if it was given autonomy to act with suitable financial support from the Government."

Shire of Upper Murray

"It (The Council) supports the recommendation that the Health Commission maintain its current responsibilities until such time as the committee reports on its review of the Cemeteries Act. But then, Council believes, that the officers currently employed in the Health Commission should be transferred to the Local Government Department to develop an effective forward planning role and to assist councils in cemetery matters as required.

Because of these decisions Council is of the opinion that the total operation of local cemeteries should be a municipal function and the operation of the Cemeteries Act should be carried out by one Department only and that that be the Local Government Department."

Mr. D.F. Drew, Shire Secretary, Shire of Metcalfe.

"Local government should be given a relatively free hand to manage cemeteries. It is a responsible form of government, it represents local communities and it has the ability to manage and deliver a large number of essential and desirable services. It might not welcome management if detailed, time-consuming requirements were to be met. Local Government generally believes that it is in a position to provide quality management that meets high standards and fullfills local needs. If transferring management, the Government should allow freedom to local government as well as requiring performance."

Under Local Government control it would further become unnecessary to legislate for and control the accounting, budgeting and record-keeping functions in relation to council managed cemeteries as Local Government has well established systems in these areas. In the Committee's view the Health Commission currently has neither the resources nor is in fact the appropriate body to determine and implement management systems with respect to cemeteries. Past performance in these areas well demonstrates this point, although recent efforts of the Working Party and Cemeteries Section have attempted some progress in that area. (See Summary of Working Party Report, Chapter 7.)

The Committee held discussions with the Local Government Department on this issue and gained the impression that in principle a transfer of legislation could be affected without great difficulty subject to appropriate administrative arrangements being made. The excerpts from a letter by the Deputy Director-General of the Local Government Department printed below raise matters which the Committee agrees, need to be considered in the transfer of responsibility.

"1. State and Federal Government policy has recognised local government as a third sphere of elected Government (its place being enshrined by the State in the Constitution Act 1975) and as being the area of Government closest to the people served and therefore best equipped to recognise and respond to local needs.

2. State Government policy has included an undertaking ensuring that there will be full consultation with local councils before any decision affecting them is implemented by any State Government Department.

3. State Government policy has also embodied the undertaking that it would not require councils to provide specific services without adequate funds being made available.

4. Such body of expertise as exists in State Government administration in respect of cemeteries/crematoria exists within the officers of the Health Commission of Victoria which together with its predecessors (the Department of Health) have been responsible for the administration of the Cemeteries Act for many years.

5. At the cemetery level, the prime determinant of efficiency levels seems to be related to the extent of activity so that those major cemetery Trusts which are most active (Necropolis, Fawkner and Memorial Park Altona) appear to contain the greatest body of technical and operational expertise coupled with the sound administrative and financial backing.

6. Development of sound management practices in Trusts in terms of management and administration systems, records, levels of fee charging, establishment and growth of reserves, maintenance etc., has varied widely according to levels of operation and competence and interest of staff.

7. Greater scope exists for effective operation where the level of operation warrants employment of skilled and paid staff but the enormous contribution of volunteers cannot be ignored (nor could the desire of small communities to continue to utilise local cemeteries).

8. The concept of local government taking over cemetery administration does offer the potential for association with locally based persons with administrative, financial, engineering, health and building expertise but would need to be balanced against the willingness of the municipality to assume the functions and that of the existing Trust to surrender them.

9. Expertise exists within the Local Government Department which could assist in the formulation of accounting and the management standards and perhaps incorporation in the Municipal Accounting Regulations of standards for those cemeteries for which a council is the Trustee. Subject to the limited availability of its resources the Department would be willing to co-operate with the Health Commission and the cemetery industry in any development of Manuals of Procedures.

10. While it is understood that three officers of the Health Commission are engaged full-time in administration (including inspections) associated with cemeteries and crematoria, it is also understood that there are several other officers who have accumulated a wealth of experience and expertise in this area but who because of duties unrelated to cemetery administration would not be available for transfer if the administration of the Cemeteries Act were to be relocated in another Ministry.

11. In keeping with the Government's policy of moving towards establishing powers of general competence in councils, progressive amendments to the Local Government Act have substantially reduced the occasions upon which approvals of the Governor-in-Council are required substituting provisions for accountability to the local community. (Advertising proposals and provisions for hearing objections). The Cemeteries Act still contains many provisions for Governor-in-Council approvals including that in respect of revision of fees but any complete abrogation of that provision might reduce the capacity of the Health Commission to monitor and influence fees.

12. Apart from establishing reserves for future maintenance, local conditions might influence the desirable cost structures. Further, any proposal for a per capita (burial or cremation) levy payable to a central fund might be seen as a requirement on the more active (and expensive) areas being forced to subsidise the less active (and inexpensive) areas.

13. In the event that a council became trustee of a cemetery and desired to delegate its function to a Committee of persons, there would appear to be a need to amend Section 241A of the Local Government Act to include land vested in the municipality pursuant to section 241 thereof.

14. The administration of a central fund for assisting the maintenance and development of cemeteries and the planning of land acquisition for cemetery purposes would require the availability of resources which are not currently available in the Local Government Department. Nevertheless, the availability of adequate funds for such purposes and the introduction of mechanisms for forward planning of sufficient suitably located land for cemetery purposes and the rational planning of crematoria is supported.

15. Reference was made to foundations for monuments. While the subsidence problems in cemeteries will inevitably have potential for movement of monuments, no information is available to the Local Government Department which would suggest that the provisions of section 23 of the Cemeteries Act are inadequate to cater for the maintenance or removal of any source of danger."

The Committee, in response to the principles mentioned in paragraph 2 of the above excerpt, in addition to seeking the views of every council to the recommendations contained in its Second Report has on a number of occasions attempted to arrange a meeting with the Municipal Association of Victoria to discuss alternative proposals for future administration of cemeteries as outlined in this current report. To date the Committee has been unsuccessful in arranging such a meeting due to the lack of response by the Municipal Association of Victoria.

An earlier submission by the Municipal Association of Victoria raised similar principles to those contained in paragraph 3 of the above letter.

"The Association wishes to express concern on behalf of its members as regards the recommended transfer of responsibility for the operation of cemeteries from trusts to local government, without a commensurate increase in funding from the State Government."

"The shifting of responsibility for the operation of cemeteries from the trust to Local Government should be accompanied by a corresponding increase in local government funding from the State Government.

It is noted, however, that although the other review options entailed some State Government expenditure, the Committee inexplicably concluded that municipalities would be able, unassisted, to bear the costs involved. In practical terms this is an unrealistic view. As stated previously, a large proportion of trusts are already having difficulty maintaining their cemeteries, and this situation can only worsen as more cemeteries close their gates. A closed cemetery will be a financial liability for a municipality. The Committee's answer to this is to give councils the "choice" of permitting cemeteries to fall into disrepair or of making available Parks and Gardens funds for maintenance. (It should be noted by municipalities that the Health Commission presently has the prerogative to recommend to the Governor-in-Council that trusts be ordered to undertake works to correct necessary maintenance or repair using surplus reserves held by the trust).

It is therefore considered that the recommendation of the Committee that municipalities take over the obligations of trusts in relation of cemeteries should not be accepted at this stage. The proposal should be modified to include appropriate funding to local government, or option (b), which sets up a Central Cemeteries Board with Regional Advisory Bodies overseeing the present trusts, should be adopted in its place."

The Committee in reconsidering its earlier recommendations has given considerable attention to the matter of finance. The increase in costs associated with the transfer to local government at central and local level has been at the basis of most objections to the initial recommendations in the Second Report.

The Committee believes that the concern expressed by most councils, the Municipal Association of Victoria and the Local Government Department is justified and that more adequate financial provisions need to be made for cemeteries at all levels.

The Committee has therefore reached the opinion that a Central Cemeteries Fund needs to be established to assist cemeteries on a needs basis. The format and source of income of such fund will be discussed in Chapter Five. It is hoped that if such fund is established it will not only remove objections based on financial considerations but also lead to improved levels of maintenance at most cemeteries.

Paragraphs 6 to 9 and 11 of the Local Government Department's response will be discussed in later Chapters as will other matters raised by the M.A.V.

The Committee considers that the detailed process of transfer of responsibility to the Local Government Department, which may include transfer of staff from the Cemeteries Section, is a matter to be determined by the Departments involved.

With respect to expertise now available which is not located in the Cemeteries Section but in the Health Commission in general the Committee believes that this expertise although further removed can still be utilised after transfer of responsibility for cemeteries to the Local Government Department. As indicated earlier the Health Commission would remain involved in determining policy and setting standards on issues affecting public health. Consultation between Departments on matters affecting the areas of responsibility of more than one Department is a well established practice in Government administration.

In conclusion of all the evidence and factors considered during the Committee's investigation of the options for future administration of cemeteries at Government level in Victoria, the Committee makes the following recommendation:

Recommendation:

That the Minister for Local Government shall be responsible for administering the Cemeteries Act 1958 and the Cemeteries Regulations 1965;

That appropriate arrangements for the physical transfer of cemetery administration be made between the Health Commission and the Local Government Department; and

That the Health Commission continue to determine policy and standards affecting public health with respect to cemeteries and crematoria.

CHAPTER THREE

3. SURVEY OF CEMETERIES IN VICTORIA

3.1 INTRODUCTION

On completion of its Second Report the Committee undertook a Survey of cemeteries in Victoria to obtain data and information about cemeteries not previously available.

Additionally the survey was to provide the Committee with a greater appreciation of the problems experienced by trusts and their attitude to proposed changes in the administration of cemeteries.

This Chapter discusses the results of this survey and draws some conclusions about the current system of administration of cemeteries at the local level.

3.2 THE NUMBER AND CATEGORIES OF CEMETERIES IN VICTORIA.

The last report of the Committee stated that there were a total of 551 public cemeteries in Victoria. This number was taken at the time from cemetery records obtained from the Health Commission but was found to be inaccurate on subsequent investigation by the Committee. Apparently some cemetery trusts had been overlooked by the Health Commission when compiling its mailing list. The Ultimo Cemetery Trust for instance had not been contacted by the Health Commission since the late 1960's and it seems the current trustees may not be appointed by the Governor-in-Council nor their fees approved by him.

The Committee also found evidence of a number of other old or disused cemeteries not included in the initial list. Although most of these have either no or very few burials they nonetheless should be included in the present consideration since they also need to be maintained on a long term basis. A break-up of what the Committee

believes to be the more accurate number of Victorian public cemteries is given below.

TABLE 2

Victorian Public Cemeteries

			TRUST	COUNCIL	TOTAL
Metropolitan	-	operating	23	18	41
	-	closed	10	4	14
		Subtotal	33	22	55
Rural	-	operating	424	53	477
	-	closed	21	11	32
		Subtotal	445	64	509
		Grand Total			564

3.2.1 Survey Sample

Of the 552 survey forms mailed to trusts by the Committee 415 were returned in time for inclusion in this analysis. An additional 26 returns were received before publication of this report. The returns included in this analysis fall into the following categories:

TABLE 3

	TRUST	COUNCIL	TOTAL
Operating Rural Cemeteries	327	27	354
Closed Rural Cemeteries	3	14*	17
Operating Metropolitan Cemeteries	23	11	34
Closed Metropolitan Cemeteries	4	6	10
Total	357	58	415

* Includes three cemeteries administered by National Parks Services.

3.3 SURVEY RESULTS

The answers to questions asked in the Survey are discussed in the same order they were given in the Questionnaire. A sample of that Questionnaire is provided in Appendix III.

3.3.1 Number of Trustees

Table 4 shows the size of trusts by number of trustees in each category of cemeteries and gives the total number of cemeteries and trustees in each category..

TABLE 4

Frequency of No. of Trustees

Other than Councillors on Cemetery Trusts

Sample - 357 Cemeteries

(not including 58 Council operated cemeteries)

Number of Trustees on Trusts	3	4	5	6	7	8	9	10	11	12	13	14	0*	Total Cemeteries	Total Trustees
Operating Rural	1	12	35	50	73	43	64	32	5	4	4	2	2	327	2374
Operating Metropolitan			1	4	10	6	1	1						23	162
Closed Rural				1		1							1	3	14
Closed Metropolitan		1		2		1								4	24
TOTAL	1	13	36	57	83	51	65	33	5	4	4	2	3	357	2574μ

* Number of returns which did not list the names and numbers of Trustees.

μ As some Trusts administer more than one cemetery this figure is slightly inflated.

From the Table it can be seen that the majority of cemeteries are administered by between six and nine trustees, the most common number being seven trustees.

In addition to the 2,574 trustees listed above the Committee believes that approximately a further 550 trustees are involved in the administration of cemeteries not included in the Survey sample. This latter figures takes into account that some trusts administer more than one cemetery. If councils were added it could be said that over 3,800 persons currently act as trustees of cemeteries in Victoria.

3.3.2 Occupation of Trustees other than Councillors

Because a large number of trustees are retired but not all indicated this in the Survey, the occupational categories listed in Table 5 do not differentiate between currently occupied and currently retired trustees. Only those who did not include their occupation before retirement are included under "retired" in the Table. Trustees whose occupation was not shown are included under "other". For trusts not listing their number of trustees an estimate was also included under "other".

TABLE 5

Occupation of of Trustees	Operating Metropolitan		Operating Rural		Closed Metropolitan & Rural		Total occupation all cemeteries	
Agricultural Grazing/ Farming/ Horticulture etc.	25	15.4%	1232	51.9%	22	57.9%	1279	49.7%
Trades & Other blue collar	30	18.5%	291	12.3%	4	10.5%	325	12.6%
Small Business & Sales	13	8.0%	172	7.2%	-		185	7.2%
Major Business Professional & white collar.	54	33.3%	111	4.7%	4	10.5%	169	6.5%

TABLE 5 (continued)

Occupation of of Trustees	Operating Metropolitan		Operating Rural		Closed Metropolitan & Rural		Total occupation all cemeteries	
Council Officer	1	0.6%	24	1.0%	-		25	1.0%
Gravediggers/ Sexton.	-	-	5	0.2%	-		5	0.2%
Funeral Director/ Monumental Mason	-	-	27	1.1%	1	2.6%	28	1.1%
Other	5	3.1%	179	7.5%	1	2.6%	185	7.2%
Retired	34	21.0%	333	14.0%	6	15.8%	373	14.5%
TOTAL EACH CEMETERY CATEGORY.	162	(6.3%)	2374	(92.2%)	38	(1.5%)	2574	(100%)

Table 5 shows that over 51% of trustees come from an agricultural background in rural cemeteries as compared to just over 15% in the metropolitan area. Larger rural cities also tended to have fewer trustees with agricultural background (not shown in Table 5) and more professional occupations amongst trustees than the smaller country cemeteries.

In the metropolitan area one third (33.3%) of trustees fall into the business/professional category whereas only 4.7% belong to that category in rural areas.

Funeral directors, monumental masons or grave-diggers and sextons were only found in rural cemetery trusts and council officers were also more common on these trusts.

TABLE 6 - NO. OF STAFF EMPLOYED AT CEMETERIES

FULL-TIME

		Sextons			Gardeners							Maintenance						Administration							Grave Diggers					Labourers		Crem. Staff	
1	No. of Staff	1	2	10	1	2	3	7	16	75*	80	1	2	3	4	7	13	1	2	3	4	5	13	25	1	2	3	4	8	1	2	1	20
2.	Operating Rural Cemeteries	14			1	2	1					2	3	1	1				1						3							1		
3.	Operating Metropolitan Cemeteries	2	1	1	4	2	1	1	1	1	1	4	4	1			1	2	1		1		1	1	3	2	2	1	1				1
4.	Closed Rural	1				1								1					1														
5.	Closed Metropolitan	1										1	1					1								1					1		
6.	Total Cemeteries	18	1	1	5	5	2	1	1	1	1	7	8		1		1	3	3		1		1	1	6	3	2	1	1		1	1	1
												PART - TIME																					
7.	Operating Rural	54	9		21	2						33	2			1		52	3						48	2	1						
8.	Operating Metropolitan	7	1		3	1						5	2					7	3	1	1	1			2					5			
9.	Closed Rural																																
10.	Closed Metropolitan																																
11.	Total Cemeteries	61	10		24	3						38	4			1		59	6	1	1	1			50	2	1			5			

* Combined Gardening and Maintenance Staff.

The categories "Others" and "Retired" are not conclusive as indicated earlier since they may comprise a variety of different occupations. The percentage of retired trustees in all major categories ranged from 30-40%.

The Committee believes that the sample of trustees of the 357 non-Council trusts shown in Table 5 can be considered representative of all Victorian cemeteries.

It becomes therefore obvious that those engaged in farming, grazing, horticultural and viticultural occupations form the backbone of the current trust system in rural Victoria. It is unlikely that trustees would in future be drawn in larger numbers from other occupational categories because changing attitudes in the rural community and changes in employment opportunities tend to lead to greater and more rapid disassociation from the traditional bonds with the place of birth, the land and the family in these non-agricultural occupation groups.

3.3.3 Staff Employed at Cemeteries

Table 6 opposite lists the number of cemeteries that employ different categories of full-time and part-time staff and the number in each category employed at each cemetery.

Item 1 of the Table shows the total number of persons in various occupations that were found to be employed by different cemeteries.

Items 2-5 indicate the number of cemeteries which have one, two or more categories of staff employed full-time. For example in the "rural operating" category 14 cemeteries have each one sexton employed whereas in the "operating metropolitan" category two cemeteries each employ one sexton, one cemetery employs two sextons and one cemetery employs 10 sextons.

Item 6 shows the total number of cemeteries which full-time employ 1,2 or more sextons and so on. The same explanations of frequencies apply to items 7-10.

Translated into actual numbers of full-time, and part-time staff, Table 6 indicates the following:

Total Staff Employed by all Cemeteries included in the Sample.

	Ful-time	Part-time
Sextons	30	83
Gardeners	199	30
Maintenance	49	53
Administration	51	83
Grave Diggers	33	56
Labourers	2	5
Crematorium Operators	21	0

Contract Grave Diggers = 11

From the 415 cemeteries included in the survey it was found that 183 (44.1%) did not employ any staff at all although it is assumed that a number of these amongst the operating cemeteries may employ contract grave diggers but did not include them in the Questionnaire.

The largest numbers of staff are employed by rural city and metropolitan cemeteries. For instance The Necropolis Trust alone employs 80 gardeners at Springvale, and the Fawkner Trust 75 combined gardening and maintenance staff.

Nearly half of the cemeteries in Victoria are therefore totally maintained by voluntary labour supplied by either trustees and people or organisations in the community but occasionally also by staff employed and paid for by councils. The Committee due to time restrictions was unable to obtain an estimate of the total manpower and the net cost (cost not recovered by fees) of labour allocated to cemeteries by councils either operating cemeteries or assisting other trusts.

Some of the reasons for the great dependency of cemeteries on voluntary labour will become evident in the analysis of fees and general financial areas.

3.3.4 Size of Cemeteries

Trusts were asked to give an indication of the total number of occupied and vacant grave sites at their cemeteries. The figures in Table 7 show the various categories of size of operating rural cemeteries. Because a number of trusts were unable to indicate their approximate number of graves due to loss of records or for other reasons, or included size by acres only the Table includes estimates for these cemeteries taken from Health Commission data (Working Party Report) combined with the number of sites occupied which were supplied in the Questionnaire.

TABLE 7

Size of Operating Rural Cemeteries by Total Number of Grave Sites

No. of Sites	%	Cemeteries
0-400	5.4%	(19)
401-800	10.5%	(37)
801-1200	16.9%	(60)
1201-2000	15.0%	(53)
2001-4000	25.7%	(91)
4001-8000	15.5%	(55)
8001-12000	5.6%	(20)
over 12000	5.4%	(19)
Total	100%	354

The Committee considers that the sample above is fairly representative of all cemeteries in Victoria which indicates that nearly half of all cemeteries have less than 2000 grave sites and one quarter contain between 2000 and 4000 sites.

In comparison only three operating cemeteries in the metropolitan area in the sample were below 2000 sites, the majority being in excess of 4000 and the largest being the

Fawkner Trust with a total of 125,000 at the old cemetery and 63,000 sites planned for the new cemetery.

3.3.5 Allocation of Sections of Cemeteries to Ethnic and Religious Groups

The analysis and results of this question are contained in Chapter Six of the report.

3.3.6 Analysis of Common Charges at Operating Rural Cemeteries.

Trusts were asked to list their current charges for the following items:

1. Fee for Right of Burial (cost of land):
   (a) lawn section;
   (b) monumental section.
2. Interment fees;
3. Exhumation fees.
4. Fees for Sinking and Re-opening.
5. Monumental permit fees.
6. Maintenance charges.

Since items 1b, 2 and 4 provide the major source of income for most operating rural cemeteries an analysis of these only is given in Table 8.

TABLE 8

Fee for Right of Burial - Monumental Section

$	No. Cemeteries	%
no fee	52	14.6
1-40	131	36.7
41-75	92	25.8
76-100	27	7.6
101-150	25	7.0
151-200	14	3.9
201-250	6	1.7
251-300	4	1.1
over 300	6	1.7
Total	357	100%

The Health Commission issued a draft scale of fees for cemeteries in January 1983 (see Appendix VIII). For small to average size country cemeteries it was suggested that a fee of $70 be charged for sites with exclusive Right of Burial and that this charge be increased by an extra $50 for own selection of land. For larger country cemeteries the recommended fees were $110 and $150 respectively.

Considering that of the 92 cemeteries in the $41-75 category about 80% charge below $70 it can be said that appproximately 70% of all country (rural) cemeteries in Victoria, regardless of size, charge fees below those recommended by the Health Commission. The variation in individual fees was also greater for this type of fee ranging from $0 and $1 to $300.

Similar results appear from an analysis of interment fees. The draft scale recommends $30 for small to average and larger cemeteries.

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TABLE 9

Interment Fees

$	No. Cemeteries	%
no charge	80	22.4
1-40	213	59.6
41-75	26	7.3
76-100	13	3.6
101-150	15	4.2
151-200	6	1.7
201-250	2	0.6
251-300	2	0.6
Over 300		
Total	357	100%

Of the 213 cemeteries in the $1-$40 category approximately 40% charge fees below $30. Therefore nearly half the sampled cemeteries again fall below the suggested fee.

Sinking fees were generally closer to the fee of $100 suggested for all sizes of country cemeteries by the Health Commission. Approximately 80% charge $100 or more for sinking a grave 1.83m. deep (standard single burial depth).

The Committee believes that fees for sinking varied less between trusts because they are more closely based on the cost of grave-digging which is carried out by paid labour at a large number of cemeteries.

Since fees for the above three items varied so greatly between cemeteries an analysis of the relationship between the size of cemeteries and fees was undertaken. This analysis showed the following results:

(a) Size compared to Fee for Right of Burial - no clear relationship between size and fee in any of the categories of cemetery sizes generally although the incidence of fees of $100 or more was greater in cemeteries above 4000 grave-sites and in cemeteries operated by councils.

(b) Size compared to Interment fees - no relationship between size and fees charged in size categories below 8000 sites. Over 8000 fees were above $100 in most cemeteries and council cemeteries generally charged between $30 and $60 for Interment.

(c) Sinking charges - as indicated earlier sinking charges varied less than other charges between trusts and most were $100 or more in all categories but generally slightly higher in cemeteries with more than 2000 sites. Council charges did not vary in that area from cemeteries in the 2000-4000 sites category.

Some of the fees charged for all three items above were as low as $1 to $5 and the Committee questions the purpose of charging any fee when the fee itself is so low that it can hardly cover the cost of publication of fees, stationery or issue of receipts.

Since the comparison between the size of cemeteries and fees did not establish conclusive patterns the Committee undertook an analysis of the relationship between fees and the number of burials per annum at each cemetery.

The data for the number of burials per annum shown in Table 10 was taken from the Working Party Final Report but some of the figures were updated from data collected by the Committee. The sample included 562 cemeteries. Closed cemeteries and cemeteries who had less than one burial per

annum over a five year period were included under "0" (zero) below.

TABLE 10

Number of Burials per annum

Number of burials p.a.	No. of Cemeteries	
0	110	
1	91	
2	59	
3	32	
4	35	
5	30	
6	19	
7	18	
8	14	
9	10	
10	14	
11-15	29	
16-20	16	
21-40	39	
41-60	13	
61-80	6	
81-100	9	
Over 100	18	
Summary 0-5	357	63.5%
6-10	75	13.3%
11-20	45	8.0%
21-40	39	6.9%
41-100	28	5.0%
Over 100	18	3.2%
	Total 562	

The category of 0-5 burials p.a. contains the majority of rural cemeteries except for a few larger cemeteries located in or near rural cities.

When the fees charged by the 357 operating rural cemeteries were compared with the number of burials per annum at these cemeteries the following pattern emerged:

(a) 0-10 burials per annum - a great variation of Right of Burial and Interment fees within this category but the fee tended to be generally below $50 and the Interment fee below $30. Sinking fees were similar to those of other categories, the majority ranging between $100 and $150.

(b) 11-20 burials per annum - fees for Right of Burial again varied within this category but were slightly higher overall and generally above $70 compared to the first group. Interment fees also showed great variations but were not much higher overall than those in category (a). Sinking fees were the same as those under 10 burials p.a.

(c) Over 20 burials per annum - the fee for Right of Burial tended to be higher again overall than for groups (a) and (b) but a number of cemeteries still charged below $30. Interment fees ranged between $60 and $100 and Sinking charges were again the same as in other groups.

It appears that although a rising pattern emerges, the number of burials p.a. is not consistently linked with fees charged since a number of cemeteries in each category still charge fees well below the average of their category.

From the analysis of fees and the number of burials p.a. it seems that the majority of cemetery trusts would have insufficient income to partially or fully maintain their cemetery and would equally have no funds to set aside for repairs, building or development works or for future maintenance. Charging higher and more appropriate fees may overcome some of the lack of repair and day to day maintenance funds but does not solve the problem of long

term maintenance. In fact, some cemetery trusts appeared to be lacking funds for postage and requested that a franked return envelope be supplied with future correspondence.

The financial situation of cemeteries will be further discussed later but the Committee wishes to note here that it believes the current fee structure to be inappropriate and the draft scale of fees issued by the Health Commission to be an ineffective attempt to alter the attitude of trusts towards fees. The majority of trusts believe that it is their responsibility to keep fees as low as possible and therefore they do not increase fees in step with inflation or future maintenance needs as will be shown in the following paragraphs. This in the Committee's view is self-defeating and increases the future burden of these cemeteries on the community.

Only 15 rural cemeteries currently make charges for maintenance of graves, five charging below $20, nine between $20 and $40 and one between $80 and $160. Only one cemetery indicated that the fee for Right of Burial included a component for future maintenance. It is therefore mostly only at larger metropolitan and rural city cemeteries that financial provisions for future maintenance appear to be made.

3.3.7 Basis of Cemetery Fees

Since the basis for charging in metropolitan cemeteries is generally more in line with business type of operations only operating rural cemeteries are included in this analysis.

The Survey Questionnaire asked trusts to describe what basis they used in formulating charges for their cemetery. Replies, and the length and terminology of replies varied greatly and answers were therefore grouped into the 12 categories shown below.

TABLE 11

Basis of Charging

Category	No. of Cemeteries	%
A. No basis or no reply	38	10.6
B. Recovery of costs and overheads plus inflation and future maintenance	25	7.0
C. Recovery of actual costs only	66	18.5
D. Based on charges of other cemeteries in area	17	4.8
E. Based on charges of similar sized cemeteries	4	1.1
F. Based on Health Commission guidelines or as determined by Health Commission and the Cemeteries Act	119	33.3
G. As recommended by Shire Council.	1	0.3
H. By % increase (inflation rate) over previous year's charges	21	5.9
I. Grave digging cost only plus minimal overhead (e.g. publications)	6	1.7
J. By Public Meeting (Trustees and Locals)	4	1.1
K. Trustee decision	12	3.4
L. A combination of two or more categories not including B.G.H. or J.	44	12.3
Total	357	100

Only category B cemeteries, and, depending on the original basis used, category H cemeteries come close to a business approach to cemetery administration, although in reality the fees charged by some cemeteries in these categories are

below the Health Commission draft scale of recommended fees.

Similarly, the actual fees charged by many cemeteries in category F are also below draft scale fees although this category includes a number of trusts who believe their fees are totally determined by the Health Commission or the Governor-in-Council. It is therefore questioned whether all cemetery trusts received or understood the purpose of these draft scale guidelines or whether they are aware of the fact that they may request an increase in fees to suit their financial requirements from the Health Commission. The Committee is not aware of any instances where fees proposed by trusts have not been vetted by the Health Commission or approved by the Governor-in-Council.

The Committee believes that the above replies demonstrate the need for a thorough review of the level of fees and for the development of a proper fee structure for the various types and sizes of cemeteries. They also point to the need for better education of trustees in relation to the financial provisions of the Act and the processes involved in the setting and approving of fees.

3.3.8 Review of Charges

Replies to the question of how often trusts reviewed charges are summarised below in Table 12.

TABLE 12

Frequency of Review of Charges by No. of Months

Months	No. of Cemeteries	%
0-12	106	29.7
13-24	32	9.0
24-36	30	8.4
37-48	13	3.6
49-60	26	7.3
more than 60	10	2.8
Periodic (3-10 years)	84	23.5
Infrequent*	22	6.2
No reply	34	9.5
Total	357	100

* This category included comments such as "when used" or "at the time of burial". A review of charges at such time would be useless as burial would have to be delayed for at least three weeks before an increase in charges was processed by the Health Commission and the Governor-in-Council. It is assumed that in some instances therefore an increase in charges may be applied by trusts prior to approval by the Governor-in-Council.

The same category also included comments like:-

"first time since 1880"
"changed after 90 years"
"every 30 years"
"first time in 30 years"
"negotiable".

The Committee is greatly concerned that there seems to be no overall control and supervision over charges by the Health Commission nor a periodic review of the same to ensure that instances as those listed above do not occur. "Negotiable" prices in particular as well as fees altered "when used" or "at time of burial" constitute a breach of the

Act which currently provides that charges be approved by the Governor-in-Council.

When assessing the frequencies of review shown in the above table it must be understood that a review does not equal an increase in charges and in many cases in fact charges are much less frequently increased than reviewed.

The Committee generally believes that a review of charges and an increase in line with inflation is necessary at least once every year for all cemeteries. A more frequent review and adjustment of charges may be necessary for all cemetery trusts with more than twenty burials per annum. The impact of more frequent reviews of charges on the workload of officers processing increases and alternative means of dealing with approvals are discussed later in Chapter Four.

3.3.9 Mausolea and Vaults and the Funeral Industry

Since the Committee has deferred further investigation and report on these subjects until 1985 survey results from these areas will not be discussed in this report. This also applies to Monumental Permit fees.

3.3.10 Non-Commercial Funerals

Non-commercial funerals represent funerals arranged by the family or friends of the deceased without the service of a funeral director. The opportunity to carry out such funerals exists under current legislation in that any person can conduct a funeral subject to meeting health requirements and the provision of the Act with respect to certification and other standards.

Because the Committee received some submissions promoting greater application of this type of funeral it was felt

that a survey of the frequency of such funerals was indicated. Although generally cemetery trusts had no objections to such funerals their incidence in comparison to the number of deaths p.a. and the total number of cemeteries in Victoria was extremely small. As far as trusts could establish from their records only a total of 92 such funerals were carried out in Victoria in the past, 41 of which occurred at one metropolitan cemetery. Six of the 92 involved burial of ashes. Overall this type of funeral was confined to 23 cemeteries. At the majority of cemeteries no request had ever been received. Lack of consumer education may contribute to the lack of demand but from other evidence the Committee understands that generally people do not wish to be involved with the physical aspects of body preparation and burial.

3.3.11 Financial and Maintenance Problems

A detailed break-up of responses to these questions is impossible here because of the bulk of information supplied. Therefore only more common responses and general trends are discussed. Since in many instances financial problems resulted in maintenance problems and vice versa it is inappropriate to deal with these two areas separately.

For example, of the 257 (61.9%) respondents who indicated that they had no financial problems over 50 stated that maintenance was entirely dependant on voluntary labour and assistance by either locals, councils or service clubs because no funds were available for employment of staff or purchase and replacement of equipment. Seven others of the remaining 200 stated that they had no immediate financial problems because they had received a grant from the Health Commission to assist with urgent repair works. It therefore appears that many of those claiming to have no financial prolems in reality lack finance for the more major maintenance and repair works.

The same argument holds true for many of the 212 (51.9%) respondents who claimed to have no maintenance problems. These respondents under financial problems indicated a lack of funds for either fencing, road or path repair, repair of old or historical monuments and other works.

The remainig respondents in each group (financial 38.1% and maintenance 48.9%) referred to a range of problems. The more frequently mentioned of these are listed below:

(a) Low number of burials led to low funds;
low fees led to low funds;
generally insufficient funds;
inflation diminishes investment savings.
(Group (a) - Financial category 18.8%)

(b) Lack of funds for or high cost of:
- insurance, workers compensation;
- printing or publications.

(Group (b) - Financial category 5.8%)

(c) Lack of funds for:
- future land requirements/purchase;
- establishment of a lawn section.

(Group (c) - Financial category 2.4%)

(d) Lack of funds for:
- employment of labour;
- general maintenance and repair works.

(Group (d) - maintenance category 18.1%)

(e) Lack of funds for:
- fencing;
- weeding/spraying;
- drainage;
- road works;
- toilet facilities;

- cleaning/clearing;
- repair of monuments;
- grave digging;
- replacement of equipment;
- other particular maintenance works.

(Group (e) - Financial 7.1%, Maintenance 30.8%).

The above evidence demonstrates that a serious shortage of funds exists in at least half the cemeteries in Victoria for on-going repair and maintenance and that even more are totally dependent on voluntary labour. It is estimated that at least 90% of all cemeteries have no funds set aside for long term future maintenance. Cemeteries which currently have accumulated reserves are generally large metropolitan cemeteries and rural city cemeteries which have a high number of burials per annum.

The Committee believes that the underlying causes for the lack of funds can be found in the following areas:-

(i) low number of burials combined with very low fees resulting in income too low to meet even smaller costs such as administrative expenses (postage, publications, gazettal, printing) or running expenses such as insurance, workers compensation, and minor maintenance works (fence repair, spraying, etc.);

(ii) low fees maintained over long periods and "recovering cost only" charging policies;

(iii) the value of accumulated reserves or investments is diminished by inflation;

(iv) inappropriate financial and investment provisions in the Act combined with inadequate investment policies;

(v) an overall lack of foresight by trustees and successive health authorities to provide for long term maintenance.

Since the errors of the past cannot be rectified for closed cemeteries, cemeteries with low numbers of burials and cemeteries reaching the end of their operating life the Committee believes that alternative provisions for financial management and future maintenance of cemeteries need to be made urgently. This will be further discussed in Chapter 5.

3.3.12 Problems Related to Ethnic and Cultural Burial Requirements

This area is discussed in Chapter 6.

3.3.13 Future Requirements

The majority of trusts could foresee no particular future requirements overall or with respect to the socio/economic or ethnic/cultural make-up of the community using their cemetery.

A few respondents mentioned the desirability of developing a lawn cemetery or memorial wall to better meet the changing burial demands of the local community.

Some rural city cemeteries indicated that a crematorium in their area would be desirable.

Financial requirements were also mentioned again and so was the need for better advice by the Health Commission. Overall responses to this question were poor considering the problems experienced by so many trusts.

3.3.14 Voluntary Assistance

The source of voluntary assistance to trusts came from the following groups in rural areas:

Lions Club
Apex Club
Rotary Club
R.S.L. Club
Country Women's Association
Jaycee's
Guides
Churches
Country Fire Brigade
Local councils or Government organisations
Local families and local communities.

Of these the Lions and Apex Clubs were the most frequently mentioned.

In the metropolitan area Guides and the Rotary Club gave some assistance.

Table 13 shows the number of organisations assisting trustees at cemeteries.

TABLE 13
Voluntary Assistance by Number and Type of Organisation μ

Number and Type of Organisation	Metropolitan Cemeteries		Rural Cemeteries	
1 Local Club	5	13.8%	65	18.2%
2 Local Clubs	1	2.8%	48	13.4%
3 Local Clubs	-	-	18	5.0%
Trustees and local community	1	2.8%	87	24.4%
Trustees only	1	2.8%	36	10.1%
Councils or Government organisations*	-	-	15	4.2%
Assistance sometimes	1	2.8%	11	3.1%
No assistance	27	75.0%	77	21.6%
	36	100%	357	100%

* Does not include cemeteries operated by Councils.
μ Not all trusts answered this question.

The above figures show that a higher percentage of metropolitan cemeteries received "no assistance" than rural cemeteries. The majority of rural cemeteries were assisted by either the local community only or by one or two service clubs. The number of those assisted by councils or other Government organisations was minimal although it must be remembered that 58 cemeteries included in the sample are totally maintained by councils or other Government organisations.

Unfortunately, the Committee was unable to obtain data of earlier periods to establish whether the number of cemeteries being assisted had changed in time. Some trusts did indicate that they no longer received voluntary help from organisations or locals who previously assisted them.

3.4 SUMMARY OF SURVEY RESULTS

The Survey of Victorian cemeteries provided a lot of data not previously available and gave a good over-view of the administration of cemeteries. In addition to purely statistical data the information and separate comments provided by trusts gave the Committee a good insight into some of the major problems under the current system and also with respect to the attitudes of trustees to cemetery management. Two of the most important problem areas are summarised here.

3.4.1 Trustees

The shortcomings of the current system for nomination, selection and appointment of trustees at Health Commission level will be referred to in Chapter 4.

At the rural cemetery level which includes most cemeteries in Victoria evidence showed that most trustees are generally elderly, many are retired and the majority remain trustees of cemeteries until either ill health or death requires their

replacement. Evidence also showed that the majority of trustees in the rural area are engaged in or, before retirement, were engaged in agricultural or industry and trade related occupations.

These factors bring to mind three possible problem areas. Firstly, the age of trustees may result in difficulties in carrying out the physical activities of cemetery maintenance (e.g. gardening/maintenance and repair work) where a cemetery is unable to employ appropriate staff due to lack of funds.

Secondly, the occupational background of trustees at many cemeteries may not be suitable with respect to interpretation and application of legislation, accounting and budgeting, record keeping or general administration, and supervision of erection of monuments and other basic engineering tasks.

More adequate guidelines for cemetery management may overcome some of these problems but will not totally overcome the fact that necessary expertise is not readily accessible or available on a regular basis at the local level.

The Committee believes it unlikely that such expertise will become more available or accessible in future without changes to the current system, both because it is becoming more difficult to find persons willing to take on voluntary taks generally and also because people with such expertise tend to experience greater mobility in employment and place of residence and therefore have fewer traditional ties.

This situation does not indicate that many trusts have not operated well in the past despite the lack of guidelines and expertise but the Committee believes that the deteriorating financial situation of many trusts and other problem areas require the introduction of new systems which demand

level of fees, management policies, age and background of trustees, Health Commission supervision and assistance and Government financial assistance and attitudes.

Because this inter-relationship exist a simple injection of more funds, even should funds become more readily available would not be sufficient to produce long term benefits. Only a complete reassessment and improvement in all areas can produce lasting benefits.

CHAPTER FOUR

4. ADMINISTRATION OF CEMETERIES AT LOCAL LEVEL

4.1 INTRODUCTION

In its Second Report to Parliament the Committee recommended that:

"(A) The Councils of Municipalities replace the Trustees of all existing Cemetery Trusts within their boundaries, as permitted by Section 3(2) of the Cemeteries Act 1958; except for The Necropolis Trust, Springvale, the Fawkner Crematorium and Memorial Park Trust, Altona; which should remain as constituted at present. The question of Local Government representation on the three major Metropolitan Trusts has been suggested but the Committee would not recommend this until further discussions have been held with these Trusts;"

Following publication and distribution of the report the Committee invited all cemetery trusts and councils in Victoria to make submissions or comment on the recommendations made in that report.

In response to recommendation (A) above the Committee received 186 written submissions from councils, including those currently administering cemeteries and 41 submissions from cemetery trusts. In addition, 145 trusts made comments on the report in the section provided for that purpose in the Cemetery Survey Questionnaire. (See Appendix III). A number of industry and government organisations also responded to this issue.

This Chapter will summarise the main points and problems and discuss the major arguments for and against local council control of cemeteries raised in these submissions.

Some of these arguments have already been discussed in the preceding chapters but the Committee believes that the opinions and problems of those most affected by this report - cemetery trusts, councils and ultimately the Health Commission and the Local

Government Department - should be given sufficient attention before the Committee's revised recommendations are set out.

Before presenting and critically discussing further evidence the Committee again wishes to stress here that its conclusions should not be considered a criticism of the work of past and present trustees. The Committee greatly appreciates the enormous contribution by thousands of trustees over the decades who voluntarily dedicated time and effort to the management and maintenance of an essential community facility and it shares the sentiments expressed in the following excerpt of the submission by Mr. Drew:

"Trustees have certainly not failed, rather time and economic conditions have overtaken them."
(Transcript of Evidence 27 July, 1984, p. 279)

Neither should the criticism of Health Commission administration be understood as criticism of individual past and present officers involved with cemeteries.

In the Committee's view if any criticism is justified it belongs with successive Governments who had responsibility for cemetery administration, and ultimately with the system itself.

4.2 PROBLEMS AT HEALTH COMMISSION LEVEL

In this section the Committee has drawn both on the evidence collected prior to the release of the Second Report and on evidence obtained through the Survey of Cemeteries.

Some of the problems associated with the administration at Government level have already been referred to in the Second Report but are again included here. The major point made in that report was that staff and financial resources in the Cemeteries Section of the Health Commission are inadequate for the administration and supervision of all Victorian public and private cemeteries under the current legislative provisions.

It is estimated that on average the Cemeteries Section administers and vets some 300 transactions for Orders-in-Council annually. An example is given below:

Approvals by the Governor-in-Council
May 1983 to April 1984*

1.	Appointments of Trustees for Cemeteries	145
2.	Scale of Fees (Public Cemeteries)	143
3.	Regulations of Cemeteries	1
4.	Cremation Fees	1
5.	Discontinuance of Burials at Cemeteries	7
6.	Notice to persons having claim on Estate	1
7.	Abstracts of Accounts	1
	Total	299

* Source - Government Gazettes 1983-1984.

Firstly, scarce resources have to be allocated to vetting of fees rather than being available for development of a more appropriate fee structure for cemeteries and crematoria. Equally scarce resources are applied to vetting and arranging the appointment of trustees.

Trustee appointment procedures also appear to be unsatisfactory. On many occasions in the past persons have been nominated for appointment as trustees who had not consented to their appointment. In other instances appointees and trusts were not notified of appointments and trusts were unable to determine who the appointed trustees of their cemetery were unless they purchased copies of the Governement Gazette.

New trustees are not adequately informed of their duties and responsibilities and are not given appropriate guidelines for the application of cemetery legislation or for the day to day management of cemeteries.

Selection procedures are equally inadequate. It is impossible for cemetery officers to measure and assess the level of competence of each of the thousands of persons nominated for appointment as trustees particularly since the central cemetery administration is far removed from the local scene.

These examples illustrate that limited resources are frequently expended on vetting transactions rather than on development of adequate procedures and systems.

The current accounting requirements for cemeteries are antiquated and the information provided on financial returns is insufficient for assessment of overall management performance. Much time is spent each year by Cemetery Section staff in collection and compilation of financial returns. No resources are made available for an efficiency audit of these returns or a follow-up investigation of particular financial problem areas.

An example of how inappropriate the current system is in relation to modern accounting requirements is the fact that "Nil" returns for cemeteries without transactions during the year still need to be signed by three trustees.

The Committee believes that not only are staff numbers insufficient to deal effectively with all the administrative requirements but the classifications, expertise and qualifications of the staff also appear inappropriate for administrative areas such as systems design and implementation or efficiency audits.

Appropriate qualifications and procedures are also required for the interpretation and application of legislation. For example in one instance a clause of the Act was amended and considerable time elapsed before the Cemetery Section of the Health Commission was made aware of the amendment and could notify trustees of the same. In other instances there were clauses in the Act of which officers of the Section did not fully understand the meaning and the opinion of the Crown Solicitor or Solicitor-General on the meaning of the

clauses was only sought when breaches of these clauses appeared to have occurred.

The Committee considers that these instances both exemplify the shortcomings of the current cemetery legislation and of the existing methods and resources to deal with the proper application of that legislation.

As indicated in the introduction the cases cited above are not intended to be a criticism of the performance of the individual officers in the Section but rather an illustration of the attitude of successive Governments and Public Health Division managers towards allocation of staff and financial resources for cemetery management.

A number of the trustees responding to the Cemetery Survey also pointed to the lack of communication between the Public Health Division and trusts. Many had almost no contact with cemetery officers for years other than receiving notifications regarding fees or appointments. Others believed that the Health Commission should assist them with or advise them better on maintenance or administrative problems. Some trusts for example did not seem to be aware that they could apply to the Health Commission for a grant or loan to assist with maintenance or repairs.

A large number of trusts also believed that they had no influence on the level of fees charged at their cemetery because they considered that the fees advised in the Government Gazette or in the Health Commission circular of guidelines were the fees they had to adopt. Often gazetted fees had been set many years earlier under different trustees and a new secretary or new trustees were not given advice by the Health Commission that they should regularly review fees or could apply for an increase in fees to suit their particular needs. (See overall survey results with respect to fees and related issues).

Many of the more recently appointed Secretaries indicated that when taking over the job not only were they not given guidelines by the

Health Commission but they also found no written guidelines, minutes or instructions in the records of the trust.

Some trusts indicated that they found the local funeral director sometimes of more assistance when facing a problem particularly since they had more regular contact with him. 26 trusts in fact have funeral directors or funeral directing staff appointed to the trust as trustees or secretaries.

From the survey results and submissions it appeared that generally trusts believed that the administration at the Health Commission level needed to be improved and more orientated towards cemetery operation and local needs.

The Committee was most concerned at this evidence and believes that unless the central administration for cemeteries is geared to a greater extent towards the local operational level the trust system must further deteriorate in future, bearing in mind the age and occupational background of trustees.

In view of the little advice and assistance trustees have received from successive Health authorities in the past it is surprising that the system has survived as long as it has.

The Committee is particularly critical of the manner in which the Health Commission in the past dealt with breaches of legislation by trustees and other persons. In many instances either no action was taken or not until a situation had developed into a scandal. Here particular reference is made to incidents which took place at the Melbourne General Cemetery and at Templestowe, Preston, Lilydale and other cemeteries. The problems at these cemeteries are discussed separately in Chapter 8.

4.3 CEMETERY TRUST RESPONSES

An analysis of the 41 written submissions and 145 comments about the report received from trusts shows that 30.1% were totally in

agreement with the recommendation that councils take over the management of cemeteries and 5.9% expressed conditional agreement. These conditions included:

- that the cemetery remain operational;
- that cemeteries be maintained at least at the same standards as those set by trustees;
- that trustees continue to be involved as committees of management under council control;
- that accumulated funds be kept separately by councils in trust for future maintenance of the cemetery.

Those supporting the recommendations generally felt that the cemetery and the community would benefit from council control of cemeteries because councils were better equipped to deal with cemetery management in the following areas:

- manpower and expertise;
- equipment;
- better maintenance;
- better accounting system;
- better record management facilities;
- resources to develop appropriate survey plans and maps for cemeteries;
- availability of engineering section to deal with major works, cemetery development and to supervise erection of memorials;
- greater accountability;
- accessibility on a regular basis due to regular office hours.

Some of those opposing council control questioned the ability of councils to manage cemeteries efficiently in exactly the same areas other trusts had listed as better under council control. For instance it was claimed that chaos would result since "it took years" for trustees or secretaries "to pick up" the skills of running a cemetery.

The Committee believes that councils comprise sufficient management expertise to take over the administration of cemeteries without

serious disruption. This was demonstrated by the majority of councils who took over the administration of cemeteries in the past. The Committee shares the views of the Shire of Upper Murray "that this function (running a cemetery) is completely compatible with local government activities".

Some trusts believed that "councils would not retain the same standards as trust" while others felt "the community would expect a higher standard of cemeteries under council control".

The Comittee considers that ultimately the state or standard of a cemetery reflects a community's attitude regardless of who manages that cemetery. If a community is strongly dissastisfied with the state of its cemetery it may be more likely to get results from a council which has access to manpower, equipment and funds than from a trust with limited or no resources. It should also be remembered that councillors are part of and elected by the community they serve.

It is agreed that "maintenance by council staff would result in higher costs" if "all voluntary input by the community is lost". But again a number of councils now receive voluntary assistance from service clubs and other organisations which shows that voluntary support will not automatically cease in every case of council management. If a community wishes to keep fees and rates low it may well be encouraged to give the council assistance, particularly if communication with the organisations now assisting trustees of a cemetery continues on transfer of that cemetery to the council.

It is also true that some of "the personal interest by families in the cemetery may be lost" but, as was pointed out by some trust, this "interest is already waning" in many rural areas and will be lost to many more trusts in the future. Those who feel strongly about family and traditions will continue to show an interest in family graves regardless of who manages the cemetery.

With respect to accounting areas one trust suggested that council control represented an "overkill" and another believed it would create "too much unnecessary paperwork". This is a misunderstanding of the Local Government accounting system and administrative procedures. Since the majority of cemeteries in rural Victoria (63.5%) have less than five burials per annum incorporating the cemetery account in the Local Government accounting system would provide little difficulty and require relatively few transactions compared to other council activities.

It was claimed that the "cemetery operators and cemetery records would be less accessible" under council control. The Committee believes that there would be very few occasions where this would be true.

Burials generally take place during daylight hours and mostly on weekdays which coincides with the hours a council would generally be open to the public. 'After hour' telephone contact provisions could easily be established for the requirements of funeral directors during Public Holidays (Christmas, Easter, etc.). Councils would generally provide a more regular base of access to funeral directors and monumental masons as council offices are always manned during office hours whereas trustees may be out for the day or on holidays at the particular time a funeral director calls to make burial arrangements.

This also applies to availability of records. Council staff may find record searches "time consuming" but if, as will be recommended records and cemetery plans are improved, this will not constitute a big problem, particularly since the Committee understands that record searches at smaller cemeteries are really not very frequent (do not occur daily or weekly).

During its visit to other States the Committee noted that many large trusts and some councils charge a fee for record searches and for copies of documents. Generally it was found that people did not object to paying such fees. It is suggested that where record

searches are more frequently requested both trust and councils may wish to consider introducing such fees to offset the cost of record searches.

The most common objection to council control arose from the consideration that "fees would increase considerably" and ultimately "the ratepayer would bear the burden of cemetery management".

The survey results showed that cemetery fees of council operated cemeteries did not vary considerably from other cemeteries in the various categories and generally council fees were within the guidelines set by the Health Commission. It is probably unavoidable that fees will rise where councils take over cemetery trusts whose fees are now very low and who have no accumulated reserves. But there is to date no evidence in Victoria or other States that council fees are excessive and the Committee is confident that councils will continue in future to set fees at levels appropriate to the size, location and usage of a cemetery.

It was feared that where cemeteries are not financially viable they may "become a liability" and require "ratepayers' funds" to be used for maintenance. The Committee believes that the financial assistance proposal outlined in the next Chapter will provide in the long term considerable resources to financially assist cemetery managers on a needs basis. In the short term, until the condition of many cemeteries now in a state of disrepair has been improved, other funds, including ratepayers' funds may have to be utilised. But generally the Committee is of the opinion that its financial proposals will alleviate some of the concerns by trusts and councils about council control of cemeteries.

The Committee also believes that its revised final recommendations will find more acceptance amongst those trusts currently opposed to changes in the system of administration of cemeteries.

4.4 COUNCIL RESPONSES TO THE COMMITTEE'S SECOND REPORT

Councils, like trusts, were divided in their responses to the Committee's recommendations that councils take over control of cemeteries in Victoria, although the proposal that cemeteries should adopt Local Government accounting and auditing standards was almost unanimously accepted.

186 councils made submissions to the Committee. Of these 56 (30.1%) were in principle in agreement with the Committee's recommendations, including those considering inaccurate the Committee's earlier assumption that council control would not involve additional expenditure.

119 (64%) councils were opposed to a transfer of control of cemeteries to councils and considered that trusts should continue in their current capacity where a trust was willing to do so and operated satisfactorily.

An additional 11 (5.9%) councils had reservations about the proposal. These were based on financial considerations and the view, that as trusts within their boundaries appeared to operate satisfactorily they did not believe a change to be of any benefit for their municipality. Some councils indicated that should they be made to take on such responsibility they would need to be given sufficient autonomy to operate the cemetery and receive financial assistance from the Government.

The submission by the Shire of Melton appropriately expresses that view:

> "My Council wishes to express its support for the Municipal Association of Victoria executive's concern that the transfer of trust responsibility to municipalities is unacceptable unless appropriate State Government funding is made available to assist with the additional financial outlays.
>
> If, however, responsibility is passed to municipalities, it is important that they be given the necessary autonomy to

administer a particular cemetery as the individual council sees fit."

Amongst those opposing the transfer of cemeteries to councils, the Shire of Woorayl expresses concerns common to most councils in that group:

> "The Council differs from the Committee in relation to its recommendations on administration. It believes that the present system of separate trusts, which gives local people a high degree of involvement in their local cemeteries, should be maintained and strengthened by more adequate State Government administration and financial support. The Council believes that the Committe has not fully addressed itself to the present level of community involvement, particularly in country areas, in the maintenance of cemeteries. In many cases service organisations and even local communities as a whole are involved in major and minor maintenance to assist the trusts. The Council is certain that such assistance may not be forthcoming if the cemeteries are fully administered by councils and the cost and maintenance would therefore rise and necessitate increased charges should the Committee's recommendation be adopted that the administration be transferred wholly to councils.
>
> The Council would only be prepared to be appointed as a trustee of cemeteries within the municipality if no local persons were willing to accept such appointment. It believes that the State has not as yet lost the spirit of voluntary participation in community functions and, while it recognises that there are deficiencies at present in administration on a number of cemeteries, it believes that additional assistance that could be, and possibly should be, made available through the Health Department would overcome a number of the difficulties that the Committee saw."

Some of the opposition was expressed in much stronger terms, as the quotation below by the Shire of Dundas demonstrates:

> "In support of its contention that the administrative arrangements remain unchanged, Council would appreciate that some cemeteries have been poorly managed in the past and that action needs to be taken to rectify that situation. To suggest the shortcomings of past practices, and the accumulated problems arising therefrom, can be alleviated by handing over to local government is, it is suggested, a gross oversimplification. Local Government is undergoing a fairly extensive reformation with the result that many hitherto State Government responsiblities are being devolved upon it.

As a level of true representative and responsible government, local government must take care to ensure that it does not simply become the "dumping ground" for those items in other levels of government's "too hard baskets".

It must be positively recognised that the majority of trusts are conscientious and forward looking, and effectively cope with their responsibilities. It would seem most inequitable to those trusts to disregard their efforts over many years. There is no reason that they should be disbanded.

Council suggests that the most effective way of dealing with the problem of administering public cemeteries is to expand the existing arrangements at State Government level to a point where the Health Commission can effectively handle the function and to communicate with and educate existing trusts in any differences in adminstrative procedures and criteria upon which their operations are based.

It seems to this Council that cemeteries are a specialised type of operation and to burden councils with them will not assist in solving their associated problems rather, simply give the public, and the government, an additional stick with which to beat the council."

It is impossible here to quote all the different responses received, but the above excerpts of submissions give some indication of the views and concerns of councils opposing the proposed change.

But it must equally be considered that one third of all councils are prepared to accept responsibility for local cemeteries and that an equal amount of trusts are willing to hand over that responsibility.

The submission by the Shire of Upper Murray shows that councils already administering cemeteries do not necessarily all share the concerns of other councils and trusts.

"The Council is currently the Trustees for the Corryong Public Cemetery and the discontinued Millers Hill Cemetery and believes that this function is completely compatible with local government activities. It therefore fully supports the recommendation in the Report that councils of municipalities replace the trustees of all existing cemetery trusts within their boundaries.

This recommendation would have the effect of adding one other cemetery to Council's responsibilities.

> Despite this however, Council is of the opinion that in these days of declining interest in voluntary assistance to cemeteries local municipalities can offer the expertise and professionalism to correctly manage cemeteries while maintaining local interest and knowledge.
>
> The Council also supports the recommendation that all accounting, management, maintenance and engineering functions be carried out in accordance with the standards set and supervised by the Local Government Department.
>
> The Council also supports the recommendations that the Health Commission maintain its current responsibilities until such time as the Committee reports on its review of the Cemeteries Act. But then Council believes that the officers currently employed in the Health Commission should be transferred to the Local Government Department to develop a forward planning role and to assist when required councils in cemetery matters.
>
> It therefore follows that the total operation of the Cemeteries Act should be carried out by one department only and that this department should be the Local Government Department."

A number of responses that were received from councils in metropolitan and rural city areas dealt specifically with the management by councils of larger regionally based cemeteries.

The Committee appreciates the concerns of these councils in considering the financial and administrative implications of managing this type of cemetery and believes that separate provisions need to be made for some of these cemeteries. But it should be pointed out here that in discussions with the Brisbane City Council, the Committee learned that this Council successfully manages 15 cemeteries in the Brisbane City area and is currently planning to establish a council operated crematorium. The Brisbane City Council considered cemetery management quite compatible with local government activity and had experienced no problems with the management and maintenance of cemeteries. Most of these cemeteries operated on a financially viable basis and those with low or no income benefitted from the overall efficient business approach of the Council.

The Committee believes that in terms of management and operation local government in Victoria is no less capable than its counterparts in Queensland and other States.

4.5 RESPONSE BY THE MUNICIPAL ASSOCIATION OF VICTORIA

In August 1984 the Committee received the following letter from the Municipal Association of Victoria in response to the Second Report:

> "The Association wishes to express concern on behalf of its members as regards the recommended transfer of responsibility for the operation of cemeteries from trusts to local government, without a commensurate increase in funding from the State Government.
>
> We are not clear as to why, although in the Committee's view, the other review options necessitated some State Government expenditure, it concluded that municipalities would be able, unassisted, to bear the additional costs involved.
>
> We consider this to be an unrealistic view. For example, a large proportion of trusts are already having difficulty maintaining their cemeteries, and this situation can only worsen as more cemeteries fill, and close their gates. A closed cemetery will be a financial liability for a municipality. The Committee's answer to this problem is to give councils the "choice" of permitting cemeteries to fall into disrepair or of making available Parks and Gardens funds for maintenance.
>
> We therefore request the Committee to reconsider this recommendation, and to either modify the proposal to include appropriate funding to local government or to recommend the adoption of Option (b), which sets up a Central Cemeteries Board with Regional Advisory Bodies overseeing present trusts.
>
> We advise that representations are being made to the Government to ensure that the interests of local government are protected in this matter."

Accompanying this letter was a copy of a report which the Municipal Association of Victoria forwarded to all councils in Victoria. This report summarised the recommendations and sections of the Committee's report and relayed to councils the resolution of the Executive Committee of the Association:-

> "The Executive Committee of the Association has resolved that this recommendation is unacceptable unless appropriate State Government funding is made available to assist local government in coping with the additional financial outlays involved. This position has been conveyed to both the Committee and the Government. The Government has been advised that the Association considers that the adoption of Option (b), which sets up a Central Cemeteries Board with Regional Advisory Bodies overseeing present trusts, would be more likely to result in an improvement in cemetery administration."

Because many of the submissions received from councils reflected the attitude taken by the Municipal Association of Victoria and in consideration of the responses by cemetery trusts the Committee undertook a re-assessment of its earlier recommendation with respect to transfer of all cemeteries to the control of local councils.

To discuss alternative options with the Municipal Association of Victoria the Committee both wrote to and on numerous occasions contacted the Association to arrange a meeting.

As indicated earlier these efforts remained unsuccessful and the Committee considers this lack of response a possible reflection of the priority given to the issue of council management of cemeteries by the Association.

4.6 THE COMMITTEE'S RESPONSE TO SUBMISSIONS AND SURVEY RESULTS

The Committee believes that the survey results in conjunction with other evidence have demonstrated that problems do exist in the areas of financial and administrative management of cemeteries and that these are more widespread than councils and those trusts who are not currently experiencing problems tend to believe.

There has been overall consensus by all parties, including the Health Commission, that management of cemeteries at the central or Government level needs to improve. There has also been overall consensus that the current accounting and record management standards at a large number of cemeteries need to be improved and that Local Government accounting standards are acceptable, where appropriate, bearing in mind the type, size and usage of a cemetery.

The greatest consensus occurred on the view that the Government should allocate increased funds to cemetery maintenance to assist more effectively those cemeteries which are not financially viable, or are devoid of income. A need for increased Government funding was generally agreed to exist regardless of who managed cemeteries.

In addition many councils expressed the view that if they were to assume control of cemeteries the Government should re-imburse them for expenses occurred in the management of cemeteries over and above the income, if any, from these cemeteries.

The main area on which there was little consensus concerned the type of administration and measures needed to effectively improve cemetery administration in the future.

As indicated before in this report the Committee believes that in view of the evidence cited in this report and considering trends in community attitudes Local Government and council control of cemeteries represents the most appropriate form of cemetery administration in the long term.

But the Committee also came to the conclusion that the pleas of many trusts and councils not to totally discard the current voluntary and less costly components of the trust system merited a serious reassessment of its earlier recommendations.

To preserve the voluntary input and retain community participation in cemetery management where desirable, and in the interest of the community, the Committee therefore decided that the replacement

of trustees of all the existing cemetery trusts with councils of municipalities should not be made mandatory at this stage, but that the revised system should be designed in such a manner that it prepares the framework for future council administration of cemeteries.

4.7 THE FUTURE ROLE OF COUNCILS IN CEMETERY MANAGEMENT

The first step recommended by the Committee was transfer of cemetery legislation to the Minister for Local Government and the Local Government Department. The Committee believes that this step is a vital step in opening an avenue for greater council participation in cemetery management and for greater decentralisation of control, which is hoped to provide a path for greater deregulation of cemeteries in the long term.

For the immediate future the Committee proposes the following measures for the administration of cemeteries.

4.7.1 The Trust System

In order to provide the opportunity for continuation of those trusts who in the opinion of the Minister currently manage the cemeteries under their control efficiently the Committee recommends:

Recommendation

That the existing cemetery trusts continue in their current role except in circumstances where:

(i) the trustees resolve to hand over their responsibility to the Local Government; or

(ii) if in the opinion of the Minister a cemetery is not being administered in a responsible manner the Minister may direct a municipal council or councils to take over responsibility for such cemetery.

The Committee considers that in some municipalities where a number of cemeteries currently operate under separate trusts or in rural cities it may be of advantage to amalgamate the administration of these cemeteries. The Committee therefore recommends:

Recommendation

That municipalities and/or trusts may apply to the Minister for approval to amalgamate and establish a joint cemetery trust.

The Committee also took into account that in a number of locations a cemetery located in one municipality may be primarily used by residents of another or other municipalities. To accommodate these particular circumstances the Committee recommends:

Recommendation

That where a cemetery is situated in one municipality but is generally regarded as serving another or other municipalities the councils concerned may negotiate on the management of that cemetery.

In some situations a council in control of a cemetery may, because of the location of that cemetery or for other reasons, consider it desirable to delegate the management of that cemetery to a committee of management. The Committee believes that this should be left to the discretion of the particular council and therefore recommends:

Recommendation

That councils of municipalities may appoint committees of management for the administration of cemeteries under their control.

4.7.2 Council Participation in Cemetery Management

The Committee believes that the current central administration for cemeteries is too removed from the local scene in areas outside the Melbourne metropolitan region to provide effective supervision and ongoing advice to cemeteries in administrative and maintenance matters.

Local Government control of cemeteries provides the mechanism for delegation of some of that control to municipal councils (City and Shire Councils or Boroughs). This delegation can only be effected by establishing a firm basis for regulated participation of councils in the management of cemeteries not directly under their control.

Councils are local arms of government and therefore ideally suited to be delegated responsibilities in matters concerning the legislative control and supervision of bodies or organisations located within their municipality.

The Committee believes that councils should be involved in future in the administration of all cemeteries which are to be continued to be operated by trusts and that this involvement should be in the following areas.

4.7.2.1 Representation on Trusts

The Committee believes that councils should be represented on all cemetery trusts not directly administered by councils. Where a cemetery serves a number of municipalities the councils involved should either provide one representative each or negotiate on the nomination of a joint representative. This should apply also to all larger cemetery trusts such as the Necropolis, Fawkner or Altona. Representatives may be councillors or council officers. The Committee therefore recommends the following:

Recommendation

That councils be represented on all cemetery trusts not directly administered by a council.

4.7.2.2 **Appointment of Trustees**

As pointed out earlier in the report the Committee believes that the current system of nomination, vetting and appointment of trustees is inefficient and time consuming. The Committee also believes that the central administrative body for cemeteries due to the number of trustees to be appointed each year and due to its distance from the local scene, would require considerable resources to implement and control effective selection and appointment procedures. The local arm of government is much better equipped to evaluate the requirements for the management of the local cemetery. Therefore the Committee considers that councils should play an active role in the nomination and appointment of trustees.

This is to be provided for by the following recommendations:

Recommendations

That councils nominate at least four persons to act as trustees of cemeteries within their boundaries from lists of names submitted to councils by persons or organisations in the community and at least one person to act as council representative;

That councils submit to the Minister the names of these nominees and of the council representatives for appointment by the Minister; and

That for the cemeteries specifically excluded from this arrangement (such as Springvale, Fawkner, Altona, etc.) all trustees other than council representatives for such cemeteries be appointed directly by the Minister.

The Committee considers that it is not necessary for trustees to be appointed by the Governor-in-Council. It is believed that in order to provide for trustees to make by-laws Governor-in-Council appointment of trustees is necessary but the Committee is of the view that it is undesirable for individual cemeteries to make by-laws in future and that it is preferable to draft uniform, but sufficiently flexible Cemetery Regulations and by-laws to accommodate varying situations.

With respect to nomination of trustees the Committee believes that councils should call for nominations in the local press and that on appointment the names of the trustees should also be published in the local press. The name of the council representative on the trust should be published in the same manner. Councils should also implement appropriate procedures to ensure the consent to the nomination of the nominee and subsequent advice to the nominee of his/her appointment.

4.7.2.3 Review of Appointments

The Committee believes that trustees should not automatically be appointed for life but that all appointments should be regularly reviewed. To this end the Committee recommends:

Recommendations

That the appointment of all trustees be subject to review by the appropriate council or by the Minister where applicable every three years; and

That, if, in the opinion of the council or the Minister a trustee should be replaced new nominations be called for.

4.7.2.4 **Accounting, Record Management and other Matters**

The Committee as indicated in its last report believes that all cemeteries should adopt Local Government accounting standards, regardless of the type of management of a cemetery unless it is a cemetery specifically excluded. The Committee considers that councils can give considerable assistance to cemetery trusts in the areas of accounting, budgeting and record keeping. Appropriate manuals for that purpose should be developed by the Local Government Department but local councils should assist trustees to implement the procedures and give advice in these areas where required.

Particularly in relation to developing appropriate cemetery plans or maps the engineering section of a council can be of valuable help. The council is also equipped to give advice to trustees on the erection, and supervision of erection, of monuments and assist trusts in the construction or repair of roads, paths, fences, graves, public facilities, buildings etc.

Whether councils require to be reimbursed for costs associated with such tasks should be left to the discretion of the council giving consideration to the ability of a trust to pay for such services.

Appropriate guidelines should be developed and circulated to trusts on all aspects of cemetery management to reduce common problems and to minimise the need for constant advice and supervision.

The Committee therefore recommends:

Recommendation

That Local Government Accounting Standards be adopted by all cemetery trusts not specifically excluded from that provision;

That appropriate instruction manuals and guidelines for accounting, budgeting and other areas of administration be developed and circulated to cemetery trusts;

That councils assist trusts in the implementation of procedures and give ongoing advice and assistance to trustees as necessary;

That a uniform record management system be developed and implemented;

That duplicate copies of burial registers, records, maps and plans be located at the council offices; and

That old records where available, and current records be microfilmed annually and placed into permanent storage under the care of the Public Records Office.

The Committee believes that these record provisions are essential because many trusts currently have either inadequate records or have lost records in fires or through vandalism. An attempt should also be made to re-create lost records where possible from headstones or other sources of information.

4.7.2.5 Fees and Charges

The Committee advised in other sections of this report that a complete review of the fee structure of

cemeteries is necessary. Until such review has been completed the Committee proposes the following interim measures:

Recommendations

That each cemetery, in consultation with the appropriate council where applicable, set its own fees subject to the approval of the Minister, bearing in mind that fees need to be adequate economically and that cemeteries need to be maintained after closure; and

That fees and charges should be reviewed at least once every year and be increased in line with inflation when appropriate.

4.7.2.6 Annual Reporting

The Committee considers that in view of the proposed adoption of Local Government standards the end of the financial year for cemeteries should be the same as that for local councils - 30 September. The Committee also believes that annual audited financial accounts and management reports should be produced by all trusts and submitted to the Minister for inclusion in the annual report of his/her Department. For cemeteries under the control of councils annual auditing of accounts need not to be provided for separately but arrangements should be made by all other trusts for annual auditing of accounts. For cemeteries with minimal transactions accounts could be audited by the municipal auditor.

Recommendations

That the end of the financial year for cemetery accounts be the same as for Local Government;

That all cemetery accounts be audited and that audited financial statements and management reports be submitted annually to the Minister for inclusion in the Annual Report of the Local Government Department; and that copies of the relevant sections of that report be made available annually to all cemetery trusts.

4.7.3 Summary of Provisions

The foregoing recommendations have been formulated after extensive consideration of all aspects of cemetery administration. Although many of the details of the proposed administration of cemeteries will still need to be formulated by the responsible Department, the Committee believes that the recommendations set out in this Chapter should lead to considerable improvements in the management of cemeteries while allowing maximum participation by the community to continue. The revised system is designed to effectively assist trustees to the greatest extent possible in the day to day management of cemeteries and at the same time make trusts more accountable to the community they serve.

The Committee also believes that the proposed system will lead to better administration of cemeteries at government level by minimising the need for involvement of cemetery officers in day to day or ongoing operational areas. Thus central management resources can be directed towards policy and systems development, evaluation and review, and to investigation of particular problems that may arise.

CHAPTER FIVE

5. CENTRAL CEMETERIES FUND

5.1 INTRODUCTION

Chapters Three and Four of this Report have highlighted some of the financial problem areas of cemeteries. These problems indicated the inadequacy of the funds provided in the past for cemetery administration and maintenance by successive Governments.

Because of this continual past lack of funds resolving these problems and concurrently providing for improved ongoing maintenance of cemeteries will require considerable resources in the future.

It is unlikely that adequate resources will and can be solely provided from consolidated revenue by the Government of the day and therefore the Committee believes that an alternative supply of funds needs to be ensured.

5.2 ESTABLISHMENT OF A CENTRAL CEMETERIES FUND

There are three areas for which funds are required from a central source:

(a) Maintenance of closed cemeteries and cemeteries devoid of income.

(b) Conversion of cemeteries to historical, pioneer and memorial parks, and preservation of historical graves and monuments.

(c) Ongoing maintenance and administration of cemeteries with low or insufficient income.

There exist a variety of different views on who is responsible for meeting the costs of providing assistance to cemeteries in the areas

listed above. The majority of submissions from councils and trusts considered the Government to be responsible, fewer considered that the individual community or the community as a whole should bear the cost.

As stated before it is unlikely that sufficient resources will be provided by the Government. In any case these resources would have to be raised through taxes and therefore would ultimately come from the community as a whole.

Alternatively it would be difficult and in some circumstances impractical and inequitable to expect a local community to fully fund its cemetery. This is particularly true for those cemeteries now grossly neglected and requiring considerable funds and those located in metropolitan areas which are used by a number of municipalities.

A third and the most preferable option in the Committee's view is the establishment of a Central Cemeteries Fund which receives its resources from both a Government contribution and a service fee collected on each funeral and cremation taking place in Victoria.

This option will, as the Local Government Department pointed out (see Chapter 2), have the effect that those areas of Victoria in which the greatest number of deaths occur and in which cemetery charges are already high will subsidise the cemeteries of areas in which few deaths occur and in which cemetery fees are generally lower.

The Committee believes that the same effect would result if cemeteries were fully funded by the Government from consolidated revenue since the largest amount of taxes is also raised in the same highly populated areas where most deaths occur and where fees are currently higher.

The Committee therefore believes that any type of funding must necessarily be inequitable for some sections of the community. Therefore, the Committee felt that it needed to disregard factors of equitability in formulating its financial recommendations.

Nonetheless, it should be pointed out here that the inequitability which currently exists in the levels of fees charged for the same services or items between different cemeteries should not be disregarded and should be decreased where possible by a revised fee structure. This was already discussed in Chapter 4 where a review of fees was recommended.

The Committee believes that in future a service fee should be levied on all funerals and cremations other than those classed as "assisted funerals (pauper burials)" and "child (neo-natal or post-natal deaths)" burials. This service fee should be collected by funeral directors concurrently with other charges and submitted directly to the Local Government Department which is to administer this fund.

The Committee considers that the level of the fee should be determined by the Minister but it suggests that the fee be at least $20.

Considering that fees would be levied on at least 29,000 funerals per annum a fee of $20 would create an annual reserve of $580,000 from this source.

In addition, the Committee urges the Government to increase its contribution to cemetery administration from the current $19,000 per annum to a more realistic figure.

The Committee believes that the resources made available from the combined service fee and the Government contribution should in the long term provide sufficient funds for improved maintenance and administration of cemeteries.

The Committee therefore recommends:

Recommendations

That a Central Cemeteries Fund be established in the Local Government Department;

That a service fee be charged on each funeral and cremation unless otherwise provided;

That the level of this fee be determined by the Minister; and

That this fee be collected by the funeral director on behalf of the Government and be paid into the Central Cemeteries Fund.

5.3 DISTRIBUTION OF FUNDS

As stated before three areas of need exist which require additional sources of funds.

The Committee believes that the Central Fund should be divided into three parts to provide a separate source of funds for each of the three areas. The amount to be set aside for each area should be determined by the Minister after assessment of the needs and priorities in each area.

On establishment of the Central Fund cemetery trusts, including councils, then may apply to the Minister for a grant from the appropriate section of the Fund according to the purpose for which the grant is required.

All grants should be allocated on a needs basis taking into consideration the purpose of the grant, the viability of the cemetery and the efficiency of its management.

The Fund should not be used for repayable loans to cemeteries unless a surplus exists after all grants have been considered. Loans should continue to be provided in addition to grants in the same manner in which they are provided now.

Recommendations

That separate portions of the Central Cemeteries Fund be set aside annually for each of the areas below:

(i) closed cemeteries or cemeteries devoid of income;

(ii) conversion of cemeteries to historical, pioneer or memorial parks and preservation of historical graves and monuments; and

(iii) ongoing maintenance and administration of cemeteries with insufficient income to be self-sufficient;

That the amount to be allocated to each area be determined annually by the Minister;

That cemetery trusts may apply to the Minister for a grant from the appropriate section of the fund;

That grants be allocated on a needs basis; and

That the application or use of such grants be included in the annual management report of the cemetery.

5.4 SUMMARY OF FINANCIAL PROVISIONS

The Committee considers that the financial provisions recommended in this Chapter will add considerably to the improvement of cemetery administration and maintenance.

But it also wishes to stress that cemetery managers should be mindful of relying too heavily on the provision of additional funds from this Central Fund. Cemetery managers should continue to make every effort to make cemeteries self-supporting where this is possible, to accumulate reserves for future maintenance of cemeteries, and to encourage voluntary assistance from the community which benefits from the existence of the cemetery.

CHAPTER SIX

6. ETHNIC, CULTURAL AND RELIGIOUS BURIAL REQUIREMENTS

6.1 GENERAL AUSTRALIAN AND VICTORIAN BURIAL REQUIREMENTS

The majority of Australians follow the christian type of burial practices common in the western world and their rites, rituals and requirements differ only slightly depending on country of origin or religious denomination. Most of the immigrants from European and American countries belonging to one of the religious denominations below fall into that category:-

Anglican	Lutheran
Baptist	Methodist
Congregational	Presbyterian
Church of Christ	Protestant
Church of England	Roman Catholic
Greek Orthodox	Seventh Day Adventist
Independent	Society of Friends
Jehovah's Witnesses	Uniting Church
	Wesleyan
Australian Aboriginals	(Both these groups are not
Jewish/Hebrew/Orthodox	strictly within this category but are included because of burial practices).

The burial requirements of the above denominations are similar in that they generally involve:-

(a) body preparation by a funeral director;
(b) a religious service at a chapel, church and/or at the grave-site or crematorium;
(c) some form of memorialisation.

They differ in areas such as:-

(a) mourning rites;
(b) religious rites;
(c) preference for burial or cremation;
(d) type of coffin and type of memorialisation.

A strong preference or exclusive demand for in-ground burials prevails in some of the above denominations but overall it can be said that the burial requirements of all of the above denominations are adequately met by the current provisions of the Cemeteries Act 1958 and the Cemeteries Regulations 1965.

6.2 CEMETERY LEGISLATION AND STATISTICS RELATING TO ETHNIC OR RELIGIOUS BURIAL REQUIREMENTS *1

Section 15 of the Cemeteries Act provides for trustees not to interfere with religious ceremonies or the original distribution of land at a cemetery set aside for separate and "distinct religious denominations" and "communions" (ethnic or other community groups). Section 16 provides for free access at all times to ministers of religion to those portions set apart. The Committee is not aware that any breaches of these Sections have ever occurred.

Of the 518 operating public cemeteries in Victoria approximately 60% have portions of the cemetery set aside for the most common denominations such as Roman Catholic, Methodist, Anglican, Presbyterian, Protestant, Church of England or Wesleyan, depending on the composition of the local community. Most also have non-denominational sections. New lawn cemetery areas are generally non-denominational, particularly at the smaller rural cemeteries.

40% of operating cemeteries have never had sections apportioned to religious or ethnic groups or no longer bury people according to the originally assigned sections.

*1 **Cemetery Survey - Questions 4, 7, 9 and 10.**

Some of the large metropolitan cemeteries and rural city cemeteries have sections for almost all the above religions and additionally provide special areas for one or more of the following groups:-

Jewish
Aboriginals
Chinese
Islamic/Muslims
Paupers
Children

By-laws at some of these cemeteries also include provisions for special groups who require particular rites, graves, monuments or inscriptions. The Committee believes that most of these by-laws should ultimately be incorporated in standard Regulations.

Five country cemeteries also provide Chinese sections and two had sections such as "suicide" and "pagans" listed.

Various sections of the Cemeteries Act 1958 make provisions for the erection of monuments and rights and duties related to the erection and maintenance of monuments.

In the Cemetery Regulations 1965, Section 4 provides for burial or cremation in coffins of approved material and design and Section 4A provides for Islamic burial. Sections 4 and 4A will be discussed later in this Chapter.

The Committee considers that overall the current legislative provisions can be said to make adequate provisions for the burial or cremation requirements of the majority of Victorians. Areas where legislation effecting religious or cultural needs could or should be reviewed concern aspects of coffin burial and construction, grave specifications, vault and monument construction and allocation of land to specific groups.

With respect to coffin construction the Committee believes legislation should not restrict the use of materials and designs developed in more recent years as long as such coffins are not contrary to health or safety requirements or offend commonly accepted standards of public decency. This matter will be discussed in more detail in future reports of the Committee.

Grave specifications for depth and width should take account of burial or coffin requirements where appropriate. An example is the different requirement for Islamic non-coffin burial.

Design and size or type of monument greatly differs between religious or ethnic groups. There is for instance a great demand for both vaults and more elaborate memorials in the European, Catholic and Orthodox, or Jewish community groups. Legislation in Victoria currently allows for erection of monuments other than mausolea or crypts but the demand for the latter types has increased in recent years. The Committee believes that, as discussed in Part 1.3.7 of Chapter One, a thorough study needs to be undertaken of health, safety and long term maintenance implications before legislation to meet those demands is enacted or changed.

With respect to the allocation of portions of cemetery land to specific groups the Committee believes that the need and demand for such allocation has decreased in all but the larger metropolitan cemeteries. The Committee also understands that cemeteries in the areas of planning, development and layout are more easily and efficiently managed and maintained where no such allocation has occurred or is practiced. This applies particularly to lawn cemeteries.

The Committee therefore believes that in planning new cemeteries or developing portions of existing cemeteries it should not be mandatory to set aside such portions unless convincing needs are established or other appropriate land and financial resources exist. Such needs could be both religious or ethnic in nature but should not be assessed entirely on financial considerations.

The Committee recommends:-

Recommendation

That provisions be made in cemetery legislation to empower trustees to set aside separate sections of cemeteries for specific ethnic or religious groups where a demand has been established.

The Committee wishes to emphasise that because special provisions need at times to be made for specific groups legislation should be flexible to avoid enactment of separate legislation for such purposes.

6.3 SPECIFIC ETHNIC AND RELIGIOUS GROUPS

Australia has experienced a considerable increase in the number of immigrants of non-European or non-Christian origin since the mid-seventies and this trend is expected to continue for some time.

A large number of these reside in the major cities of Australia, particularly Melbourne and Sydney. The majority of these immigrants are from Asian countries, a smaller number for Eastern and South Eastern European countries. The major religious denominations of the majority of these people fall within either the Islamic/Muslim, Buddhist or Hindu faiths. Their burial requirements vary from minor differences to christian type burials to quite distinctly different rites and practices.

6.4 COMMUNITY SURVEY

The Committee was of the opinion that any review of cemetery administration and legislation needs to consider trends and changes in the Australian community. The Committee therefore wrote to all ethnic and cultural organisations in Victoria to seek information from each group on the following subjects:-

(a) the number and type of people the organisation represents;

(b) the burial practices and requirements of the various sections of the community;

(c) specific preferences for cemeteries and/or crematoria in the metropolitan areas;

(d) problems that are encountered with cemetery trusts, funeral directors and monumental masons;

(e) essential or desirable future requirements of the community;

(f) preference for particular funeral directors and monumental masons and reasons why;

(g) the religious denominations of the community and the percentage that practice their faith;

(h) attitudes to non-commercial, privately organised funerals;

(i) the cost of maintenance for sections of cemeteries or private cemeteries set aside for specific ethnic or religious groups and who should bear that cost.

The Committee received 12 written submissions in reply and heard evidence at public hearings from three ethnic groups. In addition, the Committee heard evidence in camera and held meetings with the Ethnic Affairs Commission, the Aboriginal Affairs Unit of the Department of the Premier and Cabinet and with private individuals.

Lists of submissions and of names of organisations and persons who gave evidence at Public Hearings are included in Appendices I and II.

Of the organisations making submissions the following fall into the category of non-Christian ethnic groups:-

Armenian Islamic Community - (not a formal organisation)
Chinese Community Society of Victoria.
Hindu Society of Victoria
Islamic Society of Footscray.

The following paragraphs will discuss the survey results and information obtained from the Chinese/Buddhist, Hindu and Islamic/Moslem community groups in Victoria. The survey and other results from the remaining religious and ethnic groups will be discussed at the end of this Chapter.

6.4.1 Burial Requirements:

6.4.1.1 Chinese Buddhist Burial Requirements

Of the Indo-Chinese and Chinese residents of Victoria approximately 75% are of buddhist faith, the remainder belong to either the Roman Catholic or Anglican churches. Overall only about 45% practice their religious faith.[1].

Most Chinese prefer below ground burial in a coffin at a cemetery where a section is set aside for Chinese people. Their burial rites vary according to religion, family tradition or place of origin but may involve ritual slaughter of chickens and burning of incense or candles. Elderly Chinese, in particular, feel very strongly about being buried next to each other so that they may communicate after death.

The Indo-Chinese Elderly Refugee Association in Victoria financially assists elderly needy refugees with funeral and burial costs. The Society approached the Committee regarding problems at The Necropolis, Springvale, with purchasing some 10 grave sites ahead in bulk for use by these refugees to insure that they be buried side by side.

Current legislation prevents the direct sale of burial sites to other than the future occupier or his family since rights of burial are granted to individuals and not to organisations. The Committee suggested that the matter be resolved by either the organisation purchasing the required sites in the name of each of the persons to be assisted or by giving the appropriate fee to these

1. **Information supplied by the Chinese Community Society of Victoria.**

persons for purchase of their own burial sites. The resolution is still being discussed by the relevant parties.

The Committee considers where charitable or non-profit community organisations are involved in financially assisting needy individuals with funeral expenses or cemetery charges every effort should be made by the Government and by cemetery trusts to encourage such practices. This could be achieved by making legislative provisions flexible enough to accommodate extra-ordinary circumstances and requirements.

In the above case a clause could be added to the appropriate Section of the Act to permit purchase of rights of burial on behalf of other persons by non-profit organisation on application to and approval by the Minister. The appropriate administrative process for dealing with such cases and for ultimate transfer of each purchased right of burial to the deceased or his family should not be difficult. Nonetheless, the Committee recognises that appropriate safeguards would need to be introduced to avoid abuse of the system or illegal trading in burial sites.

6.4.1.2 Hindu Burial Requirements

The Committee was unable to obtain information on the current percentage of people of Hindu faith within the Indian and other ethnic communities of Victoria.

The Hindu Society of Victoria advised the Committee that Hindus generally cremate their dead. Exceptions are babies who are less than 10

days old. These are usually buried. Members of some of the tribes in India also prefer burial to cremations.

The Society pointed out that Hindus prefer to be cremated within the shortest possible time span after death and that a delay of two to three days is generally considered too long. The Committee believes that such delays will not be removed by provision of additional crematoria, as the Society suggested. Two to three days are generally required to make funeral arrangements and to obtain the necessary certificates and permits for cremation required by legislation.

Overall it appears that the requirements associated with the cremation and burial of Hindus are well met by current provisions.

6.4.1.3 Islamic/Muslim Burial Requirements

The Islamic faith is a universal religion and is widespread in the Middle Eastern countries. Migrants in Victoria of that faith come for example from countries such as Egypt, Iran and Armenia, others from places such as the Fiji Islands.

From the Islamic Society of Footscray and other sources the Committee was informed that Muslims have strict burial rites which commence at the moment of death with positioning of the body and recital of prayers. The family of the deceased is required to carry out the washing ritual and wrapping of the body in layers of cotton cloth, each cloth being of specified length and width depending on whether the deceased is male or female.

The subsequent religious service rituals and prayers are also prescribed and continue while the cloth wrapped body is carried by relatives to the grave. The body may be carried on a wooden board or more commonly in Australia in a casket from which the body is removed at the grave site. The body is placed in a specified position in a specially prepared grave, which is lined with timber. Pieces of timber are diagonally placed over the deceased to prevent earth from falling directly on the body. In the desert the grave is usually L-shaped and earth is packed beside the body to avoid direct cover by soil.

The burial requirements of Muslims clearly differ from other religious groups not only because of the rituals associated with death and burial but also because of the requirement that the body not be buried in a coffin. The Islamic people and organisations in Victoria after petitions to the Health Commission in 1982 achieved a change in legislation to accommodate this requirement. Before amendment the Cemetery Regulations 1965 in Section 4 read:-

"No human remains shall be brought into or buried in or cremated in any cemetery except in a coffin which is:-

(a) soundly constructed of substantial wooden or other approved materials in such a way as to prevent the escape of offensive liquids or exhalations; and

(b) so constructed as to prevent any person from seeing the contents thereof after the remains have been placed inside and the coffin closed."

The newly inserted Section 4 A relates to Islamic burial customs:-

"Where it is intended to bury human remains in accordance with Islamic burial customs the following procedure shall be observed:

(a) The body shall at all times be sealed in a bag of impervious material and brought to the grave-site inside a disposable or reusable container kept in a hygenic state.

(b) The body or the container containing the body shall be lowered into the grave then entirely covered by pineboards treated against rot or by any other material approved by the Health Commission of Victoria and the grave packed with earth."

In other States of Australia such legislation has not been introduced. In Queensland Muslims are buried in a coffin as the Authorities believe that coffin burial is not strictly prohibited by Islamic law particularly since it is customary in burial areas where wild animals may dig out the body or where ground water may enter the grave. Where a coffin is used, some earth from the grave is put in the coffin as the body belongs to the earth and it should therefore be put on the earth. 2

In New South Wales the body is carried to the grave and lowered into the grave in a coffin which opens at the bottom and which is removed before the grave is closed.

The South Australian Committee inquiring into the Disposal of Human Remains suggested to the Committee that it may recommend that current legislation be amended to provide for non-coffin burial by special permit to be issued by the health authorities:

2. **Information supplied by Brisbane City Council, Dept. of Health and Community Services.**

This special permit would on application provide for non-coffin burials of Muslims and any other persons whose religion or customs so required.

In Victoria it is now customary to carry the body which is sealed in a plastic bag to the grave-sites in a casket from which the body is removed before being placed in the specially prepared grave. The Committee believes that the plastic bag was prescribed for both health reasons and because the Undertakers Assistants and Cemetery Employees Union refuses to handle and carry bodies not suitably enclosed.

The Committee received submissions from the Islamic Society of Footscray and other individuals on the use of plastic bags.

The Imam of the Islamic Society of Footscray stated at a Public Hearing (Transcript of Evidence, 19 July, 1984, pages 168, 169 and 170).

"I wrote my submission because it is stipulated that we bury our dead wrapped in plastic bags, and we believe that is below human dignity. We have found that a number of people have refused to be buried in a plastic bag and that calling such a burial an Islamic burial is not right.

.....

From my research, I have not found any mention of plastic bags because our laws came thousands of years before plastic bags were invented. Placing a body in a plastic bag reminds me of a chook being put in a freezer instead of a human body that did so much work and contributed to the development of society. To be placed in a plastic bag and put in the ground is distasteful. When the body is placed in the ground, it is completely wrapped in a cotton cloth so the face or any part of the body cannot be seen.

I do not see any need for the plastic bag, so the submission asks that we have permission to bury

> our dead exactly in accordance with Islamic principles and that the current practice of burying in plastic bags be discontinued because it cannot be called Islamic at all."
>
> .....
>
> If the union objects to the plastic bag, we could put a coffin over the body and open it in the grave. In that way they would not be obliged to be upset by viewing the deceased person. The human body is composed of all the minerals that exist in the earth and the plastic bag actually prevents decomposition of the body. It stays there wrapped, with all the liquids and everything locked into the plastic bag."

Another confidential submission to the Committee advised that since Section 4A was added the religious and community leaders of the Islamic Community insist that all persons of Islamic faith be buried without a coffin and that this is strictly enforced. Muslims wishing to be buried in a coffin have allegedly been denied the presence of the Imam and full religious rites. In other instances they have also been refused access to the Mosque for washing and shrouding the deceased relative.

It is the understanding of the Committee that quite a large number of Muslims who have been living in Australia for a long time have a definite preference for being buried in a coffin but still wish to follow all other customary religious burial rites.

The Committee is very concerned at hearing evidence that an amendment to Regulations which was designed to accommodate special burial requirements has in fact led to a restriction of the freedom of choice, and has discriminated against and put pressure on individuals who wish to be buried, according to their own wishes, in a coffin.

The Committee also believes that the amendment in itself is discriminatory since it permits non-coffin burial in

accordance with Islamic burial customs only but not for other non-Islamic persons in Victoria.

The Committee therefore strongly recommends -

Recommendation

That Section 4A of the Cemeteries Regulations 1965 be repealed as soon as possible and that Section 4 be amended to provide that all bodies have to be buried in coffins of suitable material and that anyone wishing to bury a body in any other manner can only do so by special permit to be issued by the Minister administering cemetery legislation.

The Committee believes that such amendment will still satisfy Islamic burial customs but also recognise the rights of individuals of Islamic faith who wish to be buried in a coffin. It will also prevent restriction of non-coffin burial to persons of Islamic faith only.

With respect to the use of plastic bags the Committee considers that unless serious health and safety reasons can be established burial in a plastic bag should not be mandatory.

The appropriate authorities, unions and Islamic community organisations should negotiate on the possibility of permitting the body to be buried wrapped in cotton cloth in instances where a removable coffin or casket is used to carry the body to the gravesite.

6.4.1.4 Burial Requirements of the Jewish Community

The Jewish community of Victoria has parts of cemeteries set aside at five rural cemeteries and at The Necropolis, Springvale and Fawkner Cemetery. There also exists a separate section at the now closed Melbourne General Cemetery.

In addition, there are two public, but exclusively Jewish Cemeteries, the Melbourne Chevra Kadisha and the Adass Israel Chevra Kadisha, both of which are managed and maintained by trustees who represent the two sacred societies of the same name. The Jewish community both purchased the land and fully funded the development of these cemeteries in the hope of administering the same eventually as private cemeteries. They still totally fund the management and maintenance of both.

On establishment both these cemeteries were brought under the Cemeteries Act 1958 and they have been classed as public cemeteries since that time.

The Working Party Report stated that:-

"The Working Party has inspected a number of private cemeteries which are managed by various religious groups. These cemeteries operate satisfactorily with prior approvals being obtained from the Health Commission for burials that take place. In general, records were kept, provisions of the Cemeteries Act were adhered to and the cemeteries showed a high standard of maintenance.

We believe that this present system should continue but that in general, new private cemeteries should not be established.

However, as a special case following representations from the Adass Israel and Melbourne Chevra Kadisha Public Cemetery Trusts, the Working Party believes that consideration should be given to re-designating these two cemeteries as private cemetery trusts. Applications from other ethnic/religious groups for similar concessions should be assessed bearing in mind public health and common decency and their ability to properly administer and maintain the cemetery."

The Committee has also received a number of joint submissions and heard evidence at Public Hearings

from representatives of both congregations who requested that both cemeteries be given private status. The excerpt below states the reasons given for the request and future considerations of how one of the cemetery will be managed but the principles apply to both cemeteries:-

"..... observant members of the Jewish community conduct their lives according to the Halacha. In general terms that may be defined as the whole body of Jewish law which governs all aspects of Jewish life with prescribed intricate rituals relating to the moment before death and continuing through the preparation for burial, the burial itself and the erection of tombstones and monuments. It deals with the care and maintenance of cemetery areas and so forth.

At the same time, reverence for the dead is expressed through the scrupulous adherence to the extent that it is elevated to the level of a sacred duty. In fact, the term Chevra Kadisha is translated as "sacred society". An indication of the significance that we attach to the observance of these programmes may be seen by the fact that members of our community who are not normally observant of Jewish customs and law insist upon being buried in strict conformity with traditional requirements."

"* We strongly urge and request you to agree to the Working party recommendation to alter the status of our cemetery into private. All running costs and expenditure would be borne by the Congregation and Chevra Kadisha. There would be no financial burden on the government. (As far as we can ascertain - we have always paid our way, and even the initial purchase of the cemetery was paid for by us).

*We have between 10-20 funerals a year. Total charge for complete funeral service and plot is $1500-$2000. We have hardly any normal expenses as nearly all services are supplied by volunteers. The average expense for a funeral is $200-$400 for coffin materials, grave-digging etc. We have no doubt that the remainder will cover all possible future expenditure, and we are prepared to set up a reserve fund for this.

*As can be seen from the small amount of burials - we estimate the life of our cemetery to be at least another 100 years and possibly more.

We are quite happy to submit ourselves to Health Commission rules and regulations on running the cemetery, but being private is very important to us to be able to function fully according to our religious rites and traditions."

The Committee believes that the present 47 private cemeteries should continue operating as private cemeteries subject to adherence to overall cemetery legislation and the provision for special permits for burial at these cemeteries. It also believes that "in general new private cemeteries should not be established".

As stated in Section 3.2 of this Chapter exceptions to this general rule should be based on evidence of special needs or where special circumstances have been documented. This recognition of special needs or circumstances should extend to the establishment of private cemeteries.

The Committee after careful consideration believes that both the Melbourne Chevra Kadisha and the Adass Israel Chevra Kadisha should be considered as meeting those special circumstances and as having special needs.

The Committee therefore recommends:-

Recommendation

That the Melbourne Chevra Kadisha and the Adass Israel Chevra Kadisha Cemeteries be operated as private cemeteries by trustees nominated by the two sacred societies of the same name and the Jewish Community;

That these two cemeteries be managed and maintained according to the provisions of the Cemeteries Act 1958 and the Cemeteries Regulations 1965 except in circumstances where these provisions are contrary to Jewish burial customs; and

That the trustees of these cemeteries be empowered to make by-laws for these cemeteries, but that caution should be exercised that such by-laws do not discriminate against any member of the Jewish community.

The Committee considers that appropriate procedures for appointment of trustees for these cemeteries should be developed but that they should include calling for nominations in the relevant Jewish newspapers. This principle should also apply to other private cemeteries.

6.5 THE ABORIGINAL COMMUNITY OF VICTORIA

Victoria currently has four private Aboriginal Cemeteries at Condah, Coranderrk, Framlingham and Lake Tyers. Only the cemetery at Lake Tyers is still operating subject to special burial permits being issued for each burial at that cemetery.

From discussions with the Aboriginal Affairs Unit of the Department of the Premier and Cabinet the Committee understands that the Aboriginal Community is seeking additional land for burial purposes as part of its claim for Land Rights. It was also advised that Aboriginals prefer to be buried in the areas from which their families or tribes originate and many Aboriginal residents of Victoria are in fact buried at Aboriginal Cemeteries in other States.

The Committee was also informed that Aboriginals residing and working in the metropolitan area now frequently chose burial at one of the metropolitan cemeteries. This trend may continue in the future and therefore needs to be taken into consideration if establishment of new Aboriginal cemeteries is considered.

The Committee was also advised that problems exist in the Aboriginal Community with payment of funeral expenses. Many either lack appropriate funds or are negligent in meeting payments for funeral services.

The Aboriginal Affairs Unit is aware of these problems and informed the Committee that a hearse had been purchased by the community and that an effort was being made to provide a complete funeral directing service for the Aboriginal Community. This may include production of coffins in carpentry or craft workshops to be set up as an Aboriginal Community employment programme. This concept is supported by the Committee as it would both solve some of the financial problems and increase employment opportunities.

The Committee expects to report on the progress of this development in a future report.

6.6 OVERALL RESPONSES TO THE ETHNIC COMMUNITY SURVEY

Responses to the survey indicated that except for those groups specifically mentioned in the preceding paragraphs current provisions in general adequately meet the needs of ethnic or cultural groups.

A number of groups hoped that where separate portions at a cemetery were currently provided for the burial of their dead these would continue to be provided in future.

Cemeteries where such sections were currently provided usually were given preference. In most cases, the preferred cemeteries listed were Melbourne General Cemetery, The Necropolis, Springvale or the Fawkner Crematorium and Memorial Park.

The majority of respondents had no preference for particular funeral directors or monumental masons but Melbourne residents generally chose one of the larger companies within their area.

It was interesting to note that most groups' adherence to religious customs was strong in both first and second or third generations. It was stated by most that although young people often did not speak the language of their parents they still adhered to the religious customs of their families and community.

On the question of attitudes to non-commercial, privately organised funerals all groups other than those whose religion demanded extensive family participation (e.g. Muslims) preferred to engage funeral directors to deal with all funeral arrangements. The Committee believes this to be also the attitude of the majority of Australians.

Answers on the question of responsibility for the cost of maintenance of separate ethnic sections of cemeteries or of private cemeteries differed greatly. Only the Jewish and Ukrainian Communities believed that each community should bear the cost of maintenance of its own section. Some others believed that both the particular group and the community at large should jointly bear the responsibility and cost. Others considered that the Government or the community as a whole should provide for the different groups. The latter response was generally given by the less affluent immigrant groups.

CHAPTER SEVEN

7. REVIEW OF THE FINAL HEALTH COMMISSION WORKING PARTY REPORT ON CEMETERIES AND CREMATORIA.

7.1 INTRODUCTION

In March, 1980, the Minister of Health, the Hon. W.A. Borthwick, M.P. established a Working Party of five members drawn from the Health Commission, the Municipal Association of Victoria and including the General Managers of the two major metropolitan cemetery trusts, to inquire into aspects of cemeteries and crematoria.

This Working Party was given the following terms of reference:-

1. Consider and report on ways and means of caring for those cemeteries which are reaching the end of their economic life;

2. Consider the role of the State Government in matters relating to cemeteries and crematoria and the resources necessary to undertake that role;

3. Advise of steps that might be taken to provide adequate facilities for burial and cremation;

4. Advise on procedures aimed at ensuring the efficient management of cemeteries and crematoria;

5. Review the Cemeteries Act 1958 No. 6217.

In July, 1982, the Working Party produced an Interim Report. The Mortuary Industry and Cemeteries Administration (MICA) Committee commented on the recommendations made in that report in both its First Report tabled in December, 1983 and its Second Report tabled in May, 1984.

The Final Report of the Working Party was presented to the Minister of Health in August, 1984, and was forwarded by him to the MICA Committee for consideration. Given the scope of the terms of reference and considering the problems that arose under the present system, which range from fundamental lack of control by the central administrators to trust mal-administration, the MICA Committee expected that the Working Party would produce a detailed proposal for a better system of administration of cemeteries and for the disposal of the dead in Victoria.

The Committee considers that the Final Working Party Report, which represents the results of four years of deliberation, is a somewhat disappointing document. The Committee believes that the 25 recommendations made in that Report do not adequately respond to all the areas of administration that require review, nor did the information accompanying these recommendations provide sufficient background information or evidence.

In this Chapter the Committee will briefly comment on each of the 25 recommendations of the Working Party Report. Some of these have already been covered in earlier Chapters of the present report but some will again be included in this Chapter. Comments on recommendations concerning areas the MICA Committee has not sufficiently investigated to date will be confined to preliminary impressions of the proposals contained in them.

7.2 FINAL RECOMMENDATIONS BY THE HEALTH COMMISSION WORKING PARTY

The Working Party Recommendations are listed here in the order they were given in the Working Party Report and are prefixed by the Terms of Reference to which they respond.

7.2.1 Working Party Term of Reference No.1

"Consider and report on ways and means of caring for those cemeteries which are reaching the end of their economic life".

Working Party Recommendation 1

That the following cemeteries be closed to sales of new gravesites as soon as practicable:

> Nillumbik (Diamond Creek), Ferntree Gully, Footscray, Frankston, Lilydale, Preston and Templestowe.

Burials will still be possible in graves where a right of burial can still be exercised and in any unused graves legally recovered by the Trusts concerned under Section 25 of the Cemeteries Act 1958.

As recommended in the Interim Report the following cemeteries have already been closed to sales of new gravesites:

> Boroondara (Kew), Box Hill, Brighton, Coburg, St. Kilda and Warringal (Heidelberg).

MICA Committee Comment

This Committee in its Second Report (paragraph 119) criticised the Interim Report of the Working Party for its analysis of the "life" of cemeteries. The cemeteries recommended for closure above were all included in that Interim Report along with those that were closed in the meantime.

The Committee again wishes to register its criticism of the Working Party's approach to recommending closure of cemeteries.

Firstly, the Committee believes that the statistical evidence given in an Appendix of the Working Party's Report which relates to the expected life span and the average

number of burials per annum of these cemeteries is incorrect. This became obvious when these statistics were compared to figures supplied in the Cemetery Survey and to data supplied on request by the cemeteries concerned.

From this information the Committee believes that at least two of the cemeteries named should not be closed at this stage although preparations for the future closure of these cemeteries should be set in motion now. These preparations should include discussing the impending future closure with the trustees of the cemeteries concerned. It was brought to the attention of the Committee by one of the trusts administering a cemetery recommended for closure that the trust had not been consulted by the Health Commission nor had any discussions taken place on the closure or its implications for the trust. The first indication of the impending closure had come to the trust in the form of the recommendation contained in the Working Party's Interim Report.

The Committee considers that the relationship between the Health Commission and trusts should be very close and involve counselling and joint pre-plannig where a cemetery is nearing the end of available burial space, particularly with respect to financial management under reduced income conditions.

All the cemeteries recommended for closure are located in the metropolitan area where existing burial space is scarce or limited. No consideration was given in the Report to the effects of the closure on the burial requirements of an area nor did the Report explore possible means of extending the life of some of these cemeteries.

In view of the above considerations the Committee believes that Recommendation 1 of the Working Party should not be acted on until appropriate discussions have taken place between the Health Commission and the trusts concerned.

Working Party Recommendation 2

That legislation be introduced to enforce a limited tenure period of 75 years on new rights of burial purchased in any new cemetery established in Victoria. At the end of this tenure period the holder of the right of burial would be afforded the opportunity to renew the right of burial. If the right is not renewed, the remains would be exhumed and buried elsewhere within the cemetery or re-located in the same grave and the right of burial re-sold for further internments.

MICA Committee Comment

The Committee, as indicated in Chapter One of this Report, has not completed its examination of limited tenure and deferred the issue to a future report.

Nonetheless, the Committee is concerned at the possible implications of the above recommendation on existing and future rights of burial. These implications were addressed by Mr. Downy, a witness to the Inquiry previously quoted in this Report. The excerpts of his evidence below refer to Newspaper reports and comments made by a Member of the Working Party on radio with respect to the above recommendations:

"I have long thought that there is what might be called a principle of legislative tendency: Provisions are enacted which are of very limited application, and it is said that, of course, those provisions are introduced by way of exception to deal with an exceptional or special case and that they would not be extended to other cases; however, once those provisions have been enacted, there is an inherent pressure to enact similar provisions to apply to other cases."
Transcript of Evidence, P. 247.

"Going back to the radio broadcast, there is something very significant in what was said on the principle of legislative tendency, only here it was said in advance. People always say what the tendency is after the tendency has worked.

In the course of that broadcast, which was shortly before 3 o'clock in the afternoon, the interviewer said to the member of the Working Party, "Why did you settle on 75 years then if you say W.A. is only after 25 years?" The member of the Working Party said, "Yes, 25 years, and, as I said, South Australia is 50 years coming down to 25."

After further exchange had taken place, the member of the Working Party made this significant statement, "One might say that, you know, one foot in the door to start with, 75 years, and hopefully it might come down even more."

If the Working Party proposal is implemented by legislation, it may be expected that the period will be progressively whittled down and that similar legislation will be enacted so as to apply in relation to graves in old cemeteries."
Transcript of Evidence, p. 249.

The Committee is also concerned at the lack of supporting evidence which shows the need for introduction of limited tenure in Victoria and which indicates what led the Working Party to decide a period of 75 years in preference of the more common period of 25 years in other States.

The Committee strongly believes that further considerations are necessary before any limited tenure should be introduced, if at all, in Victoria.

Working Party Recommendation 3

That legislation be introduced to prohibit any burials 20 years after a date proclaimed in respect of those cemeteries reaching the end of their economic life. The land would then be transferred to the local municipal council or other appropriate body for passive recreation and/or historic preservation purposes. It should be the responsibility of the Trust to prepare the cemetery for these purposes.

MICA Committee Comment

This legislation proposal conflicts with the limited tenure of rights of burial of 75 years and Section 25 of the Cemeteries

Act if no provisions are made to prohibit the sale of rights of burial on a pre-need basis well prior to the closure of the cemetery. E.g. if a right of burial is sold 1-5 years prior to the closure date on a pre-need basis this right could not be exercised. Any closure of cemeteries before at least 55 years of the 75 year tenure of each and every occupant or owner of all graves have expired would infringe on the rights of these owners if such cemeteries were converted to a passive recreation area 20 years after closure.

The recommendation also does not take account of perpetual rights of burial for which under current legislation consent of owners or relatives must be obtained before conversion to a memorial park etc., may take place.

There is also no explanation of the manner in which trusts are to prepare cemeteries for transfer to councils for conversion to passive recreation or other purpose.

Working Party Recommendation 4

That financial assistance be provided by the Government to maintain these cemeteries referred to in Item 3 over the 20 years period. This will be necessary because of the decreasing revenue of the Trust and in most cases, the lack of adequate financial reserves.

MICA Committee Comment

The Committee feels that this is an easy "bail out" recommendation which is similar to many of the submissions received from cemetery trusts who feel that it is the Government's responsibility alone to support non-income producing cemeteries. The Committee believes that some responsibility rests with the community whose burial needs the cemetery serves.

Before this recommendation should be considered by the Government it would be necessary to prepare a justification and an estimate of its financial impact including compensation to people for loss of burial rights not exercised. The Committee also refers to its own recommendations in Chapter Five of the Report.

Working Party Recommendation 5

That a mechanism be devised to identify, classify and preserve historical and other significant monuments in cemeteries.

MICA Committee Comment

The Committee has not yet considered the question of historical monuments in full detail, but agrees with the basic principle and has made recommendations with respect to financial provisions for preservation of historic monuments in Chapter Five of this Report.

Working Party Recommendation 6

That within one year of a cemetery being closed to all further interments the original trust burial register and other historic records be deposited for safekeeping with the Public Records Office after they have been microfilmed.

MICA Committee Comment

The Committee feels that this recommendation is too confined as it believes there are inherent problems in the overall system of record keeping in Victorian cemeteries and that any changes to the methods of record keeping and storage should be common to both open and closed cemeteries as indicated in Chapter Four of this Report.

7.2.2 Working Party Term of Reference No. 2

"Consider the role of the State Government in matters relating to cemeteries and crematoria and the resources necessary to undertake that role."

Working Party Recommendation 7

That the Government ensure that cemeteries and crematoria be operated as business propositions, financially responsible for both daily operations and future maintenance.

MICA Committee Comment

The Committee supports this general user pays principle approach. However, since completing its survey of trusts, it is also aware of the greatly differing levels of expertise throughout the system and of the greatly differing levels of financial viability of cemeteries due to low numbers of burials (see Chapters Three and Four of this Report).

Working Party Recommendation 8

That the Government have power to set minimum fees for all Rights of Burial purchased for interments and for cremations. These fees should be realistic bearing in mind the actual cost of services, the financial position of the trust and the necessity to provide a reserve fund for present and future maintenance and/or extension of the cemetery/crematorium.

MICA Committee Comment

The Committee agrees in principle, but prefers to defer further comments until a total review of the fee structure for cemeteries has been investigated by the Committee.

Working Party Recommendation 9

That in the absence of a commitment by the Government to fund the on-going operations of impoverished cemeteries, a small levy be set and added to each interment and cremation fee: the funds so generated to be placed in a central Trust Fund and distributed to cemeteries on an established needs basis. A levy of $10 on all burials and cremations conducted in Victoria would have raised an estimated $300,000 last year.

MICA Committee Comment

The concept of such a fund is supported as discussed in Chapter Five of this report. The terminology used above to describe the sources of the proposed fund should not be "levy", as levies cannot constitutionally be raised by the States. The level of $10 indicated above is in the Committee's opinion too low if improved maintenance standards as recommended are to be achieved.

Working Party Recommendation 10

That a major cemetery trust(s) in each of eight designated regions act as a Regional Resource Cemetery Trust and be required to provide from its resources advice and assistance as required to other cemeteries in the region. The major cemetery trust should be able to charge for its services.

MICA Committee Comment

The original regionalism concept in the Interim Report of the Working Party brought a good deal of critical response from country cemeteries and was rejected by the Committee as a viable proposition for long term management of cemeteries in Victoria.

Working Party Recommendation 11

That the present Cemeteries Section of the Commission's Public Health Division be expanded and that a Health Commission Officer be appointed as Industry Liaison Officer to provide input to the Commission from the various sections of the Funeral Industry. This officer should formally meet at least four times a year with an Industry Advisory Group comprising representatives of the Australian Funeral Directors' Association, Master Stone Masons Association of Victoria, Coroner's Court, metropolitan and country cemeteries. The Working Party stresses that if this option is adopted, additional staff and facilities must be provided.

MICA Committee Comment

As outlined in this report the Committee believes that control of cemeteries should not remain with the Health Commission. But the Committee would like to examine the role and purpose of the suggested advisory body before making further comment on this proposal. Overall the above recommendation should have included cost estimates associated with the proposed expansion.

7.2.3 Working Party Term of Reference No. 3

"Advise on steps that might be taken to provide adequate facilities for burial and cremation."

Working Party Recommendation 12

That a major cemetery complex be established in the Lilydale area to meet the burial needs of residents of Melbourne's eastern suburbs.

MICA Committee Comment

The current Lilydale Cemetery has an estimated operational life of five years. The Committee is aware that the Minister has directed that no efforts be made on site selection in this area until after the Bundoora and Pakenham proposals are established. It is understood that this direction was based on local municipal and resident opposition.

The Committee would like to see evidence of alternative potential sites before commenting further.

Working Party Recommendation 13

That immediate steps be taken to secure the purchase and/or reservation of land for cemetery purposes at the following:

Melton	-	Approximately 50 hectares between Bulmans and Harkness Roads, Melton.
Bundoora	-	Approximately 75 hectares at the rear of the Janefield Colony.
Pakenham	-	Approximately 150 hectares west of the Toomuc Creek with access to the Princess Highway.
Fawkner	-	56.3 hectares north of the existing Northern Memorial Park.
Bairnsdale	-	Approximately four hectares north of the existing Bairnsdale cemetery.
Moe	-	Approximately 30 hectares on the corner of Purvis and Early Roads, Moe. It is noted that the Land Conservation Council has reviewed its earlier recommendation for use of this land and has now decided that it should become a bushland reserve.

MICA Committee Comment

The Committee is aware that action has been taken with respect to the Melton, Bundoora, Pakenham and Fawkner proposals. It has no information on those at Bairnsdale and Moe but considers that overall recommendations for purchase of land for cemeteries should be accompanied by evidence supporting the need for additional burial space and by overall forward planning procedures.

Working Party Recommendation 14

That immediate steps be taken to identify suitable land and secure its purchase and/or reservation for cemetery purposes at the following;

> Warragul, Colac, Mildura, Campbell's Creek (Castlemaine), Daylesford and the Mornington Peninsula.

MICA Committee Comment

No information has been made available on these proposals and the report does not appear to support the recommendation by evidence of need as discussed above.

Information taken from the Working Party's Report Appendix C, (Statistics on Land Use at Victorian Cemeteries) shows the following current situation in these areas which appears to conflict with parts of the recommendation made.

Cemetery	Approx. Years Left
Warragul	5
Colac	46
Campbell's Creek	100
Daylesford	330

Cemetery	Approx. Years Left
Mornington Peninsula	
- Mornington	130
- Dromana	25
- Flinders	500
- Rye	30
- Sorrento	1,300

Working Party Recommendation 15

That cemetery trust should make the best use of available cemetery land by the efficient layout of graves and by digging graves to the maximum depth possible bearing in mind the requirements of the holder of the right of burial including religious observances.

MICA Committee Comment

The Committee agrees in principle but wishes to add that appropriate standards and guidelines should be developed for that purpose.

Working Party Recommendation 16

That the Government consider establishing crematoria of appropriate size at Bendigo, Geelong, Hamilton, Horsham and Shepparton, and that the necessity for the provision of crematoria at other centres be kept under review.

MICA Committee Comment

The Committee is aware of moves to establish crematoria at Bendigo and Geelong, but believes that more justification for such installations at Hamilton, Horsham and Shepparton and proposals for the management of such facilities should have been provided in the Report.

Working Party Recommendation 17

That in an effort to improve the efficiency of crematoria the Health Commission should encourage the establishment, where considered necessary, of a cool room where bodies for cremation may be stored for a limited approved period.

MICA Committee Comment

On face value this recommendation appears reasonable. More information as to the need for such installations should have been supplied and a consideration of possible public response to body storage after the funeral service should have been included.

Working Party Recommendation 18

That when new crematoria or large cemeteries are established or existing crematoria modified provision should be made for mourners' facilities to be included for use by family and friends of the deceased.

MICA Committee Comment

As the Committee has not examined the need for this type of facility no comment can be made other than that the proposal merits investigation.

7.2.4 Working Party Term of Reference No. 4

"Advise on procedures aimed at ensuring the efficient management of cemeteries and crematoria."

Working Party Recommendation 20

That the document "Guidelines for the Administration of Cemeteries", Appendix B be introduced for use by cemetery trustees and trust officers.

MICA Committee Comment

One of the major areas of criticism of Health Commission control of cemeteries by cemetery trusts related to the very little help and information given to trustees for cemetery management. Many procedures in use have been handed down from Secretary to Secretary, resulting in a multitude of mostly inadequate techniques and advice.

This Committee agrees with the concept as expressed in this recommendation but has reservations about the appropriateness of the proposed guidelines which are included in Appendix IX of this Report. Separate comments on this document are included in the relevant Chapters of this report but it is again stated here that the Committee considers the guidelines inadequate for assisting trustees who mostly lack experience in accounting practices and other management areas essential for efficient cemetery management.

7.2.5 Working Party Term of Reference No. 5

"Review the Cemeteries Act 1958 No. 6217."

Working Party Recommendation 21

That the Cemeteries Act 1958 (No. 6217) be revoked and the legislative proposals set out in Appendix C form the basis of a new Cemeteries Act, bearing in mind the necessity to retain legal continuity of certain provisions of the Cemeteries Act 1958 (No. 6217).

MICA Committee Comment

The Committee agrees that the current legislation has been found to be less than appropriate in content and form for the task expected of it. However, it considers the draft

inappropriate in view of its own recommendations for future cemetery management. As certain questions central to its own review of legislation and particularly the current Act's relationship with the Trustee Act has yet to be determined (see for example, the reference to Templestowe Cemetery in Appendix IV), the Committee defers any comment on suitable legislation until its review of all legislation affecting disposal of the dead has been completed.

Working Party Recommendation 22

That the deposition of human remains in mausoleums be prohibited in Victorian cemeteries.

MICA Committee Comment

The Committee defers comment on this issue as it has not completed its own inquiry into the subject. Nonetheless, the Committee is disappointed at the lack of evidence supporting this recommendation considering that a member of the Working Party supposedly studied these structures overseas.

Working Party Recommendation 23

That the need to amend the Cemeteries Act and Regulations from time to time in keeping with religious requirements of various ethnic groups be kept under review. Such amendments should be in conformity with accepted public health practices and general standards of decency.

MICA Committee Comment

This issue is discussed in detail in Chapter Six of this Report.

Working Party Recommendation 24

That the Health Act 1958 be amended to empower the Director of Public Health to order the cremation of a corpse in cases where public health is likely to be endangered.

MICA Committee Comment

The Committee agrees with this recommendation and adds that consideration should be given to the Coroner being given similar powers.

Working Party Recommendation 25

That the Fifth Schedule to the Registration of the Births, Deaths and Marriages Regulations 1971 be amended to include the following statement by the certifying medical practitioner:-

"I certify that there is no circumstances surrounding the death of the deceased that requires an inquest or further inquiry by the Coroner before the body is buried or cremated."

MICA Committee Comment

The Committee feels that the whole aspect of certification has not been covered sufficiently in the Working Party Report and no recommendations like the one above should be made without a complete review of medical and other certificates and without establishing the overall appropriateness of the certificate referred to.

All required forms under the Coroners' Act, Registration of Birth, Death and Marriages Act and the Cemeteries Act are currently being reviewed by the Committee along with those for similar purposes in other States. It is felt that there is a need for greater standardisation, better design and more

adequate and consolidated control of these certificates. The Committee will report on this issue as indicated in Chapter 1 at a later stage.

7.3 SUMMARY OF WORKING PARTY RECOMMENDATIONS AND REPORT

As indicated in the introduction of this Chapter the Committee considers that the Working Party has not addressed itself adequately to all the areas covered by its terms of reference. This is particularly true with respect to items 2 and 4 of the terms of reference, which required a much more detailed study and report on the problems existing under the current system of management of cemeteries at the Government and local level. The Committee believes that therefore the recommendations made by the Working Party must be assessed in this light. The Working Party Report, in the Committee's view, further supports the Committee's opinion that the Health Commission is not the appropriate body for overall control of cemeteries and cemetery legislation in Victoria.

The Committee, as a result of its consideration of the possible consequences of that Report therefore strongly urges the Minister of Health and the Government not to act on the Working Party's Report nor implement any of its recommendations until the Committee's own report has been considered by the Government.

CHAPTER EIGHT

8. SPECIAL INVESTIGATIONS OF INDIVIDUAL CEMETERY TRUSTS

8.1 INTRODUCTION

Possibly the greatest reason for the establishment of this inquiry was the amount of public complaint in recent years about a series of incidents which had occurred at a number of different cemeteries.

These incidents were each investigated individually by Health Commission officials and in many cases have since been resolved. However, a number of incidents repeatedly pointed to particular problem areas and legal opinions on these pointed to legislative inadequacies.

Confronted by the difficulties in resolving these issues the Government decided to call for a Parliamentary Inquiry. This Chapter examines the incidents which occurred at five cemeteries with respect to underlying shortcomings of current legislation and control of cemeteries.

Of these incidents the Committee felt that the problems at four of the cemeteries had occurred too long ago or had been successfully resolved to warrant a new detailed investigation. Its own investigation was therefore confined to a review of official files and other material submitted to the Committee. The other incident which occurred at Preston more recently was dealt with by the Committee in a series of in-camera hearings with the parties concerned.

Details of the particular incidents at each of these five cemeteries are contained in Appendix IV of this report.

8.2 PROBLEMS AT INDIVIDUAL CEMETERIES

8.2.1 Melbourne General Cemetery - Carlton

The major problem at this cemetery resulted from the desire of the trust to extend the operational life of the facility far beyond its real capacity.

This is becoming a common problem in many of the original metropolitan cemeteries because there has been no long term financial planning for maintenance after closure, or, in some cases where plans were made, the effect of inflation has eroded the real value of investments reserved for this purpose.

The reaction to this type of problem has in many cases resulted in usage of areas within the cemetery which were not originally designated as burial areas. This measure was used at Melbourne General Cemetery and eventually extended to the re-use of areas where paupers were interred and finally, re-use of private burial plots which were previously used for burial as late as 1958.

The popularity of the cemetery amongst Italian and Greek migrants brought an increased demand for concrete vault burials and extravagant memorials which led to rivalry between competing monumental masons and at times erupted into violence.

As outlined in Appendix IV the investigations by the Police and the Health Commission resulted in criminal charges being laid against several staff and the resignation of all the trustees of the cemetery. The fact that allegations of illegal practices were occurring up to 10 years before the Police were called in, points at the inadequacy of a system which allows a trust to independently investigate or respond to allegations concernings its own activities without

immediate inquiry by the controlling Department, which in this case was considerably delayed.

Because conflicting statutory declarations were received in response to allegations made in 1969, had investigators been immediately available to conduct a thorough examination of affairs there is little doubt that the true level of misconduct at the cemetery would have emerged and been responded to much sooner. Most likely the cemetery would have been closed and a further multiplication of problems would have been avoided.

During the period when staff of the cemetery was facing charges based on irregularities in relation to trust funds, no action was taken over the large scale re-use of burial areas. As a result the Government has had to grant the present new trustees of the cemetery $89,000, needed to resolve problems associated with exercise of legitimate rights of burial which had been issued for re-use areas but which on legal advice could not be exercised.

The Committee is highly concerned with the fact that the previous trustees were not fully held to account for their actions. The Health Commission in most of these situations has shown a reluctance to apply what few penalties there are incorporated in the Cemeteries Act 1958. It demonstrated instead a preference for requesting voluntary resignation and, only as a last resort, recommended removal of trustees by the Governor-in-Council.

8.2.2 Lilydale Cemetery Trust

The problems at Lilydale cemetery stemmed from an obvious conflict of interest between the activities of a staff member as the Secretary/Manager of the trust and as owner of a monumental business.

The survey of cemetery trusts carried out by the Committee has shown that there are a number of trusts throughout the State who include amongst their trustees, funeral directors and monumental masons. It has been put to the Committee that the local funeral director is the only member of the community interested and available for advice on the efficient management of the cemetery. The reasons are obvious. The Committee has yet to reach a conclusion on the question of whether persons with vested interests should be placed on trusts and will report on this issue at a later time.

At Lilydale complaints were received that the Secretary was actively canvassing the services of his own firm to the clients of other masons when these were making applications to erect monuments in the cemetery. The Trust was asked to rectify the situation but stated that they could not see a conflict of interest.

This represents another instance where the Health Commission as the responsible Government agency did not take quick and positive action because of its own perceived lack of intervention powers. An appeal to this Committee to intervene and resolve the situation was not needed to be acted on when a change of staff at the Cemetery solved the problem. The principle problem of conflict of interest nonetheless needs to be resolved to avoid similar incidents in future.

This incident also demonstrated that in many cases trusts see their appointment by the Governor-in-Council as a mark of independence from Government control and reject any interference by the controlling Department. The responsibility of trustees and their accountability must therefore in future be much more carefully spelled out.

8.2.3 Templestowe Cemetery Trust

The problem at Templestowe relates to the improper action of the Trust Secretary and one Trustee who jointly invested trust funds without the knowledge of the other Trustees, despite a resolution that all investments over a certain amount were subject to the agreement of the whole Trust.

The investments were made in contributory mortgages which are permitted under the Trustee Act 1958 but may be in conflict with investment provisions under the Cemeteries Act. Part of the investment concerned, an amount of $45,500, has yet to be recovered five years after the redemption date of the loan.

Legal opinion has questioned the ability of trustees under the Cemeteries Act 1958 to act to the full extent as trustees under the Trustee Act 1958, because of the restrictive financial controls contained in the former. This above incident points to the need for examination of legislative provisions concerning financial administration of cemeteries. The Committee will undertake such a study as part of its overall review of legislation.

8.2.4 Ferntree Gully Cemetery Trust

At Ferntree Gully problems arose because the effective control of the Trust rested with a small group within the Trust which was dominated by the Secretary.

Financial reports to the Health Commission indicated that the Cemetery was being managed efficiently but investigation of the management practices revealed serious conflicts of interest where the Secretary and two Trustees emerged as the main suppliers of materials and services to the Trust. This situation highlights the need for more extensive management reports to accompany financial returns and the need for regular audit review.

Of the nine Trustees, the Chairman was aged 82, one other member was 100 years old, another named on the official register of trustees as being appointed in 1947 could not be remembered, one resided permanently in Geelong, while another was the wife of the Secretary and at least two others were described as old but still attending meetings.

The Health Commission responded to problems with the Trust by giving Trustees the opportunity to explain their actions. These were considered and the Trustees were asked to resign or they would be forcibly removed. Subsequently four Trustees resigned and three were removed by the Govenor-in-Council.

Two further issues arose from the incident at Ferntree Gully cemetery. One was the lack of direction given by the Health Commission to members of trusts to enable them to fully understand and manage their responsibilities. The other was that trustees again questioned the legality of an inquiry by the Health Commission into trust affairs. Section 50 of the Cemeteries Act 1958, refers specifically to the powers of the Commission to inspect the state and condition of cemeteries and to ascertain that Regulations have been complied with by trustees.

The Committee does not wish to comment on the correct interpretation of Section 50 at this time. However, it will also consider this Section when the legislative requirements for cemeteries are being reviewed.

8.2.5 Preston General Cemetery

The problem at Preston Cemetery was investigated by the Committee at the request of the Minister of Health, Mr. T. Roper, M.P. because it was considered relevant to the overall inquiry of the Committee.

Preston Cemetery is administered by the councillors of the City of Preston. The Trust was forced to develop areas which would not normally be developed at this time because of roadworks associated with the extension of the Preston Tram line which affected the opportunity for later development of the cemetery. The Trust decided that rocky areas not suitable for normal earth burials could be used for the installation of concrete vaults. Because there was a time limit placed on the accessibility of the construction site by heavy machinery due to the road construction by the Metropolitan Transit Authority, monumental masons were approached by the Trust to install stock vaults at their own cost. These vaults were to attract the normal fee set for the righ of burial at the time of sale plus any subsequent fees for monumental work.

The Health Commission became aware of this situation and ordered the Cemetery Trust to stop further bulk installation of vaults by masons and froze the sale of existing vaults. The decision was based on considerations that the sale of these vaults directly to customers by monumental masons contravened Section 27A of the Cemeteries Act 1958, which is designed specifically to prevent trafficking in grave sites by parties other than trustees.

The details of this incident are contained in Appendix IV.

The outcome of this action is that two monumental firms now have ownership of 99 vaults which they can only legally sell to the Trust.

The Committee suggested to the Minister and the Trust that the Trust purchase all the vaults at once as it is entitled to borrow the necessary funds under Sections 8 and 8A of the Cemeteries Act 1958, considering that it is expected that all the vaults concerned could be sold within six months according to current demand. This would put an immediate end to activities considered in conflict with legislation.

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The Trust replied that it will proceed to purchase the vaults in $20,000 lots in accordance with the provisions of the Local Government Act 1958, which is contrary to the Committee's recommendation. The Minister is aware of the Trust's response to the matter.

The letter from the Minister asking the Committee to investigate the construction and sale of vaults at Preston also drew attention to the fact that the Health Commission could not legally request evidence on the actual selling prices of monumental works added to these vaults, which was important because the selling price determines the percentage fee for monumental permits. The letter asked for the assistance of the Committee to investigate.

The Committee has taken some evidence in-camera on this issue but has not completed the investigation and will report on this matter, which affects many cemeteries, at a later date.

The Committee has received an opinion from the Crown Solicitor on the affairs at Preston. His reply has been referred to the Minister of Health as it indicated that offences may have been committed and that the practices at Preston exemplified significant potential for abuse of the Act's intentions.

These issues and any subsequent action that may be taken by the Health Commission will again be considered by the Committee in a future report.

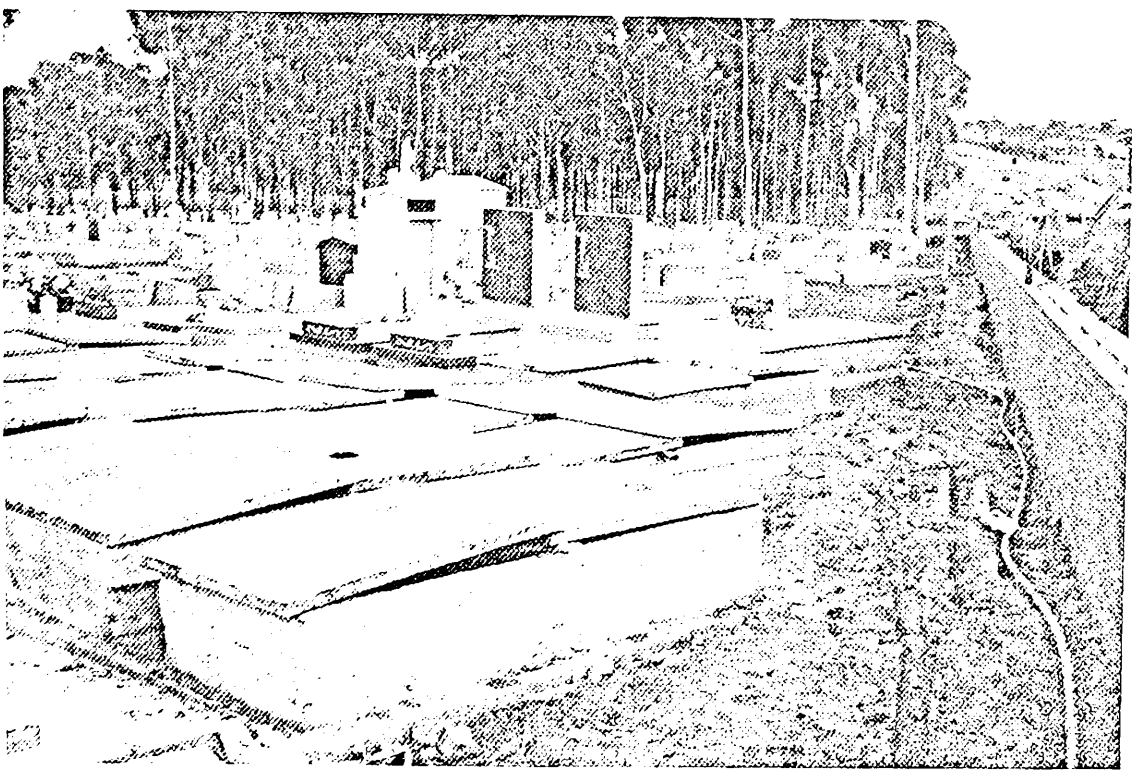
8.3 CONCLUDING COMMENTS

It can be seen from the preceding examples that the administration of an Act of Parliament which draws its language and provisions from the 19th Century is not easy to understand and act upon for cemetery trustees of the 1980's who are expected to respond responsibly and in an efficient business manner to cemetery management.

While not all the blame for these incidents can be placed on legislative shortcomings or system inadequacies the Committee does deduct that a review of legislation is essential for effective future control and management of cemeteries, regardless of which Government agency will be responsible for administering this legislation.

The Committee has commented previously on the lack of instructions given to trustees and this has now been recognised by the Health Commission. The Committee hopes that its own recommendations, if acted on, will prevent in future many of the problems faced by trusts now and that incidents of the nature outlined above will be avoided.

Incidents which involve criminal or negligent activity, of course can occur under any system but it is expected that under the proposed new system those in control will be able to respond to and act more appropriately on breaches of legislation.



CHAPTER NINE

SUMMARY AND CONCLUSIONS

This report illustrates the problems inherent in the current system of administration of cemeteries in Victoria. It provides an overview of cemeteries which backs the Committee's contention that a change of the current system is not only highly desirable but also essential for the long term benefit of the people of Victoria.

This report also discusses some of the particular incidents which contributed to the establishment of this Inquiry and which further highlight the need for a complete review of all legislation associated with the disposal of the dead and for detailed investigation into matters concerning associated industries.

The Health Commission Working Party which produced two reports on cemetery and crematorium management proposed a future system of cemetery mangement which, as discussed, the Committee considers little more than a revamp of the current system and therefore believes to be inadequate to meet future requirements for cemetery management.

The Committee hopes that cemetery managers will support the Committee's recommendations and recognise that they were framed in the best interest of the people of Victoria.

The Committee equally appeals to the Government of Victoria to consider the Committee's recommendations with a matter of urgency and make the necessary provisions for their early implementation.

It also urges the new Government to be constituted in 1985 to re-establish the Committee so that investigations into other important aspects of cemetery management and associated matters can be completed.

Committee Room,
29 October, 1984.

APPENDICES

APPENDIX I

General Submissions

Australian Funeral Directors Association

Monumental Masons

Consumer Affairs

Health Commission of Victoria

City of Hamilton

Municipal Association of Victoria

Fitzroy Legal Service

Shire of Ballan

Preston General Cemetery

Mr. K. Davies, Private Citizen

G. Giannarelli & Sons, Funeral Directors

A. Giannarelli & Sons, Monumental Masons

Linda Blundell, Community Project Worker

Mr. J. Downey, Private Citizen

Mrs. J. Wade, Private Citizen

Mr. A. Faithfull, Project Officer, Consumer Council of Victoria

Minister for Planning and Environment of Victoria

Melbourne Chevra Kadisha and Adass Israel

Submissions Received by Councils in Response to Report and Survey

Town of Camperdown
City of Sandringham
City of Broadmeadows
City of Sale
City of South Melbourne
City of Moorabbin
City of Hamilton
City of Horsham
Town of Stawell
City of Berwick
City of Traralgon
City of Doncaster & Templestowe
City of South Barwon
City of Melbourne
City of Box Hill
City of South Melbourne
City of Dandenong
City of Moe
City of Footscray
City of Benalla
City of Kew
City of Geelong
City of Williamstown
City of Newtown
City of Frankston
Rural City of Wodonga
City of Ballarat
City of Sandringham

Shire of Yackandandah
Shire of Waranga
Shire of Pakenham
Shire of Nathalia
Shire of Maffra
Shire of Traralgon
Shire of Metcalfe (D.F. Drew)
Shire of Gisborne
Shire of Huntly
Shire of Mornington
Shire of Daylesford and Glenlyon
Shire of Deakin
Shire of Tungamah
Shire of Alberton
Shire of Woorayl
Shire of Bellarine
Shire of Warracknabeal
Shire of Walpeup
United Shire of Beechworth
Shire of Bass
Shire of Broadford
Shire of Avon
Shire of Kowree
Shire of Dunmunkle
Shire of Dundas
Shire of Gordon
Shire of Violet Town
Shire of Hastings

City of Echuca
City of Ararat
City of Caulfield
Borough of Kerang
Borough Council of Sebastopol
Shire of Upper Murray
Shire of Cobram
Shire of Creswick
Shire of Tallangatta
Shire of Whittlesea
Shire of Rodney
Shire of Kerang
Shire of Mount Rouse
Shire of Buninyong
Shire of Benalla
Shire of Mortlake
Shire of Dimboola
Shire of Rosedale
Shire of Donald
Shire of Goulburn
Shire of Metcalfe
Shire of Bacchus Marsh
Shire of Portland
Shire of Korumburra
Shire of Arapiles
Shire of Cohuna
Shire of Narracan
Shire of Hampden
Shire of Kilmore
Shire of Stawell
Shire of Ballan
Shire of Rochester
Shire of Omeo
Shire of Ararat
Shire of Warrnambool
Shire of Bungaree
Shire of Maldon
Shire of Melton
Shire of Wannon
Shire of Birchip

Submissions Received from Cemetery Trusts

Fawkner Crematorium and Memorial Park
Balmoral
Katandra
Tungamah
Blackwood
Harrow
Crib Point
Maffra
Mt. Egerton
Kiata
Lilydale General
Burwood General
Lorne
Barnawartha
Moe
Ballarat General
Rheola Public
Goornong
Carngham
Harrietville
Tarrayoukyan
Geelong West Public
Ararat
Taradale
Lake Rowan
Templestowe
Heathcote
Torrumbarry & Patho
Casterton New
Cheltenham Public
Hamilton Public
Eddington Public
Hazelwood
Boroondara General
Meeniyan
Epping
Chiltern
Creswick
Leongatha
Nelson Public
Geelong Eastern
Kingower
Upper Yarra Public
Necropolis

Submissions from the Ethnic Community and Religious Organisations

Adass Israel Chevra Kadisha
Islamic Society of Footscray
Croatian Community Welfare Association of Victoria
Hindu Society of Victoria
Chinese Community Society of Victoria
Diocese of the Armenian Church of Australia and New Zealand
Australian Polish Community Services
Ukrainian Orthodox Church of Australia
Armenian Relief Society, Inc.
Australian Melitan Welfare Union
Melbourne Chevra Kadisha

APPENDIX II

Organisations Giving Evidence at Public Hearings

Public Health Division, Health Commission.
Municipal Association of Victoria.
The Necropolis, Springvale.
Mr. H.W. Buckle, Monumental Mason.
Mr. Marshall Slattery, Historian.
Miss K. Gawler, Mt. Waverley.
Geelong West Public Cemetery Trust.
Ballarat Cemetery Trust.
Undertakers Assistants and Cemetery Employees Union of Australia.
Creswick Cemetery Trust.
Shire of Creswick.
Islamic Society of Footscray.
Giannarelli & Sons, Funeral Directors.
Mr. G. (John) Giannarelli, Stone Masons.
Australian Funeral Directors Association.
City of Kew.
Melbourne Chevra Kadisha.
Adass Israel Chevra Kadisha.
Family Involvement Funerals.
Mr. John Downey, Private Citizen.
Master Stone Masons Association of Victoria.
Ministry of Consumer Affairs.
Shire of Cobram.
Mr. D.F. Drew, Shire Secretary, Shire of Metcalfe.
Keith Russell Simplicity Funerals Pty. Ltd.

In Camera Hearings

7 Witnesses in total.

MORTUARY INDUSTRY AND CEMETERIES ADMINISTRATION COMMITTEE

CEMETERY TRUST SURVEY

(Please print all answers and attach separate notes where space provided is insufficient)

CEMETERY TRUST: .....

(or Municipality if appropriate)

Address: .....

.....

Telephone: .....

* * * * * * * * *

QUESTION 1: Trustees (or Councillors where appropriate):

Name	Current Occupation	Funeral Industry Affiliations (if any)	
		Funeral Director	Monumental Mason
		Yes/No	Yes/No
		Yes/No	Yes/No
		Yes/No	Yes/No
		Yes/No	Yes/No
		Yes/No	Yes/No
		Yes/No	Yes/No
		Yes/No	Yes/No
		Yes/No	Yes/No

QUESTION 2: Trust Secretary:

Name: .....

Telephone: ..... (for follow-up contact)

Occupation: ..... (if not full time Secretary)

Funeral Industry Affiliations (if any):

Funeral Director	Monumental Mason
Yes/No	Yes/No

QUESTION 3: **Staff**

Number of persons employed at Cemetery other than Trustees: _____

	Number	Full Time	Part Time
Sextons			
Gardeners			
Maintenance Staff			
Administrative Staff			
Other (please specify):			
Total			

QUESTION 4: **Cemetery Details** Cemetery operating/Cemetery closed (delete one)

Number of total grave sites (est.) _____
Number occupied _____
Number still available (est.) _____
Number of child burial sites _____
Number of destitute persons sites _____

Please indicate whether any areas or grave sites are specifically allocated to ethnic groups or religious groups currently. Give details of groups and percentage of estimate of total area/or sites allocated.

Number of buildings located on Cemetery Grounds:

Chapels: _____
Crematorium Chambers/Furnaces: _____
Administrative Buildings: _____
Maintenance Buildings: _____
Public facilities: _____
Other (please specify): _____

QUESTION 5: Current Charges (June 1984)

Fee for Right of Burial _____
(a) Lawn area _____
(b) Monumental area _____
Interment fee _____
Exhumation fee _____
Sinking and/or Re-opening fee _____
Plaques _____
Monumental Permit fee: _____
Maintenance Charges _____

What basis do you use in formulating charges and calculating increases in charges:

_____
_____
_____
_____
_____

How often do you review charges?

_____
_____
_____
_____
_____

QUESTION 6: Associated Industries

Total number of **Funeral Directors** (firms) using Cemetery during last 5 years:

Approximate percentage of total number of burials in last 5 years:

Names	%
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Total number of Monumental Masons firms using Cemetery during last 5 years:

Approximate percentage of total number of jobs performed during last five years:

Names	%
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

(attach separate list if space insufficient)

QUESTION 7: **Non-commercial burials.**

Number of private, non-commercial funerals (e.g. not using funeral directing firm) carried out at Cemetery during the last 5 years: _____

QUESTION 8: **Mausoleums**

How many, if any, requests have you had in the past five years for the erection of:

(a) Mausoleums _____

(b) Vaults _____

Has there been any increase in the request for the erection of mausoleums or vaults (please comment):

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

What is the view of your Trust on the erection of:

(a) Mausoleums?

_____

_____

_____

(b) Vaults?

QUESTION 9: Problem Areas

Please comment on any particular problems associated with the operation of your Cemetery in the following areas: (attach separate list if space insufficient)

Finance:

Maintenance

Religious or Ethnic Burials:

Affiliated Industries:

QUESTION 10: Future requirements*

Please comment on any specific requirements you perceive in the future arising from the socio-economic or ethnic composition of the community using the cemetery:

QUESTION 11: Voluntary Assistance*

Please indicate which organisations (if any) in your local community participate in Cemetery maintenance, or other acitivities at your Cemetery on a voluntary or unpaid bais:

QUESTION 12: Report*

Please comment on the enclosed Report, or any section of the Report:

QUESTION 13: General Comments*

The Committee would be interested in your comments on any other issues not covered by the above questions:

*Attach separate sheet where space insufficient.

APPENDIX IV

PROBLEMS WITH INDIVIDUAL CEMETERY TRUSTS

Committee Summary of Extracts from Health Commission and Police Files.

As stated in the Second Report of the Committee, the Minister of Health, the Hon. T. Roper, M.P., indicated in his speech supporting the motion that this inquiry be established, that a number of specific issues had arisen involving the actions of certain Trusts or their employees which would require full investigation. Those Trusts were named as the Melbourne General Cemetery Trust, the Lilydale Cemetery Trust and the Templestowe Cemetery Trust.

Since that time the attention of the Committee has also been drawn to the circumstances surrounding the resignation of the Trustees of the Ferntree Gully Cemetery Trust, and at the request of the Minister an investigation has been made into certain practices at the Preston General Cemetery.

Because of the period which has elapsed since the occurrence of the particular problems, most of which have since been resolved (The Melbourne General Cemetery situation occurred in 1979), the Committee felt that the review of the facts should be confined to an examination of the relevant Health Commission files and material which has been submitted directly to the Committee. As the Preston problem is current the Committee decided to hold in-camera hearings and all relevant parties were interviewed.

The following sections on each of the named Cemeteries are included to establish the factual circumstances in each case. The attitudes of the Committee to these issues are incorporated in the body of the report.

(a) Melbourne General Cemetery - Carlton

The Melbourne General Cemetery opened on the 1st June, 1853 on forty acres in Carlton, an area that was subsequently expanded to the current 107 acres.

Because of its central site, during the 130 years in which it operated, Melbourne General was regarded as the main Cemetery for the City and many of the historic figures of that important period for Victoria, found their final resting place within its boundaries.

Over the years there have been numerous outcries from the public about the state of maintenance in this Cemetery, a common problem with many of the larger Cemeteries, however in November 1969, "The Truth" newspaper started a series of articles criticising the Cemetery Trust for practices far more serious than "not cutting the grass". The paper claimed it had evidence of widespread re-use of graves in the older areas and that the bones of the original occupants were being dug-up, hidden in the mounds of dirt then re-buried with the remains of the new occupant of the grave, or in some cases dumped with excess soil at the Brunswick tip.

It was also claimed that a "Mafia" type terror campaign was being conducted amongst Stone Masons for the lucrative market in concrete vaults and stone memorials for the Italian community. Allegations were made that the firm of A. Giannarelli & Sons had the exclusive right to construct "stock" vaults prior to their need and without permit, while other masons could only construct single units following the death of the intended occupant.

A further allegation by the paper was that the Trustees had allowed a large above ground Mausoleum capable of holding between 80 to 100 bodies to be constructed by a private company in 1964. This was in contravention of the Cemeteries Act 1958 which does not allow for bodies to be interred above ground level. The allegation was indeed true, for the Health Department which had only become aware of the structure after three bodies had been placed in the niches within the Mauseoleum, had immediately stopped any further sales by the Company. The litigation which followed, resulted in the decision of the Department being upheld and finally the structure was pulled down following the re-interment of the three bodies.

The Minister of Health, the Hon. Vance Dickie, called for an immediate investigation. This took the form of officers of the Commission of Public Health inspecting the Cemetery and interviewing Trustees and staff, a meeting between the Commission and the Trust and the examination of two affidavits supplied by "Truth" made by ex-employees stating that the digging up of remains did occur and a number by existing employees denying the practice.

This process established that an area near the Lygon Street boundary used in the 1880's for "public" burials for which no burial rights were issued, had been filled with up to 2 feet of dirt, then re-developed for graves at different angles to the original ones. This theoretically would mean that any new graves dug would be higher and so not interfere with the earlier remains.

During the investigation the Secretary to the Trust, Mr M.S. Brennan, had furnished a number of contradictory explanations to Commission officials. As they did not have the power to require evidence on oath and as he had the backing of a number of employee affidavits, this enquiry reached a stalemate.

On the question of the "stock vaults" the officers were more successful. Monumental Masons, A. Giannarelli and Sons, were found to have an exclusive arrangement with the Trustees to construct numbers of stock vaults in unsold graves. These were constructed without written permit and without payment of any fees, whereas other firms were required to take out the necessary work permit and to pay fees to undertake any work.

Following the revelation of this practice the Trustee altered their mode of operation and the building of stock vaults was undertaken only after the calling of competitive tenders, although the lowest tenders were not necessarily the only tenders accepted.

The Health Commission files on the Cemetery for the period from the early 1950's included a number of individual complaints about the land use practices within the Cemetery. The placing of vaults along the edges of roadways brought complaints from relatives whose access to graves in inner sections was cut off by these structures.

This practice appears to be the result of the Cemetery Trust trying to prolong the life of the facility well beyond its expected capacity.

Although no action was taken by the Department at the time, the annual official returns forwarded by the Trustees each year gave a good indication of the situation, but it appears that this information was not used effectively by the officials.

The following is a collation of the figures taken from these returns which indicate the number of sites available for sale within the Cemetery:-

Year		Year		Year	
1954	414	1964	1000	1974	750
1955	430	1965	1000	1975	790
1956	350	1966	1000	1976	686
1957	630	1967	1200	1977	212
1958	600	1968	1600	1978	-
1959	700	1969	1200		
1960	800	1970	1000		
1961	1000	1971	900		
1962	1000	1972	900		
1963	1100	1973	600		

At first glance one would think that major expansion must have been taking place as the numbers of unused sites increased, but later events were to show that the figures submitted were known by the Trust to be inaccurate.

The Trustees, aware of the shortage of available sites, proposed building a Crematorium within the Cemetery during the 1970's, a move which would have given the Cemetery continuing viability. The Department did not agree with this proposal, mainly on the basis that the proposed crematorium site was very close to residential areas and within sight of the residents in the high rise Commission flats.

In February, 1978 the former Superintendent of Grounds at the Cemetery, sent a lengthy letter of complaint to the Commission of Public Health which contained such allegations of misconduct that they were referred to the Chief Secretary for investigation by the Police. The subsequent report prepared by the Police for the Department has been examined by the Committee and while sections of its contents have been previously quoted in the Parliament and the Press, the report has not been released to the public. Requests have been made to the Committee by witnesses for access to this material.

The Committee feels that it is not the appropriate body to release such a document, however since much of the material has been publicised previously, some as a result of the Court cases following the charges laid against three employees of the Trust, it is not breaking confidentiality in releasing some of the findings of the report.

The following are the conclusions drawn from the investigations by the Police:-

- that there was evidence of mismanagement of the Cemetery by the Secretary, Mr. M.S. Brennan and his office staff, and lack of control by the Cemetery Trustees.

- that particular undertakers and monumental masons have been favoured in the allocation of gravesites and burial vaults,

- that unusually large amounts of money had been found hidden in the Secretary's residence,

- that the Fraud Squad investigation of the books of account had revealed discrepancies,

- that the Trustees had allowed the terms of the original grant relating to the preservation of the rights and character of denominational areas, to be breached in clear disregard of Section 15 of the Cemeteries Act 1958 through the massive re-use of areas with no regard to the previous denominational nature of the area, and without regard for private burials within these areas where exclusive rights of burial had been issued,

- that there was evidence of breaches of Section 48 in that exhumations had taken place without Health Commission licence,and

- that the Trustees had conveyed either deliberate lies or mis-information through their officers or official correspondence, concealing the true nature of affairs at the Cemetery and preventing the Health Commission and the Minister of Health from learning the truth of many matters.

Backing these conclusions a number of particular practices were detailed including:-

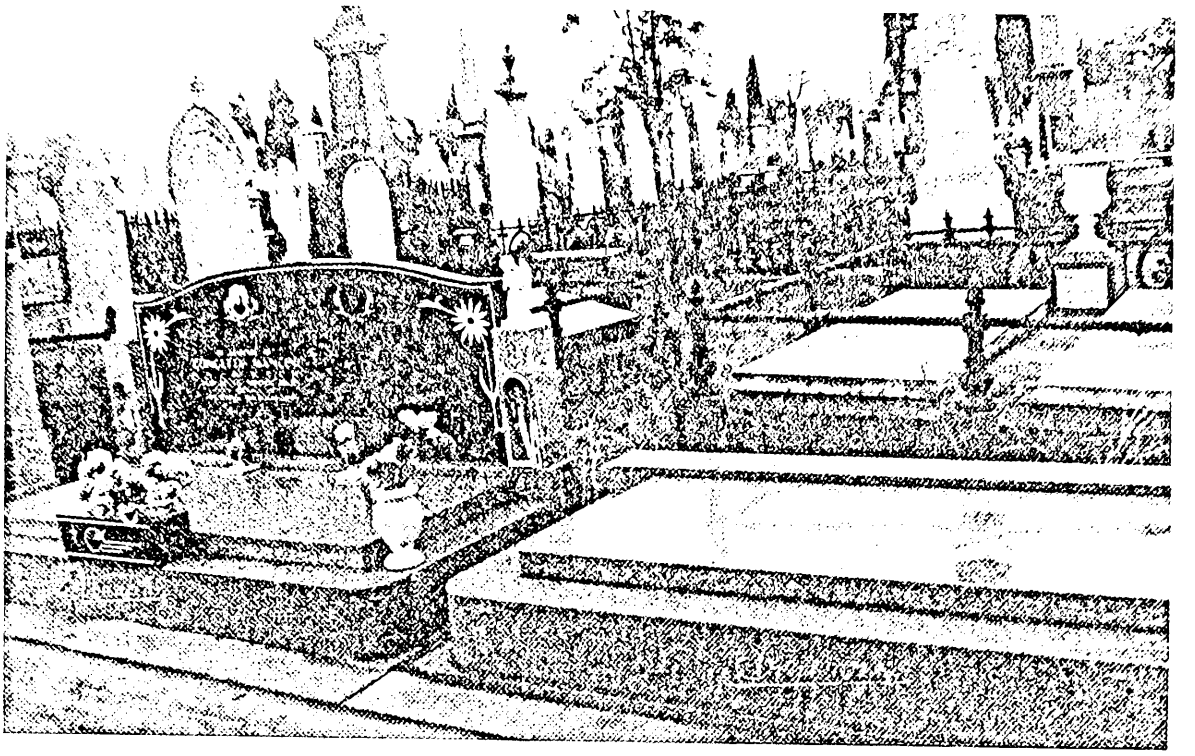
- Share grave for still-born babies. A large communal pit, covered with old pieces of tin, was used to dispose of up to 300 still born babies. Earlier complaints had brought the response from the Trustees that an adequate cover of earth would separate each coffin, but Police exhumation showed that the earth cover was approximately 1" and that conditions in the pit were muddy and foul. The covering was neither weather nor vermin proof.

- Shallow Burials. Many shallow burials had been found thus preventing expected further use of graves by families. A variety of reasons were given for this occurring such as lazy diggers, incorrect records of the number of occupants, funerals arriving before digging was completed, other bones and coffins were found in re-use areas, unstable ground and subterranean water, which filled graves as they were dug.

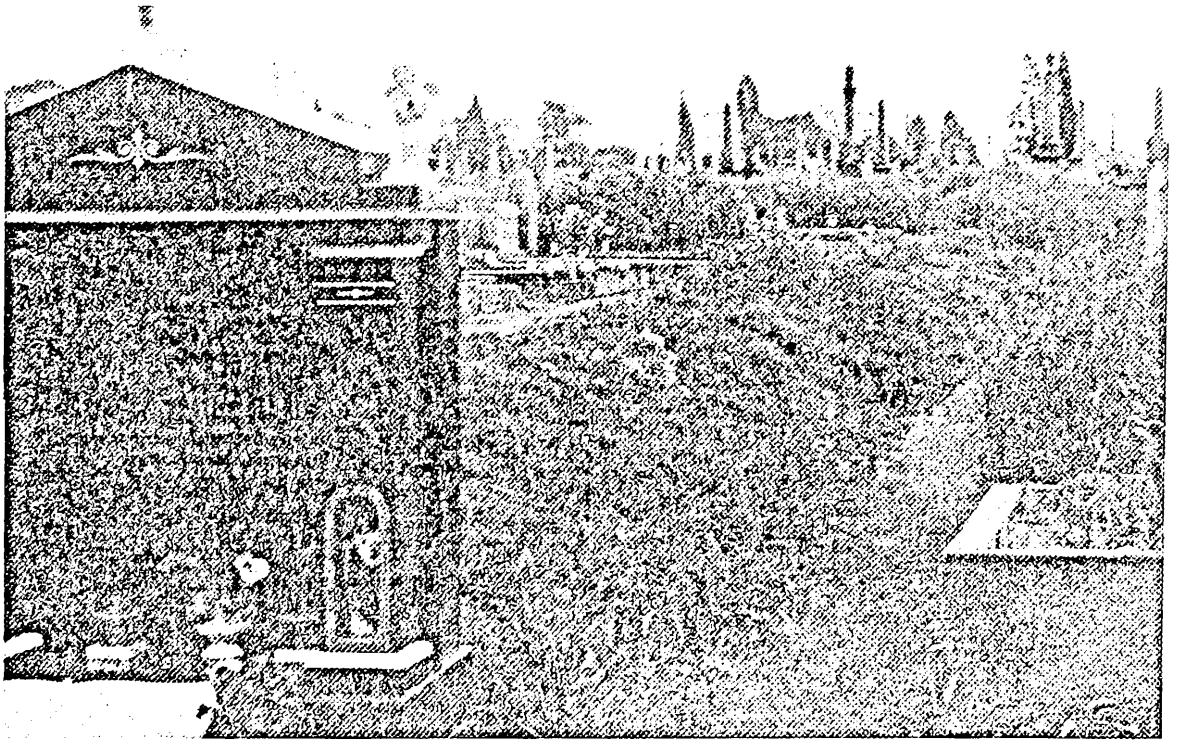
  Drainage in these areas was bad and often lead to pools of foul water lying on paths. Some drainage problems had been created by the building of vaults along gutters causing them to fill with foul water.

- Illegal Exhumations. Reasons given were that shallow burials had taken place because funerals arrived before grave digging had been completed. Later the coffin was lifted and the grave deepened.

  Errors by Sextons or Office staff had resulted in coffins being placed in wrong graves. There had been mix ups in locating of grave sites, and relatives had requested the shifting of bodies, usually from a muddy grave into a concrete vault.



Melbourne General Cemetery - New vaults line the roadway blocking access to interior graves.



Melbourne General Cemetery - Earth bank indicates the start of the filling in a re-use section.

- Maps and Plans. These were found to be grossly inaccurate due mainly to office staff failure to enter details of sites sold onto the maps.

  The provision of additional maps from the re-use areas made it easy for staff to confuse anyone into thinking that there were plenty of sites available within the Cemetery. There is also evidence of memorials being shifted to cover previous mistakes thus compounding the problems associated with the maps. The numbering system had become chaotic due, in part, to adding on of additional graves.

The attitude of the Trust members to the Police investigations is interesting. On the initial visit a member of the Trust challenged the Detectives and the Health Commission Officer. They were told they had no right to be there without prior permission of the Trustees. When informed that the Commission Officer was empowered under the Cemeteries Act 1958 to inspect the Cemetery, the Trustee advised that he was directly appointed by the Governor and acted under his authority and questioned their rights. Examination of books found them to be in good order and audited each year, however the burial book was found to be inaccurate and the figures supplied to the Health Commission, as mentioned earlier, did not correspond with the records in the book.

New burials were confined to the funeral firms of Tobin Bros., Gianarellis and Mulqueens. Investigations found that an earlier practice of requesting purchasers of concrete vaults to sign a form stating that within 3-6 months they would erect a memorial, had been extended to earth graves. This form had become a compulsory pre-requisite as grave-sites would not be released to a funeral director unless he had obtained a signed form to this effect. This was seen as a reason why other funeral directors were not using the cemetery, although the inconsistent attitude of the secretary was also a contributing factor. It was common for him to tell funeral directors one week that he had no graves available, yet soon after he would advise them that there were plenty of sites available.

It appears that during the 1950's when it was realised that a critical space shortage was occurring that spare areas such as nature strips, roadways, paths reduced in size, garden inlets and incinerator reserves, started to be used for earth graves. It was also at this time that the Lygon Street re-use commenced and public complaints started.

The report identifies two types of re-use:

- During the 1960's older areas would be cleared of trees and old memorials and covered with 1'6" to 2' of clay fill. After settlement these areas would have new paths constructed and be pegged for new graves usually at a different angle to the original areas. The Trust stated that these areas were old public or pauper graves for which no burial rights had been sold, however this was found not to be true in all areas.

- The second type of re-use did not occur until the 1970's when old brick graves and sandstone memorials were progressively demolished so that eventually areas would show no signs of earlier use. In time these areas were re-used and because filling was not used, diggers would frequently encounter remains.

These practices were verified through the examination of the old registers and maps, and reference to the aerial photographs of the Cemetery taken at three

yearly intervals by the Department of Crown Lands and Survey during its overall aerial surveys of the State.

The popularity of concrete vaults as a burial medium within the Italian and Greek communities resulted in vaults being placed along the edges of most of the roadways and in any other space that could be made available, with little regard to denominational sections. In many cases these constrictions would block access to graves and services such as drainage and water supply.

The elaborate style and value of these structures created a highly competitive market and payment of spotter's fees and touting were said to be widely practiced.

Some violence erupted with one mason having his premises burnt down and a number of his unpaid memorials within the Cemetery damaged on the same night.

Customers who had bought but not used vaults and had failed to erect a monument as indicated in their letter of intent were often faced with the vault being filled with clay and rubble and given the option of selling it back to the Trust or paying to have it dug out.

This type of action plus the difficulties some masons encountered in obtaining stock vaults for clients meant that gradually the number of firms competing for the Italian trade in the Cemetery dropped to a very few.

A survey of the vaults located along the roadways showed that A. Giannarelli and Sons had erected 964 memorials compared with 197 by G. Carmignani and Sons, the firm with the second highest number of installations.

Concern was expressed that Cemetery staff had given preferential treatment to particular firms, not only in the allocation and siting of stock vaults, but in allowing them to breach Cemetery Regulations. Unsupervised weekend construction of foundations, placement of memorials on foundations which had just been poured and unequal treatment of different firms by Cemetery staff for what appear to be similar breaches of the Regulations were cited.

The examination of the books of account showed that investments of Trust monies totalling $387,000 had been made through the legal firm of the Trust Chairman, Mr. Williams. These investments in mortgage loans, had been made with the full knowledge of the other Trust members, and while this type of investment is allowed by the Trustee Act 1958, the action raises moral questions as it is of some benefit to the Chairman by way of the fees charged for collection and handling, along with the advantage given to his firm by having access to large amounts of investment funds.

The overall conclusion of the report was that the earlier newspaper reports on the problems at the Cemetery had been based on fact, not merely on the allegations of disgruntled ex-employees.

The Health Commission had been told carefully constructed lies which had resulted in incorrect information being supplied to the Minister of Health. As this had occurred over a period of time, the Trustees had ample opportunity to resolve the problems, instead they considered the allegations as attacks against the Cemetery and themselves personally and became defensive rather than seek the truth.

The relevant sections of the Police report were forwarded to the Health Commission, while criminal charges for theft were laid by the Police against the Secretary, Mr. Brennan, and two staff members.

The Commission on the 27th September, 1978 closed the Cemetery to all new burials and restricted burials to persons holding existing burial rights where these could be exercised.

The Trustees when confronted with this situation and the expressed loss of confidence by the Health Commission were given the opportunity to resign, which all members did.

A caretaker was appointed until legislation could be passed in 1979 which allowed the Trustees of the Necropolis, Springvale, to take over the role of Trustees to the Melbourne General Cemetery.

The new management was faced with a much greater task than that normally associated with closed metropolitan cemeteries. In addition to large areas which required extensive maintenance, the Trust was also faced with the legal issues related to the overlay or re-use areas.

The main question since revolves around the legality of burial rights which have been sold in the overlay areas. Graves sold on the basis of multiple interment which had been partially exercised, have been covered with fill so that two parties now may claim rights for burial in the same plot. The Police report found that some of the original areas contained private burials as late as 1935 and 1938 and not the public burials from the 1800's as explained by the original Trust. Subsequent research by the new Trust indicated burials as late as 1958 in these areas.

The question of the legality of burial rights issued by the Previous Trust and the liability of the succeeding Trust was referred to the Crown Solicitor as the Trust's own Solicitors had advised against allowing any further burials in the questioned areas. Based on the Crown-Solicitor's advice, people claiming burial rights in those areas have been offered graves at alternative cemeteries and in the 1983/84 year the State Government gave a grant to the Trust of $89,000 to reimburse costs associated with this practice.

No legal solution has yet been found to the situation and advice from the Crown-Solicitor as recent as the 21st May, 1984 indicates that any solution may require new legislation to be framed.

(b) **Lilydale Cemetery Trust**

The major area of concern expressed with the activities of the Lilydale Cemetery Trust centered around the obvious conflict of interest of a previous Secretary/Manager, Mr. M. Carroll, who held the position from 1972 to 1982 and for part of this period also conducted a monumental business trading as Lilydale Memorials.

A number of complaints to the Health Commission were made about this situation, particularly the fact that the Yellow Pages telephone directory lists the Lilydale Cemetery Trust Office and Lilydale Memorials on subsequent lines, each with the same number.

The Commission wrote to the Trust on a number of occasions complaining about the ethics of such a conflict of interest, backed by information contained in complaints from both the public and monumental masons, that applications for permission to install monumental works lodged with the Trust Office were being met with counter-offers to carry out the same work at a lower cost.

Masons also complained that they were being banned from operating at the Cemetery without reason, because they were competing with the activities of Lilydale Memorials. The Trust replied that this was incorrect and that bans which had been placed on two firms, A. Giannarelli & Sons (for 12 months from January, 1974) and G. Carmignani and Sons (from April 1981) were imposed because these firms had understated the cost of monuments being installed thus avoiding fees payable to the Trust as these are levied as a percentage of the total cost.

At a meeting convened between Trust members, Health Commission officials and an officer of the Consumer Affairs Bureau in July 1982 the Carmignani ban was discussed and after a review of this particular case a decision was made to drop the ban. The question of the dual interests of Mr. Carroll was also raised with the Trust at the meeting.

Following this meeting a Health Commission official undertook an examination of Trust minutes and books of accounts and reported the following:-

- Mr. Carroll although unpaid for his duties had use of a Trust vehicle, was paid $50 per week for rental of office accommodation within his home, had been paid approximately $100 per month for petrol, and by resolution of the Trust had been empowered to pay himself an annual bonus;

- The Trust had a contract with Mr. Carroll to supply and install concrete vaults;

- Mrs. Carroll was employed as full-time book-keeper/receptionist operating from the family home;

- The Carroll's son was employed full-time at the Cemetery on maintenance works;

- No financial audit had been undertaken of the Trust's activities in 1980 or 1981 both of which were years of considerable turnover; and

- A $20,000 first mortgage loan had been made to a Trust member.

At the same time that this problem was being discussed the Health Commission was engaged in protracted negotiations on behalf of the Trust aimed at expanding the area available for cemetery use in the Lilydale region. Negotiations for a number of suitable sites had proved unsuccessful and a final alternative, a parcel of 202 acres of land opposite the existing Cemetery which was owned by the Commonwealth and originally intended for Defence Service Homes and surplus to requirement was being considered. This area proved suitable for the intended use and the process of gaining approval was commenced and had proceeded to the stage where the Treasurer, Mr. Jolly, had stated that he was prepared to approve purchase of the land. The Health Commission had also recommended that a Government representative be appointed to the Trust in view of the expected expenditure of $450,000 of State funds on the purchase.

The proposal to expand the existing cemetery was not popular with local residents and a concerted campaign was mounted against it which met with success in that the Shire of Lilydale changed its attitude from one of support to opposition to any land purchases for cemetery purposes.

The process had taken over 12 months and the Minister for Planning, Mr. Walker, had just announced that further consultation would occur with the Upper Yarra Valley and Dandenong Ranges Authority, when advice was received from the Federal Department of Administrative Services that the property had been sold to another buyer.

In his memorandum to the Minister on the 29th December, 1982, the Secretary to the Health Commission, Mr. P.R. Wilkinson, made the following comments on the planning processes:

> "..... this correspondence indicates yet again what a complex area cemeteries administration is. Our officers can only proceed in property matters if discussion (takes place) with this Authority (U.Y.V. & D.R.A.), the local council or councils, Department of Planning, C.R.B., Ministry for Conservation, Lands Department and P.W.D. (Property and Services). This is an administrative nightmare and the involvement of so many authorities will always render it virtually impossible to proceed quickly to a solution if and when properties are identified".

The reaction of the Minister was to stop any further action by Health Commission officers on the extension proposal and to direct their efforts towards the establishment of two other new cemetery complexes at Pakenham and Bundoora. In a memorandum to Mr. Wilkinson dated 18th August 1983 in which he is critical of the fact that some work had continued on the search for potential sites in the Lilydale area, the Minister stated:

> "Until Pakenham and Bundoora are finalised I want no further work done in relation to Lilydale. The Lilydale Shire decided that cemeteries were not a high priority, and for the moment I certainly am prepared to go along with that, we have enough work to do in relation to two other proposals".

If the land question had been resolved there is no doubt the nature of the management structure of the Cemetery would have changed, if only by the closer relationship it would have brought with the Health Commission. In November 1982, Mr. M. Carroll, resigned and his son, Mr. C. Carroll, replaced him as Secretary/Manager to the Trust. Mr. Carroll, senior, continued to operate Lilydale Memorials and part of the family home continued to be used as the Trust Office.

The Health Commission continued to receive complaints about this relationship and in February 1984 referred the following complaint from a monumental mason to this Committee:

> "A recent quotation to the ..... family involved a headstone which is not an ordinary type, and not easy to produce. We did however offer to supply this type of headstone and the family left to consider the whole matter.
>
> Some days later they called back for a price to supply the headstone only as "the man from the cemetery" approached them at the cemetery and offered to supply and erect a stone for them, but on discovering the nature of the design they had in mind, he suggested that they get us to supply the stone and he would cut the inscription and erect the stone.

> We were not happy with this situation and we rang the Lilydale Trust to seek a clarification as to whether monumental masons in general were entitled to sell and erect stones in the cemetery. We rang 726 9789 and on asking for the Secretary or Sexton, we were advised he had "gone to the bank". The person who answered the telephone then asked for the nature of our enquiry and was told that "we were ringing about headstones". He then introduced himself as a stonemason who could assist us with any purchase we intended to make. We then enquired if we had rang his office by mistake and he declared that the trust and he shared an office. We thanked him and ended the conversation.

On checking the Yellow Pages 1984 edition, it was noted that there are three entries for the number advertised as the Lilydale Cemetery Trust, Chirnside Park Office, (page no. 1165) in the current white pages. They appear in the Yellow Pages on page 1179 as CARROLL M & G 726 9787 and on page no. 1180 as LILYDALE CEMETERY TRUST OFFICE 726 9787. LILYDALE MEMORIALS 726 9787."

The letter was shortly followed by advice that Mr. Carroll, junior, had resigned from his position to travel overseas and that moves were being made to locate alternative office accommodation for the Trust. This action removed a conflict of interest situation which had generated public complaints and which the Health Commission had been aware of since 1981, but apparently had been powerless to take action in other than by writing to the Trust advising of their concern.

The Committee is concerned at what appears to be a lack of ability by the agency charged with the administration of an Act of Parliament to be able to ensure that compliance with the Act is occurring, particularly in situations where public complaint has made a problem well known to the agency. The Committee has found evidence of this occurring in other areas during its investigation and it will examine this in greater detail in other parts of this report and also in forthcoming reports.

The most recent contact that this Committee has had with the Trust was a letter on the 17th September, 1984 from Miss C.E. Gray, Chairman of the Trust, who wrote expressing concern that the Lilydale Cemetery Trust had been named in the Second Report of the Committee as one of the reasons why the Parliamentary Inquiry had been instigated. The reference which Miss Gray refers to is the section which summarises a speech given by the Minister of Health on the 1st July 1982 in moving the motion in the Legislative Assembly which set up this Committee. That section was not a comment by the Committee and this has been drawn to the attention of the Trust, however the letter also included the following comment:

> "It is also worthy of note that since approximately 1975, the Secretary and Trustees at Lilydale have spent much time and energy seeking to alert authorities to the coming shortage of burial space in the Eastern areas of Melbourne, including finding several very suitable sites which were lost by default .... an example of LOCAL foresight and initiative for LOCAL needs being thwarted by centralised bureaucracy. This shortage is now desperate, and the Bundoora site so distant from the area of need as to be untenable".

It is interesting to note that the Minister and the Health Commission see the barrier to expansion at Lilydale as the local attitude as voiced through the Municipality and the petitions presented by residents to the Council and the Parliament, whereas the local management body sees the problem as one of central Government interference.

(c) Templestowe Cemetery Trust

The Templestowe Public Cemetery is one of a number of small community cemeteries which have found themselves located in areas which are changing character due to the urban expansion of metropolitan Melbourne. The Cemetery at Templestowe was established in 1857 on a site of a little over nine acres near the small township which serviced the orchard growing areas of Doncaster and Templestowe. Its establishment was seen as necessary by the residents at the time as flooding of the Yarra had prevented bodies from being taken to Heidelberg Cemetery on a number of occasions.

The activity at the Cemetery reflected the nature of the area up until the start of the expansion of suburban sub-divisions in the area in the late 1960's. This is illustrated by the fact that for the year 1969, 72 burials were carried out, bringing the total number of burials since 1857 to 726. By 1981 the annual figure had reached 738 with a total number of burials of 5842. The final report of the Health Commission Working Party on Cemeteries and Crematoria which is examined in detail in Chapter Seven of this report, has estimated that the remaining area of .5 hectare at the Cemetery represents approximately 1000 graves or two years of supply, and as a consequence has recommended the closure of the Cemetery.

The increased popularity of the picturesque Templestowe Cemetery helped by the astute business acumen of the Trustees brought with it a level of prosperity uncommon for cemeteries of its size.

Using 1969 again as a benchmark, the Trust in that year held $2,750 in investments and $1,939 in bank accounts. In the year ending 30/12/83 the investment figure had increased to $1,245,201 accruing annual interest of approximately $125,000, and a bank account balance of $40,000.

Health Commission files indicate that the performance of the Trust at Templestowe was seen by officials as being a model example of efficient cemetery administration with two minor exceptions.

Examination of the 1979 abstract of accounts by the Health Commission revealed that the Trust had granted an $8,000 first mortgage loan to the joint Secretaries, Mr. and Mrs. D. Hall, at an interest rate of 8% per annum. Advice from the Law Institute of Victoria indicated that the rate of interest for such loans in December, 1977, when the loan was made, ranged from 13% to 13.5%. The Health Commission advised the Trust that such an investment prejudiced the earning capacity of the Trust and was considered not to be in the public interest. The Trust took the attitude that it was within its rights in granting concessions to a long serving employee as part of employment conditions. It questioned the power of the Commission to direct that the mortgage be terminated, but added that Mr. Hall was shortly to leave the Trust's employment, an act which required the loan to be repaid.

The other incident came to light in February, 1980, and involves a similar practice to that occurring at several other cemeteries, two of which are mentioned in this Appendix, the construction of concrete vaults by monumental masons.

At Templestowe, A. Gianarelli & Sons were constructing vaults, selling them and then reimbursing the Trust for the cost of the site and the fee due for any monumental work. When the Health Commission became aware of the situation the Trust was advised that immediate steps should be taken to ensure that all

unused vaults reverted to the Trust's ownership, and that all future sales should only be made through the Trust at the approved fee. This action was carried out. The implications arising from this practice are discussed in the section of this Appendix dealing with the Preston Cemetery Trust.

During the late 1970's the Trust, aware of the rapid decrease in available space at the cemetery, started negotiations to acquire vacant land adjoining the cemetery. Funds were earmarked and held in the Trust's bank account to purchase the property but delays were encountered in the re-zoning process.

In August, 1979, the Secretary, Mr. Hall and a Trustee, Mr. Roy Harle, drew a cheque for $100,000 which was invested by the Trust's solicitors, Harle and Associates, at 14% in contributory mortgages. The full Trust were not advised of this action.

In 1977, following an incident where an existing mortgage to a Mr. Cameron had been increased from $40,000 to $80,000, without the knowledge of the full Trust, a resolution was passed that any investment in excess of $10,000 must have the prior approval of the Trust.

In June, 1980, following a meeting between some Trusts members and Health Commission officers which was held to discuss the land purchase, an examination of the material supplied to the Trust's Auditors by Harle and Associates indicated a $100,000 investment of which the Trust members were unaware.

Investigation indicated that the initial investment of $100,000 had been applied to short-term finance, repaid on 30/1/80 and subsequently re-invested. The Trust claimed that it was not advised at any stage of this re-investment of its funds. The Committee can understand a certain amount of confusion on this issue as an examination of the copies on file of the different portfolios indicates. For example:-

Included in the details of 17 loans totalling $283,000 supplied in June, 1980, is the following information:

- Mge. No. 21 Instrument of Mortgage No. H268998 over Lot 2, Cooper Street, Epping.
  $200,000 at 14%, Trust share $19,000

A letter from the Solicitors to the Trust Secretary on 26/8/80 stated:

- Goldcel Nominees Pty. Ltd.,
  207B Balaclava Road, Caulfield.
  Property Lot 2, Cooper Street, Epping.
  Total loan $200,000. Your contribution $45,500

A letter from the Solicitor to Kellett, Till and Associates, Public Accountants on 2/2/81 detailed:

- $45,500 - Mortgagee Goldcel Nominees Pty. Ltd.
  Mortgage No. H602805, repayable 31/12/80 (overdue),
  principal sum $180,000.

It appears that of the $100,000 invested in 1979 by Messrs. Hall and Harle, by August, 1980, it was held in five contributory mortgages through Harlaw Nominees

Pty. Ltd., a nominee company of the Solicitors, Harle and Associates. Of these five mortgages, three totalling $69,500 were loaned to Goldcel Nominees Pty. Ltd. and secured on properties at Koomba Road, Wantirna, Fitzsimons Lane, Templestowe and Lot 2, Cooper Street, Epping.

Subsequent advice to Kellett, Till and Associates on 2/2/81 indicated that the figure owed on these three mortgages which were all payable on 31/12/80 and therefore overdue, was $71,000.

At the meeting of the Trust held on 8/11/81 the members decided to replace Harle and Associates as Solicitors to the Trust.

A special meeting of the Trust was requested to enable Mr. Harle to explain his action of investing the $100,000 without the Trust's knowledge. This meeting took place on 3/2/81 and the minutes recorded that Mr. Hall had been instructed to invest the $100,000 in the Trust Account in the State Savings Bank until otherwise instructed by the Trustees. Mr. Harle explained that he had suggested to the Secretary that the money should be invested in short-term mortgage loans as the Trust would receive a higher rate of interest. He had asked Mr. Hall to contact all trustees to gain their approval but it appears that this was not done.

Mention is also made of payment to a contractor for the erection of an ornamental waterfall. The contract price of $5,000 had been paid, but a further payment of $4,000 had also been made without the full knowledge of the Trust. The cheque had been signed by Mr. Harle and another Trustee, Mr. Mitchell. The Secretary had explained to another Trustee that he had asked these two to sign the cheque as he knew that the waterfall design was a controversial issue within the Trust and that these two would be the only ones to give their signature.

At the annual meeting of the Trust held four days later on 7/2/81, three trustees announced their decision to resign because Mr. Harle had not been asked to resign by the Chairman, however they would not move a motion to that effect.

The three trustees sent a copy of their letter of resignation on 9/2/81 to the Health Commission but no formal action was taken for it to be brought to the attention of the Governor-in-Council, presumably because it was not an official letter from the Trust.

In the interim period, Harle and Associates attempted to recover the loans which were in default from Goldcel Nominees Pty. Ltd. and the guarantor, Miss. C. Goldman. The loan of $11,000 secured on the Wantirna property was repaid during 1981, the Templestowe property was sold late in 1981 and the loan repaid in January 1982. Of the loan owing on the Epping property, $45,500 is still outstanding despite a Supreme Court order in favour of the Harlaw Nominees.

In November 1981, the issue was raised in the press and questions were asked in Parliament.

The Chairman of Health Commission, Dr. G. Trevaks, reported to the Minister that if the facts related were correct then Mr. Harle could be severely criticised on at least three counts of misconduct:

- that he was party to significant investments and re-investments of Trust funds without the knowledge of the full Trust and in contravention of a 1977 Trust resolution.

- that he was a party to a payment of $4,000 to Mr. Kostescky (builder of the waterfall) without the knowledge of the full Trust and in opposition to its wishes.

- that he was involved in a conflict of interest situation in that Trust funds were invested, largely because of his actions, through a firm of solicitors in which his son played a major role.

He recommended that Mr. Harle and the Trust Chairman be interviewed to determine the truth of the allegations, that his resignation be sought or moves be made for his removal as a Trustee and that depending on confirmation of the facts surrounding the waterfall overpayment, the Trust be encouraged to seek immediate re-repayment of the $4,000.

The Crown Solicitor was also asked to comment on the legality of the situation at Templestowe but as the issues have not yet been resolved, the Committee will not make any comment on his opinion other than to mention two technical issues which his advice exposed, one of which is apparent from reading the preceding paragraphs. The particular mortgages involved are described as contributory mortgages, that is, the Trust's money was added with amounts invested by other parties to aggregate to the full amount of the mortgage. This is recognised as an authorised investment as defined by Sub-section 4(2C) of the Trustee Act 1958.

Sub-section 4(2C) provides:

> "(2C) The power to invest trust funds on real securities in the State of Victoria shall extend to the investment on the security of a contributory mortgage if the mortgage would have been an authorised investment under this Act if it were a mortgage entered into by the trustee alone and if the mortgage contains a covenant by which each of the other mortgagees covenants with the trustee to do or concur in all such acts or things as may be necessary or expedient for enforcing the rights of the mortgagees on the default of the mortgagor whenever so requested by the trustee."

It is obvious from the earlier example of the different values placed on the Trust's share in individual mortgages that it was most unlikely that the required covenants existed due to the difficulties involved in changing them. This raises the question of the status of the investments if they are not contributory mortgages.

The second issue is one which will be attended to in a future report of the Committee and alludes to the relationship between the provisions of the Cemeteries Act 1958 and the Trustee Act 1958. There is some question as to the ability of trustees of cemeteries to act as trustees within the meaning of the Trustee Act as they are subject to financial controls imposed by the Cemeteries Act.

The Minister, Mr. W. Borthwick, met a deputation of trustees on 19/2/82 and on 1/3/82 sent a letter to Mr. Harle calling on him to resign or to submit comments and information on the issue. Mr. Harle responded by presenting a statutory declaration on 10/3/82 explaining that the waterfall payment was for works in addition to those originally quoted. With respect to the mortgage incident, he advised that he was not associated with the legal firm and that this firm had acted on behalf of the Trust for a number of years. He believed that Mr. Hall had advised other trustees of the proposed investment when he signed the cheque.

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Mr. Harle did not resign, but on 18/3/82 the Governor-in-Council accepted the resignations of the three trustees which had been given to the Trust on 9/2/81.

As mentioned earlier the outstanding loan has not been recovered, however the Committee believes that currently moves are being made to resolve the situation and in view of this it will not comment further on the issue at this stage.

(d) **Ferntree Gully Cemetery Trust**

In July, 1980, the monumental firm G. Carmignani and Sons wrote to the Health Commission to complain about a ban which the Ferntree Gully Cemetery had placed on the firm in September 1979. Investigation by Health Commission officers established that the firm had attempted to construct a monument on a grave site for which it had not made application or paid the necessary fee. The Secretary had prevented the work from proceeding and a confrontation had occurred which was witnessed by one of the Trustees and resulted in the Police being summoned. At a subsequent meeting the Trust decided to apply the ban to the firm. Given this information, the Health Commission replied to the firm that the Trust was within its rights under Section 20 of the Cemeteries Act 1958 and that any lifting of the ban would depend on the Trust.

Further advice from the Trust in June, 1981, indicated that it had not changed its mind on this issue.

The Health Commission's file of material supplied by the Trust in explaining its position on this issue also showed some other irregularities. For example, the minutes of the meeting of the Trust of 29 August 1980, contained a number of motions seconded by the Secretary, Mr. R. Read, who was not a member of the Trust.

These documents also refer to problems with other monumental firms. The Committee is not in a position to comment on these as there is no evidence of whether these problems were confined to this Trust or whether they indicate the general state of that industry and its relationships with cemetery trusts.

In December, 1981, the Trust Chairman, Mr. A. Owen, contacted the Health Commission with certain allegations about the manner in which the Trust's activities were being run. Examination of the make up of the membership of the Trust indicated that:

- The Chairman was 82 years old;
- one member according to the offical register held by the Health Commission had been appointed in 1947, but was unknown to other Trustees;
- one female member with long family links with the Cemetery Administration had just turned 100;
- an ex-Councillor who was also an ex-Policeman lived on a farm at Geelong, was still an active Trustee;
- one was the wife of the Secretary to the Trust;
- three other trustees were described as old or 65+ but were regular attendants at meetings.

In January, 1982, the Secretary of the Health Commission, submitted to the Commission the following points of concern and recommended that a Committee of Inquiry be established under Section 50 of the Cemeteries Act 1958.

These are the points of concern:

(a) Communications from Mr. Owen, the Trust Chairman, or on his behalf, whilst non-specific are of concern and perhaps indicative of problems in respect of the administration of the cemetery.

(b) Minutes of Trust meetings on file suggests that Mr. Read, the Trust Secretary, is at times involving himself in Trust business as though he was a Trustee. For example, one set of minutes show that he actually seconded two resolution passed by the Trust.

(c) There has been a deal of controversy concerning the access of various monumental masonry firms to the cemetery, including the banning of at least one such company. The Consumer Affairs Ministry is involved in these discussions.

(d) There is a certain amount of innuendo concerning Trustees being paid for various duties (probably in contravention of the Act), the Secretary's involvement with or on behalf of one firm of monumental masons, monies paid to the Secretary (well in excess of the secretarial duties) for grave digging etc., Trust meetings held without the knowledge of the Chairman of the Trust and so on.

Section 50 of the Cemeteries Act empowers the Health Commission to appoint and authorise any person to investigate the affairs of a particular cemetery. That Section reads as follows:

> "50. The Health Commission of Victoria may from time to time appoint and authorise any person to inspect any cemetery burial ground or place of burial and ascertain the state and condition thereof, and where regulations in relation thereto have been made as in the last preceding section mentioned to ascertain whether such regulations have been observed and complied with and every trustee or other person having the care of any such cemetery or burial ground or place of burial subject to such regulations as aforesaid who violates or neglects or fails to conform to or obey or to enforce any such regulation shall be liable to a penalty of not more than $20."

The Commission agreed with this recommendation and appointed Dr. Ian Brand and Mr. Ron Curley to carry out the investigation. Their Report found:

> "- Trustee Mavis Joyce Read receives an honorarium from the Trust for being Treasurer, is engaged by the Trust as Assistant Secretary with wages of $1,368 in 1981, and is half of the partnership of R.E. and M.J. Read which received payments from the Trust of $19,018.50 in 1981.
>
> - Trustee E.L. Gale trading as Gale's Garden Services received payment from the Trust of $8,725.60 in the year 1981.
>
> - Trustees E.L. Gale and M.J. Read together with the Secretary R.E. Read sign all cheques of the Trust, and we have sighted cheques payable to R.E. and M.J. Read signed by R. Read and M. Read (the same people). All cheques payable to Gale's Garden Services were signed by Gale (together with M. Read). M. Read was a signatory to three cheques paid to her.

- There are no records of any actual times worked by any person rendering accounts to the Trust. There are no checks on the times alleged to have been worked, no signatures verifying these times, no certifying of the accounts, or any apparent authorisation at all, apart from the drawing of the necessary cheques.

- The Chairman of the Trust has received an honorarium for a considerable period.

- One of the chief beneficiaries of the increase in the hourly rate, Trustee F.L. Gale, seconded the motion authorising the new hourly rate.

- The trade-in of the Trust's Cranvel Digging Machine on a new machine purchased by Mr. Read was not authorised by the Trust. Mr. Read held over payment of $3,600 (the trade-in figure quoted for the Trust machine) for six weeks without the Trust knowing of this.

- The Secretary was unable to provide satisfactory explanations concerning the sale of the Trust's ride-in mower, which sale was not confirmed by the Trust until five months after the event.

- There is no burial register although the need for this was first drawn to the attention of the Trust's Secretary (not Mr. Read) in 1928. This is a legal requirement under Section 51 of the Cemeteries Act.

- No tenders have ever been called for any contracts and no proposition has ever been put to the Trust by the present Secretary that tenders should be called for any work done in the way of maintenance, grave digging or any provision of services. There have been no tenders called for installation of vaults or for anything else.

- The Trust has moved "that all graves required in Ferntree Gully Cemetery be dug on a contract hire basis, as also all work required to be done to maintain the Cemetery to an acceptable standard be performed on a contract hire basis at a figure (cost) negotiated by the Secretary with contractors". The Secretary in fact does all the grave digging work and together with Mr. Gale does the bulk of the maintenance work. Yet the Trust has given him absolute freedome to negotiate charges with contractors, who are chiefly Gale and himself." (Report to the Secretary, Health Commission of Victoria from Board of Inquiry into Ferntree Gully Cemetery Trust 1982, Parliamentary Paper No. 65)

The Health Commission considered the report which recommended that Trust Members be given the facts as detailed above and be given the opportunity to resign or have their membership terminated. Also the Knox City Council was to be asked to manage the Cemetery.

As a result several of the Trustees employed a Solicitor to act on their behalf and represent them at a meeting with Health Commission officials.

The Solicitor questioned the ability of the Health Commission to appoint a Board of Inquiry under Section 50. He felt that the Commission was acting in a similar fashion to that set out in Sections 9A and 384 of the Health Act 1958 and was imposing the requirements of Section 386 of that Act.

It was put at the meeting that many of the practices being used by the Trust had been used over a number of years successfully and that Trustees were unaware of any breaches of the provisions of the legislation. The Solicitor was critical of the lack of information and assistance given by the Health Commission and for not carrying out close supervision of trustees. On 6 July, 1982, the Governor-in-Council accepted the resignations of four Trustees and removed from office the remaining three. The Council of the City of Knox were appointed as Trustees of the Cemetery shortly after.

The Committee is aware of the confusion surrounding the interpretation of much of the Cemeteries Act by the individual trusts and will examine much of the legal argument developed by the Ferntree Gully incident when it completes its review of this act and the complimentary legislation associated with the conduct of cemeteries and the disposal of the dead.

(e) **Preston Cemetery Trust**

On the 25th July, 1984, the Hon. Tom Roper, M.P., Minister of Health, wrote to the Committee to advise of investigations by the Health Commission into certain vault construction practices at the Preston Cemetery.

These practices which are described further in this section were believed to be unsatisfactory by the Minister for a number of reasons:

(a) lack of a safeguard with respect to the fee charged by the monumental mason for the vault (and possibly the right of burial fee);

(b) clear advantage given to particular masons in securing monumental work at cemetery;

(c) creating a situation where cemetery trust employees are open to temptations and allegations of touting and corruption;

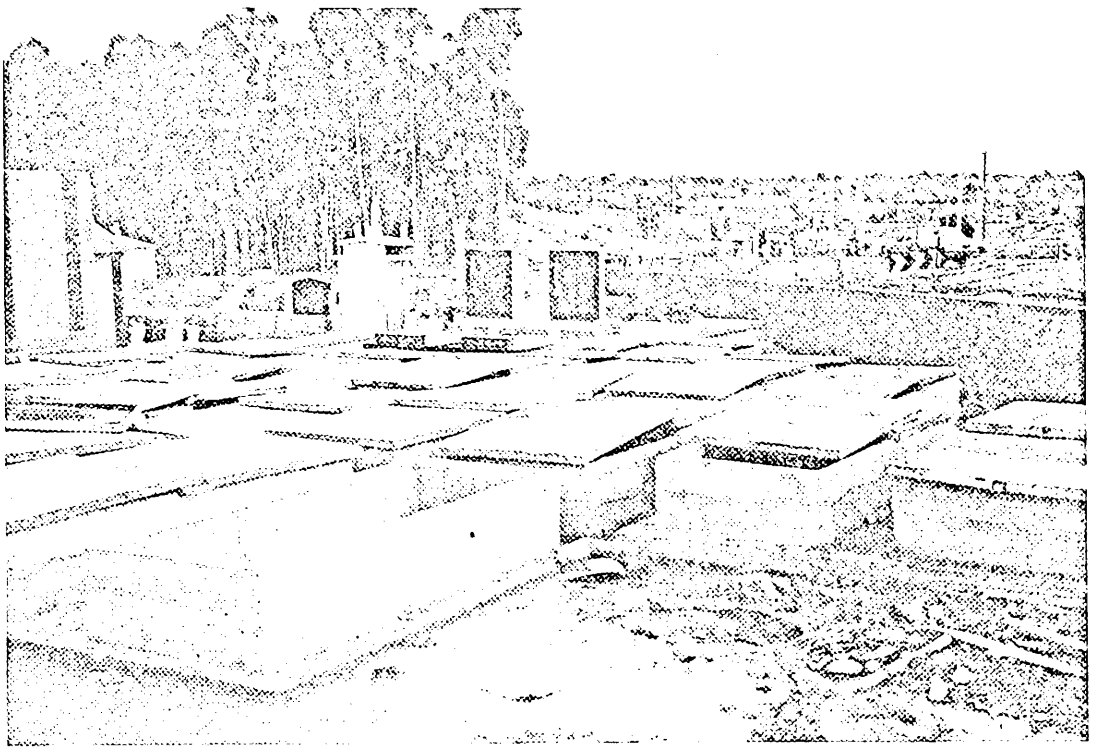
(d) lack of income that could be generated by the Trust itself installing the vaults through a regular tender system as is done at most other large cemeteries.

The Minister's letter also advised the following:

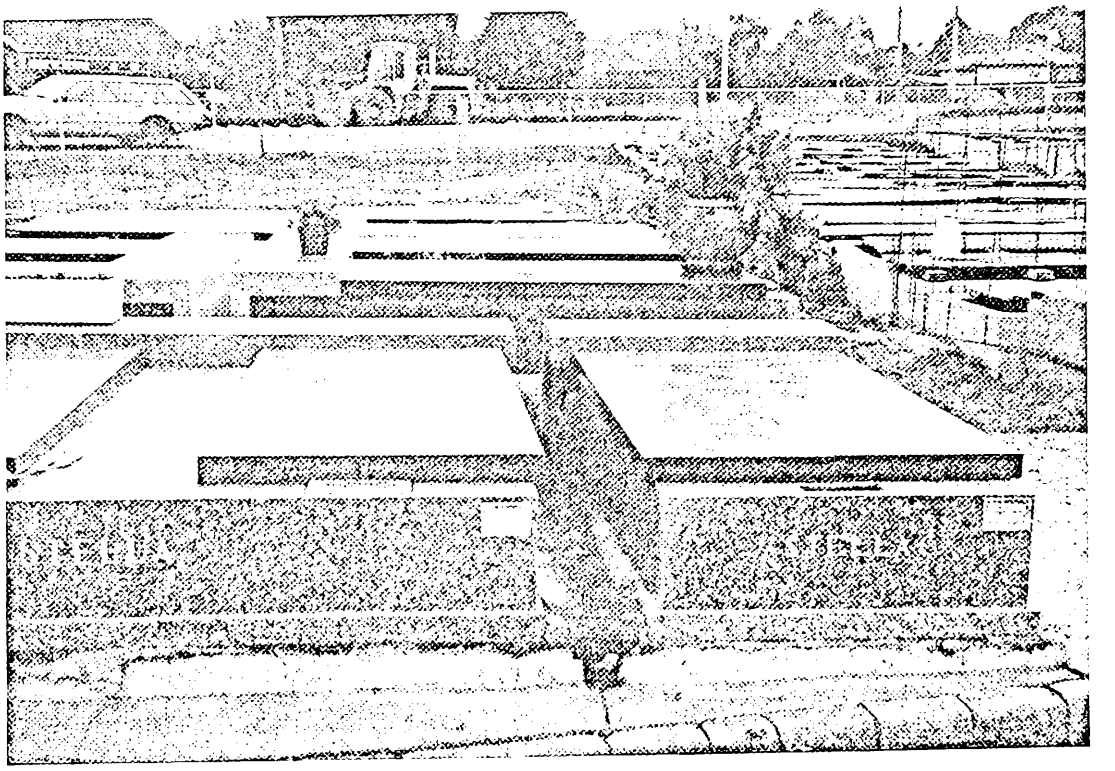
> "The Trust has, on the recommendation of the Commission, ceased the construction of vaults under the present system and is presently considering options for the disposal of the unused vaults at the cemetery.
>
> The Health Commission is limited in its powers under the Cemeteries Act 1958 to the inspection of matters relating to cemeteries and because of your Committee's wider powers I consider it appropriate that this matter be referred to your Committee for further investigation."

The Committee accepted the Minister's request and as it had just completed its scheduled Public Hearings it decided that the parties should be called to appear at in-camera sessions of the Inquiry.

The Committee inspected the site and met with officials of the City of Preston, the councillors of which are the Trustees of the cemetery. The following report was submitted by the Manager of the cemetery on the "Matter of Vaults":



Preston Cemetery - Giannarelli vaults.



Preston Cemetery - Vizzini vaults with Plenty Road tramway works in background.

"Several areas of the Preston General Cemetery have not been suitable for the purpose of earth graves, due to the large amount of rock encountered. In 1969, it was decided to allow the construction of vaults in those areas not suited to earth graves.

When vaults were first introduced to the Cemetery, it was on the proviso that the land was to be purchased by the public, who could then arrange for a monumental mason to instal the required vaults.

Due to the number of enquiries from the public and Funeral Directors, permission was granted to allow stock vaults to be available - conditional on any Mason not to have in excess of ten (10) stock vaults at any one time. This system has worked satisfactorily over the years, with three masons providing the service:

G. Giannarelli & Sons
Vizzini Memorials
G. Carmignani & Sons.

The method adopted for sale of these vaults is as follows:

'When a funeral director contacts the cemetery for a vault, he is provided with details of the above firms. The director purchases the vaults from one of the above Monumental Masons and pays the Preston General Cemetery the amount of $300 for the gravesite'.

The income received from the sale of this otherwise unusable land has enabled the cemetery to match income with expenditure over recent years.

The majority of land suitable for vault installation is that parcel of land nearest to Plenty Road. With the widening of Plenty Road, due to the tramway extension, the Preston Cemetery car park was re-located to the south-west section of the grounds. With this re-location, the reconstruction of roadways leading from the cemetery entrance to the new car park are to be reconstructed at the cost of the Metropolitan Transit Authority.

When vaults are being constructed and/or installed, large mechanical equipment is required to be within the cemetery grounds. This equipment tends to have a detrimental effect to roadways, so permission was granted for the construction of additional stock vaults. With the installation of these vaults completed, roadways can then be reconstructed. The matter of these additional vaults was considered a matter of urgency as the Plenty Road project is heading towards completion.

At this stage, the following stock vaults are available -

G. Giannarelli & Sons	16
Vizzini Memorials	84

The first-mentioned Mason, G. Giannarelli & Sons, was in the process of installing a remaining 70 vaults. This would take up all land not suitable for earth burials in the area adjacent to Plenty Road.

However, on the 13th June 1984, Council was advised in writing by the Secretary of the Health Commission, that the present arrangements are to cease because -

"The Commission considers that these procedures are unsatisfactory and could lead to problems in the future, especially where your Trust has no control over the approved individual Monumental Masons. It also appears that the present system gives certain Monumental Masons a clear advantage in securing monumental work at the cemetery."

Since that date, no more vaults have been installed and sales of existing vaults by Masons have been suspended.

Council is now considering the purchase of the recently installed vaults and will then apply to the Health Commission of Victoria to have the appropriate fee chargeable gazetted.

It is anticipated that when the number of existing vaults diminish, tenders will be called for further stocks to be installed. Vaults will then be supplied under similar methods as adopted by other cemeteries."

The Committee appreciates that the Preston situation was forced by the activities of an outside authority, the widening of Plenty Road by the Metropolitan Transit Authority, if the full potential of the cemetery was to be realised.

The financial history of the Preston Cemetery in recent times was operation on a break-even basis. Any surplus revenue had been spent on maintenance or improvements in the year that events occurred.

This means that reserves were not sufficient to allow the Trust to finance the installation of vaults on the scale requried to use the available areas prior to the re-construction of the cemetery roads unless some other source of financing was used. With the method adopted by Preston, monumental firms would carry the cost until all vaults were sold.

The Health Commission's objection is based on the question of ownership of rights of burial. No certificates of rights of burial were issued to the stone masons. Customers requiring vaults were shown the areas by cemetery staff and depending on their choice were directed to the firm which had installed the vault to arrange purchase.

The mason was paid for the vault and the fee for right of burial (currently $300) was remitted to the Trust by the mason usually together with the 5% fee for the monumental permit which is assessed on the cost of the monument.

The Commission was concerned that there could have been a breach of Section 27A of the Cemeteries Act 1958, which is framed to prevent the trafficking of grave sites by persons other than the Trustees. However the situation is not entirely clear as this is a difficult section of legislation to interpet.

Section 27A reads as follows:

27A.(1) A person shall not -

(a) pay or promise or demand or receive; or

(b) enter into any agreement or transaction or arrangement under or by reason of or in connexion with which he or any other person is to receive -

any consideration in money or money's worth (not beign a fee or charge or other consideration provided for by or under this Act) for or on account of or in connexion with -

(c) the use;

(d) any consent by him or by any other person to the use; and

(e) any failure by him or by any other person to object to the use -

of any grave or vault in any public cemetery for the burial or interment or other disposal of any body or the cremated ashes of any body whether the body is or is not the body of some specified or identifiable person or is not the body of a person then living.

(2) A person who contravenes any of the provisions of this section shall be liable to a penalty of not more than $2,000.

During the in-camera hearings an officers of the Commission stated that the section reads like of piece of "gobbledegook" and that it approaches the stated purpose, in a "very long winded way".

The Committee can appreciate the problems that these officers have in administering this legislation. If they have such an opinion, it is not difficult to see the lay cemetery trustee being unable to cope with its practical application.

The situation is further complicated by the fact that Section 27A was inserted in the principal act by means of the Cemeteries (Amendment) Act 1980 which was partially proclaimed on 1st July 1982.

This Act could only be proclaimed in stages after the passing of the Cemeteries (Amendment) (Commencement) Act 1982, a process which seems to have confused the internal processes of the Health Commission. The officers of the Cemeteries Section gave evidence to the effect that they were not aware of the insertion of Section 27A into the Act, until just prior to the situation at Preston becoming known to them in May 1984.

It appears that most cemeteries in the State are still unaware of the inclusion of the provision of the Cemeteries (Amendment) Act 1980. An approach by this Committee to the Minister suggesting that advice on the section's implications and interpretation should be sent to all Trusts, has brought the reply that this will be done after the opinion of the Crown Solicitor requested by the Committee, has been received and examined.

The major concern of the Trust since they were advised of the ban on construction of further vaults, has been how the existing empty vaults should be treated.

Presently, they are the property of two masons who have no rights over the ground in which they are installed and they have been prevented from selling them to the public. The Trust has a large number of vaults installed on its property, has insufficient reserves to buy them from the masons, and does not have an official fee for the sale of vaults in its scale of fees as approved by the Governor-in-Council.

The Trust has advised the Committee of its intention to purchase the vaults in lots of $20,000 in value, the maximum allowable under the Local Governmetn Act 1958, without calling for tender, while at the same time putting an application to the Governor-in-Council for approval of a fee for vaults.

The Committee has heard evidence that the capital investment by one of the monumental firms which has been frozen since the 13th June, 1984, is imposing severe financial strain on the business. It feels that it would be more satisfactory if the entire stock were pruchased at once, as the Trust estimated that its scheme could take six months to complete. This is seen to be an unnecessary cost on the two firms who were invited to undertake these works. The Committee has advised both the Trust and the Minister that an alternative financing scheme is available. The Councillors of the City of Preston, acting as the Trustees of the Preston Cemetery, have the ability to borrow under sections 8 and 8A of the Cemeteries Act 1958.

Advice indicates that this borrowing power can be exercised over and above the Council's borrowing powers under the Local Government Act.

The Trust has advised the Committee that it has decided to proceed with its original intention.

The advice requested by the Committee from the Crown Solicitor has been received and offers an interpretation of Section 27A in relation to the Preston situation. The Attorney-General who transmitted the advice, indicated that "offences may have been committed and that the practice described in the Health Commission officer's report involves significant potential for abuse of the Act's requirements". The Committee has decided to send the advice to the Minister of Health for further action.

The Committee has not been able to complete its investigation of the area referred to as having "significant potential for abuse", as the in-camera hearings directly preceded the preparation of this report. However, it intends to continue its examinatin of material presented at those hearings, particularly evidence on the charges made by monumental masons in relation to the percentage amounts paid as fees to trusts, in a future report on the monumental mason industry.

APPENDIX V

AUSTRALIAN FUNERAL DIRECTORS' ASSOCIATION

(Victorian Branch)

FIRST AND

SECOND SUBMISSION TO

MORTUARY INDUSTRIES

AND

CEMETERIES ADMINISTRATION COMMITTEE

July 1984

RESPONSES TO SPECIFIC QUESTIONS RAISED BY THE MORTUARY INDUSTRY AND CEMETERIES ADMINISTRATION COMMITTEE

QUESTION 1

Do you believe some form of control is needed over - a) Funeral Directors and b) Monumental Masons generally (possibly through registration/licensing; if so, why; if not, why?)

As a prime task, funeral directors must ensure that the bodies of deceased persons entrusted to their care are disposed of in such a manner that public health is protected, potentially vulnerable consumers are not disadvantaged and account is taken of religious, cultural and ethnic requirements and customs.

The AFDA (Vic.) believes that its members have fulfilled their responsibilities in respect to these tasks ethically, responsibly and to the satisfaction of consumers for many decades. This can be demonstrated by the lack of formal consumer complaint, responses to client surveys conducted by this Association and in direct feedback from consumers to individual members.

In the absence of any hard evidence to indicate otherwise, we see no compelling reason at the present time for "some form of control ... through registration/licensing". The only area of which we are aware that some sort of control may be needed refers to the manner in which some funeral directors handle monies held for "pay in advance" funerals. This matter is dealt with under question 5 in more detail.

If, however, the Committee of Inquiry wishes to discuss the matter further, this Association will be happy to be part of such discussions as it believes it is in a unique position to make a helpful contribution. We believe that such discussions would be assisted if the Committee was able to define what it means by registration/licensing and if it considered such questions as - who or what should be registered/licensed, for what purpose, and the likely ensuing benefits to consumers?

We would be alarmed if some form of registration/licensing was unnecessarily imposed on funeral directors by the establishment of a semi-government authority which may well result in a reduction of efficiency and a series of increased costs which inevitably would be passed on to the consumer.

This Association is not competent to comment on the situation in respect to monumental masons, other than to say that the scope of cemetery trust regulations seems adequate to control their activities. With the exception of the more recent events at the Melbourne General Cemetery, this seems to have been achieved over the years. Cemetery Trusts should be in a position to monitor the activities of monumental masons and as such we see no reason why any specific registration or licensing control is needed.

QUESTION 2

Whether some form of control is necessary over funeral directing premises (e.g. mortuaries, chapels, storage facilities).

Adequate controls over funeral directors' premises presently exist. We see no reason for additional controls in respect to Town Planning, Local Government and Health Commission regulations pertaining to the planning, construction and operating of funeral premises.

However, there is no regulation which requires funeral directors to provide (or have access to) refrigerated body storage facilities. The absence of such a requirement enables people without such facilities to operate to the possible detriment of public health. There are examples of such occurrences in Victoria and elsewhere.

The introduction of such regulations, controlled by the Health Commission, to correct this situation would receive the support of this Association.

QUESTION 3

What minimum standards or facilities should be provided by a funeral director?

This Association believes that appropriate standards for facilities and practice are necessary to enable funerals to be arranged and conducted in accordance with the needs and wishes of bereaved people and accepted community standards.

This Association believes that minimum standards should require funeral directors to provide or have access to:-

1. refrigerated body storage facilities
2. body preparation facilities
3. a viewing area
4. appropriate office space and/or suitable space in which to make funeral arrangements.

It is also desirable that where there is a demand, and it is economically feasible, a chapel should be provided.

In addition to minimum standards of facilities being available as set out above, this Association also believes that a minimum standard of training and knowledge is a desirable pre-requisite for those who wish to enter the funeral industry and for those working in it.

Whilst this Association has done well in providing a range of courses and other training for its members and staff, it believes that a more formalized course of studies leading to some form of certification is needed. Additionally, we believe that an authority such as the Small Business Development Corporation, a college of advanced education or the Technical and Further Education Board are appropriate authorities through which the development of such a course should be pursued.

QUESTION 3 (continued)

Accordingly, we believe that funeral directors, embalmers, certain emplcyees and people wishing to commence business as funeral directors ought to possess appropriate qualifications or be prepared to take steps to attain such qualifications to show that:-

1. They have knowledge of appropriate laws, e.g. Health Act and Cemeteries Act, etc.

2. They understand procedures and practices associated with arranging and conducting of funerals.

3. They possess some knc wledge of the nature of loss and grief and the various responses that people are likely to have and present at the time of bereavement.

4. They have knowledge of various religious and ethnic requirements.

SUBMISSION IN RESPECT TO LICENSING/REGISTRATION OF FUNERAL DIRECTORS

1.1 Introduction

At the time of discussing our May 1983 submission to the Mortuary Industries and Cemeteries Administration Committee, the committee requested this association to submit its views on licensing/registration. This submission has been prepared following that request.

First, this association wishes to reiterate the comments made in its May 1983 submission that "in the absence of any hard evidence to indicate otherwise, we see no compelling reason at the present time for some form of control ... through licensing/registration" (p. 21). This association's attitude regarding this matter remains basically unaltered, but it has taken the committee's request seriously and submits its views accordingly. It should be noted that what follows is not necessarily a recommendation but our most favoured option, should some form of licensing/registration be introduced.

To assist us in preparing this document, a number of licensing/registration boards, including the Optometrists' Registration Act 1958 and the Funeral Services Act 1980 (Ontario, Canada)., were studied.

1.2 Why Licence?

If some form of licensing/registration was considered to be necessary, then this association can identify only four reasons for such action:

1. To maintain public health;
2. To better protect and serve consumers;
3. To establish and maintain better professional standards of practice;
4. To ensure that people wishing to enter the funeral service industry will provide appropriate facilities and possess necessary qualifications.

Public health is, at present, adequately protected through various acts of Parliament and government regulations. This association is not aware of any occasion when public health has been placed at risk by any of its members' actions. An exception to this situation could occur in the event of any long term withdrawal of labour by workers engaged in various sections of the industry. Discussions with the Health Commission have been held to make preparations should such an eventuality occur.

This association has demonstrated in its submission of May 1983 that consumers have been well served and protected by its members over a longer period of time and would not see the necessity for additional controls to maintain such protection. Similarly, this association, through its various educational and training activities and by its members' voluntary adherence to its code of ethics, has made a major contribution to the establishment and maintenance of professional standards and practice. It is firmly contended that, without the work of this association in self-regulation and training, such standards as currently exist could not have been developed.

It is recognized however that should a member contravene the code of ethics or engage in conduct contrary to accepted standards of professional service then, because of constraints imposed on its powers by the Trade Practices Act, then there is little scope for the association to implement adequate disciplinary measures.

Additionally, the present lack of licensing and registration requirements enables unqualified or unprincipled people or those with inadequate facilities to enter the funeral service industry which could be detrimental to public health and not in the best interests of consumers. To prevent this occurring, therefore, it is recognized that some form of licensing/registration may be worthy of consideration.

There are dangers that licensing/registration of funeral directors could lead to restrictive regulations which must inevitably increase funeral directors' charges and reduce efficiency. Accordingly, we would reiterate our concern that any proposed licensing/registration requirements must not be unwieldly, expensive or unnecessarily burdensome to funeral directors and/or consumers. The committee would be aware that the Public Bodies Review Committee has expressed its concern at what appears to be an overabundance of government, quasi-government and semi-government authorities.

1.3 Envisaged System

If licensing/registration is introduced, this association would suggest a system which registers the business or company and licences certain people employed by the business or company.

1.4 Registration of Businesses

Appropriate standards for facilities and practice are necessary to enable funerals to be arranged and conducted in accordance with the needs and wishes of bereaved people and accepted community standards. The registration of any funeral business/company should require that the following minimum facilities be provided or be accessible:

1. refrigerated body storage facilities;
2. body preparation facilities;
3. a viewing area;
4. appropriate office space and/or suitable space in which to make funeral arrangements.

It is also desirable that, where there is a demand and it is economically feasible, a funeral chapel should be provided or available.

Businesses or companies seeking registration should also be required to demonstrate their financial viability and stability. This is regarded as being essential, specifically in respect of the protection of any monies paid to such companies for funeral arrangements made in advance of need.

1.5 Licensing of Personnel

The only personnel required to be licensed should be those whose work requires some training in a technical or professional skill such as embalmers and perhaps some people who interview clients for the purposes of arranging funerals.

Licences would not be necessary for personnel involved in general funeral duties such as drivers and funeral conductors. Such personnel are presently provided with the required training in these areas by their individual companies or by taking part in various activities provided by this association.

1.6 Embalmers

Individuals seeking to be licensed embalmers should be required to complete the course offered by this association which certifies people as members of the Australian Institute of Embalming. This should become the standard qualification for an embalming licence. Embalmers possessing qualifications from other licensing authorities, i.e. British Institute of Embalmers or New Zealand Embalmers' Association, could apply for a licence on the basis of their overseas training.

1.7 Funeral Arrangers

For people who arrange and interview clients for the purposes of arranging funerals and who wish to be licensed, a minimum standard of training and knowledge should be required. Such people should have:

1. Knowledge of appropriate laws, e.g. Health Act and Cemeteries Act, etc.;
2. An understanding of procedures and practices associated with arranging and conducting of funerals;
3. Knowledge of the nature of loss and grief, the various responses that people are likely to have at the time of bereavement and have a level of competence to enable them to deal with such situations appropriately;
4. Knowledge of various religious and ethnic requirements.

The AFDA's Funeral Management Summer School should be accredited as the required standard for any funeral arranger's licence. Both the AFDA courses, in conjunction with International Correspondence School and the AFDA Summer School, should be accredited as being standards for licences being issued and other training, experience or qualifications, e.g. Gippsland Institute of Technology, Death & Bereavement, might also be seen as acceptable licensing standards.

Whilst such a licence is a desirable qualification, it should not, in our view, be an essential requirement for all people who arrange funerals.

1.8 Registration Board

We would prefer a universal licensing/registration requirement rather than a graduated scale based on volume, location or facilities. Such an arrangement would enable any board the discretion and flexibility for consideration of volume of business, location and method of operating of each individual applicant.

Should a registration board be established, then this association would seek involvement with it to the degree that it is involved in determining its manner of operation and that members of this association were appointed to the board. We reiterate our concern in respect to the imposition of additional, and perhaps unnecessary, costs to consumers and believe that this could be curtailed if such a board were set up as follows:

1. That the number of members of any such board be no more than five, three of whom should be appointed or nominated from AFDA members.
2. That licensing/registration fees be minimal and that money collected in excess of operating costs of the board not form part of government revenue but be re-invested in the industry through training and education. This arrangement, we understand, works most satisfactorily with the Optometrists' Registration Board.
3. That people who were appointed to any board have a thorough understanding of the funeral service industry as well as other areas of expertise as may be deemed necessary.
4. That an appeals mechanism be incorporated in the regulations governing the operations of any such board.
5. That the board be vested with the powers of inspecting premises of funeral directors if and when it deems it necessary.
6. That the involvement of this association includes its executive director acting as registrar or its equivalent to the board.

It is understood that, should such a board be envisaged, it will be necessary to specify more fully its powers and operation. It is not the purpose of this submission to attempt to spell out these, but again we would stress the importance of this association being involved in the development of any proposed board.

1.9 Conclusion

We thank the committee for the opportunity to make this second submission and remain available to discuss this or any other matter with your committee as and when required to do so.

APPENDIX VI

PRIVATE CEMETERIES AND BURIAL PLACES APPROVED

BY THE FORMER COMMISSION OF PUBLIC HEALTH

* Axedale - Catholic Cemetery.

Bacchus Marsh - (Hopetoun) Catholic Cemetery (now closed).

Bacchus Marsh - Church of England Cemetery (now closed).

Ballarat - St. Patrick's Cathedral.

Bendigo - Poor Clare Sisters Catholic Cemetery.

Bendigo - Sacred Heart Cathedral Burial Crypt.

Box Hill - St. Paschal's College Cemetery.

Bulla - St. Mary's Church Cemetery (now closed - remains transferred to a Public Cemetery).

// Bundoora - Christian Bros. College Cemetery.

Byaduk - Lutheran Cemetery.

Campbellfield - Scots Presbyterian Church Cemetery.

Cape Clear - Rowe Family Cemetery.

Condah - Aboriginal Cemetery.

Coranderrk - Aboriginal Cemetery.

Corryong - T.W. Mitchell's Private Cemetery, Towong Hill.

// Croydon - Sacred Heart Monastery Cemetery.

Doncaster - Lutheran Cemetery.

Donvale - Carmelite Father's Monastery Cemetery.

* Eganstown - Catholic Cemetery.

Elaine - Serbian Orthodox Church Burial Vault.

Eurambeen (near Beaufort) - Beggs Family Private Cemetery.

Framlingham - Aboriginal Cemetery.

// Geelong (Newtown) - Convent of Mercy Cemetery.

Geelong (Lovely Banks) - Oblates of Mary Immaculate Cemetery (now closed - remains transferred to a Public Cemetery).

Geelong (Highton) - St. Gabriel's Passionist Monastery Cemetery (now closed - remains transferred to a Public Cemetery).

Geelong (Freshwater Creek) - Lutheran Cemetery.

PRIVATE CEMETERIES AND BURIAL PLACES APPROVED BY THE FORMER COMMISSION OF PUBLIC HEALTH

(continued)

Gladysdale - St. Benedict's Catholic Cemetery.

// Gnardenthal - Lutheran Cemetery.

// Greenmount - Catholic Cemetery.

* Hamilton - Lutheran Cemetery.

Katyil - Lutheran Cemetery.

Kennington (Bendigo) - St. Therese's Catholic Church.

* Kilmore - Catholic Cemetery.

// Lake Tyers - Aboriginal Cemetery.

Macedon - Marist Bros. College Cemetery.

// Melbourne - St. Patrick's Cathedral Burial Crypt.

Millgrove - Pallotti College Cemetery.

Northcote - Little Sisters of the Poor Catholic Cemetery.

Oakleigh - Good Shepherd Convent Cemetery (now closed - remains transferred to a Public Cemetery).

Sandon - St. Laurence O'Toole's Catholic Cemetery.

Scoresby - Christ the Priest Seminary Cemetery.

St. Helena - St. Katherine's Church of England Cemetery.

Sunbury (Rupertswood) - Salesian College Cemetery.

Tabor - Lutheran Cemetery.

Tarrawarra - Notre Dame Abbey Cemetery.

Templestowe - Christ the King Seminary Cemetery.

Thomastown - Luthern Cemetery.

Please note: All burials at private cemeteries are subject to special permit by the Health Commission.

// Burials conducted very rarely.

* Burials conducted on a fairly regular basis.

APPENDIX VII

ADMINISTRATION OF CEMETERIES AND CREMATORIA IN OTHER STATES

NEW SOUTH WALES

New South Wales has three types of cemeteries -

(a) Public cemeteries managed by Councils;
(b) Public cemeteries managed by Trustees; and
(c) Private cemeteries managed by either Trustees, churches or private companies

Private cemeteries and crematoria operated by private companies are generally outside Government control although they are expected to conform with general health standards. Where private crematoria are located within the grounds of a public cemetery the operators of the crematoria are expected to contribute an amount fixed by the Governor-in-Council towards the maintenance of that cemetery. (Provided under the Public Health Act 1902-1972). 4 private cemeteries are located in the metropolitan area of Sydney.

Cemeteries operated by Councils are under the control of the Local Government Department subject to the Local Government Act 1919-1972 Sections 445-452L make provisions for Councils to control public, and in certain circumstances, private cemeteries, to establish crematoria, to manage public mortuaries and to licence funeral directors. Section 518(2)(b) of the Act make provision for the sale of cemetery land. The majority of all cemeteries fall into categories (a) and (b).

There is no overall administration by the Local Government Department of country cemeteries as some are controlled by local Councils and others by Trustees or private companies. Cemeteries not subject to the Local Government Act are covered by the Lands Department under the Crown Lands Consolidated Act 1913-1972, Section 24, which provides for the dedication of crown lands for the interment of the dead and for charging fees in relation to burial of the dead. This legislation covers 8 metropolitan cemeteries and one cemetery in Lithgow and one in Newcastle.

The Lands Department also administers the Necropolis Act 1902, which provides for the administration of the Rookwood Cemetery, for appointment of Trustees for each denominational section, for the powers and duties of Trustees and the establishment of a joint committee representing the Trustees of the various denominational sections.

New South Wales (Cont'd)

Most crematoria in New South Wales are privately owned and operated and are located on either private or Crown Land.

The Public Health Act 1902-1972, Parts IV and 6A provide for the establishment, and operation of crematoria and fees for cremation. The part of the Act providing for crematoria contribution towards the upkeep of a cemetery if a crematoria is situated within cemetery grounds also applies to the Necropolis Act, except where stated otherwise. Part 6A of the Act provides for licencing of undertakers, registration of mortuaries and deals with embalming and exhumation.

The Report of the New South Wales Prices Commission which was published in 1977 noted that the system of fragmented control and fee setting in New South Wales created confusion and resulted in great differences in the price and profitability in the running of cemeteries. All three Departments, Health, Lands and Local Government, each were involved in the regulation of burial and cremation fees in certain areas although no Department appeared to have the proper machinery or expertise to set these fees on a correct costing basis. The procedures for fixing fees and charges which were subject to Ministerial approval were also found to be inefficient and causing delay in recommending cost increases.

With respect to cremation, about 60% of all dead are cremated in New South Wales.

New South Wales has a Cemeteries and Crematoria Association which was formed in 1965. This Association represents private companies and trusts whose Trustees are appointed by the Lands Department. Association members comprise all the major metropolitan and rural cemeteries and crematoria not under the control of Local Government.

QUEENSLAND

Queensland has a total of 388 recorded cemeteries. Of these 346 are considered "public cemeteries" which means that these cemeteries were established on land reserved under the Land Acts 1962 to 1965 The remaining 42 cemeteries are referred to as "private" cemeteries because they were established on "freehold land". 95% of these are cemeteries on "freehold" church grounds.

Of the public cemeteries 270 are controlled by Councils (Local Authorities) under the Local Government Act 1936 to 1965. This includes 15 public cemeteries controlled by the Brisbane City Council under the City of Brisbane Act 1924 to 1960. These Acts are administered by the Local Government Department. 76 of the public cemeteries are controlled by private Trustees subject to the Cemeteries Act 1865 and the Cemeteries Trustees (Declaratory) Act 1966. This includes cemeteries in the towns of Townsville and Bundaberg. Both Cemetery Acts are administered by the Lands Department. This Department is largely responsible for the acquisition and development of land for new cemeteries and surprisingly also for authorisation of exhumation.

Private cemeteries are generally administered by churches or by Trustees appointed by these churches. This group includes Nudgee cemetery which contains many mausolea as its ground in parts is unsuitable for earth burial. It also includes 8 cemeteries in the Brisbane area. One other cemetery in Brisbane is controlled by the Commonwealth.

Private cemeteries are not subject to any Act it appears and this from evidence seems to create some confusion as to what the powers and duties of Trustees of private cemeteries are.

There also exists the Cremation Act 1913 to 1978 which deals with the establishment of public and private crematoria and the conditions under which cremations may take place. To date there are only privately operated crematoria in Queensland but the City of Brisbane Council now intends to establish a public crematoria. Private crematoria are represented by an organisation called Queensland Cremation Limited.

Cemeteries in South Australia fall into three major groups.

1. Cemeteries controlled by the State Government or Local Government Authorities.
2. Cemeteries controlled by Trusts.
3. Cemeteries controlled by Churches.

Those in the first group are mainly local government operated cemeteries and are provided for under the Local Government Act 1934 Sections 287(1)(g), 383(1)XXI, Part XXX Cemeteries 585-596 and 666C, 667XXII and the Local Government Act 1934-1941 - General Cemetery Regulations.

The Act, which is committed to the Minister for Local Government, provides for the establishment, care, control, management and closure of public cemeteries and also for the establishment, care, take-over and closure of private cemeteries by Councils. It also empowers Councils to expend its revenue on any public cemetery within or outside Council boundaries irrespective of its ownership. Councils are also empowered to construct, purchase, establish and manage crematoria and mortuaries.

The powers of Councils also extend to cemeteries operated by trusts or churches in that the Council may inspect any non-Council cemetery and direct that work be carried out at neglected cemeteries or where that direction is not followed the Council may enter and do the necessary work itself.

Each Council sets its own fees and no approvals from the Minister or Governor-in-Council are required.

The General Cemetery Regulations provide for the "controlling authority" (the Council, trustee or other persons or body having control of the cemetery) the power to appoint a Curator who is responsible to the authority for the care, control and management of the cemetery. The Regulations also provide for other matters of cemetery management in relation to graves, monuments, maintenance, record keeping, certification requirements prior to burial and exhumation or removal of a body subject to a licence by the Attorney-General.

The General Cemetery Regulations also apply to all other non-Council cemeteries administered by trustees or other bodies which are not covered by other specific legislation.

Exceptions are the Enfield General Cemeteries Act 1944 which is also administered by the Minister of Local Government and the West Terrace Cemetery Act 1976 which is committed to the Minister of Public Works.

The Enfield General Cemeteries Act 1944 provides for the constitution and membership of the trust and for the powers and duties of trustees with respect to the care, control and management of the cemetery. The trust is also empowered to erect, maintain and operate a crematorium subject to the provisions of the Cremation Act 1891.

The West Terrace Cemetery Act 1976 provides for the cemetery to be vested in the Minister of Works Corporation, a body constituted by the Commissioner of Public Works Corporation Act 1917. It also sets out the powers of the Corporation with regard to the management and use of the cemetery and for the closing of any portion of the cemetery by proclamation and for future management of closed portions.

South Australia (Cont'd)

The South Australia Cremation Act 1891 is administered by the Attorney-General and provides for the establishment of crematoria and for cremation procedures. The establishment of a crematoria is subject to the approval of the Central Board of Health for the site, plans and equipment of the proposed crematorium and the Act sets out the process of application for a licence to establish a crematorium. The Act also deals with the certification required before cremation can take place and for regulations to be made with respect to crematoria operation and disposal of ashes, the condition under which funeral directors must operate including type and size of coffins to be used and other details related to the process of disposal of a body by cremation.

The Minister of Health is responsible for the Health Act 1935 which make provisions for body storage in places other than public mortuaries or premises under the jurisdiction of the Coroner or the Police and empowers Central Board of Health Officers to direct burial or cremation of bodies within a specified period where storage is offensive and a health risk or where infectious disease is involved. The Act also deals with the limitations of the movement of infected bodies.

Regulations under the Act deal with disinfection of vehicles used for conveying infectiously diseases bodies and for provision of mortuaries in private hospitals if deemed necessary.

In 1983 the Attorney-General established a Committee in South Australia to examine and assess legislation relating to the disposal of human remains in South Australia. This Committee reported in August 1984.

In South Australia currently only Centennial Park Cemetery has a limited tenure of 50 or 75 years which was introduced in 1936 and has become accpeted to the general community, most choosing the shorter (and cheaper) period of 50 years. All other rights of burial at other cemeteries under the Local Government Act are granted for a period of 99 years.

WESTERN AUSTRALIA

Western Australia has 177 operating cemeteries and an estimated 200 closed cemeteries or disused burial areas. The administration of cemeteries is provided for in the Cemeteries Act 1897-1966. This Act is administered by the Minister for Local Government and the Local Government Department.

Cemeteries under the Act are either managed by local authorities as corporate entities or by not less than three trustees. The Governor-in-Council has the power to appoint individuals or local authorities to be trustees of cemeteries. The Act of 1897 was mainly modelled on the Victorian Cemeteries Act of 1890 and the provisions of the Act are similar to those of the current Victorian Cemeteries Act except for minor amendments and the power of trustees in Western Australia to grant exclusive rights of burial either in perpetuity or for a specified term which most commonly is either 25 or 50 years at the major metropolitan cemeteries.

The Western Australian Cemetery Act Review Committee Report of 1982 recommended that the 1897 Cemetery Act be repealed and new legislation be drafted.

The new legislation is to incorporate provisions for specific cemeteries now covered by separate Acts and change existing provisions as follows

- all burials to be in public cemeteries unless otherwise authorised by the Minister
- funeral directors to be licenced by trustees with a right to appeal to a court of competent jurisdiction in case of refusal to issue or cancellation of a licence
- trustees to be able to administer more than one cemetery as a body corporate or board
- trustees to be appointed for a period of 5 years and the maximum age limit for trustees to be 70 years unless the Minister extends the appointment in special circumstances. Not less than three and not more than 7 trustees to be appointed for each cemetery trust other than a local authority
- trustees to re-develop old areas in cemeteries and convert them to memorial parks subject to certain procedures being met
- trustees to have power to amend right of burial in perpetuity to grants of a specified term
- uniform standard and model by-laws for cemeteries be incorporated in new legislation
- trustees to have power to issue infringement notices for minor offences against the Act and by-laws
- financial and accounting provisions of Act to reflect modern practices

- cremation of indignant persons as an alternative to burial

The recommended new legislation has not come into operation to date.

Crematoria in Western Australia are administered by the Public Health Department under the Cremation Act 1929. There are only 3 crematoria in Western Australia at present, all operated by non-profit organisations (e.g. trustees or local authorities).

The Cemetery Act Review Committee in considering aspects of the Cremation Act recommended only minor changes to this Act including cremation of still-born children as an alternative to burial.

The Committee also recommended for a certificate of medical attendant to be given by a medical practitioner attending during the deceased's last illness.

84180/84—8

TASMANIA

Tasmania has two types of cemeteries, public cemeteries, which operate under legislation controlled by the Government and private church cemeteries, which after Ministerial approval for their establishment has been granted, operate outside any of the existing cemetery legislation. Private cemeteries are none the less expected to operate within health standards set for public cemeteries.

Cemetery legislation with respect to all public cemeteries other than those two administered by the Southern Regional Cemetery Trust is incorporated in the Local Government Act 1962, Sections 487-527. This Act is administered by the Minister for Local Government.

Although the Minister responsible for Local Government has legislative responsibility for these cemeteries no overall control is exercised over them by a Government Department.

The Corporation (Council) of each Municipality independently manages its cemeteries within the guidelines set in the Local Government Act.

The two cemeteries in the Southern Region located at Hobart and Kingston are administered by the Southern Regional Cemetery Trust (formerly the Hobart Cemetery Board established under the Hobart Corporation Act 1963).

The Southern Regional Cemetery Trust is constituted under the Southern Regional Cemeteries Act 1982 which is under the control of the Premier. This Act provides for the administration of the two cemeteries by six Trustees of which one is nominated by the Minister (Premier) to be Chairman, one is nominated by the Under Treasurer and the other four are nominees of each of the four Municipalities and Cities in the Southern Region (Hobart, Glenorchy, Kingsborough and Clarence).

The Trust is an independent corporate body and is not subject to any direct control by either the Premier or the Premier's Department. It is responsible to the Minister of Health with respect to the operation of its crematoria.

The Minister for Health administers the Cremation Act 1934-38. This Act provides for the establishment and operation of crematoria and for the setting of fees for cremation for all crematoria other than the one managed by the Southern Regional Cemetery Trust. There are only two crematoria in Tasmania to date - one in Hobart and one in Launceston.

The role of the Health Commission with respect to burial and cremation is confined to setting guidelines for and approving the establishment of cemeteries, crematoria and the operation of cremation furnaces. The Health Department is also responsible for exhumation and the setting of general health standards relating to burial.

AUSTRALIAN CAPITAL TERRITORY

Cemeteries in the Australian Capital Territory are covered by the Cemeteries Ordinance 1933. This legislation provides for the establishment of private and public cemeteries on land belonging to the Commonwealth. It also provides for setting aside portions of such cemetery for the purpose of a general cemetery, for religious denominations and for the Naval, Military or Air Forces of the Commonwealth.

The Ordinance is administered by the Minister of State for Territories and Local Government. It was last amended in 1983 to repeal Sections relating to Bank accounts, accounting, auditing and annual reports of trustees.

In contrast to other State legislation most of the provisions relating to the general administration of a cemetery are covered in the Regulations under the Cemetery Ordinance.

Crematoria in the Australian Capital Territory are provided for in the Cremation Ordinance 1966 which is administered by the same Minister. Crematoria can be operated by private and public bodies on application for a licence which is approved by the Minister.

This legislation deals with the certificates and approvals required before cremation takes place and sets out the powers of the Health Authorities to order cremations in case of infections and notifiable disease. It also gives the Attorney-General power to absolutely or temporarily prohibit cremation in certain circumstances where specific conditions have not been complied with.

It is interesting to note that the applications for cremations and other documents related thereto which the Cremation Authorities are to maintain under the Ordinance can be destroyed after 20 years at the authorities' discretion.

The Ordinance also provides for inspection of crematoria premises, facilities and records by an inspector appointed by the Minister. These provisions are not made in Cremation legislation in other States.

APPENDIX VIII

HEALTH COMMISSION OF VICTORIA

PUBLIC HEALTH DIVISION

DRAFT SCALES OF FEES FOR SMALL TO AVERAGE COUNTRY CEMETERY

In pursuance of the powers conferred upon them by the Cemeteries Act 1958, the Trustees of the Public Cemetery hereby make the following Scale of Fees, which shall come into operation upon publication in the Government Gazette, and from and after such publication every Scale of Fees heretofore made by the said Trustees shall be and is hereby rescinded to the extent to which it conflicts with this scale: -

PUBLIC GRAVES

Interment in Grave without exclusive right - Stillborn Child	$ 25.00
Interment in Grave without exclusive right - Others	$ 45.00
Number Peg or Label	$ 10.00

PRIVATE GRAVES

Land, 2.44m x 1.22m	$ 70.00
Own selection of land (extra)	$ 50.00

SINKING CHARGES FOR PRIVATE GRAVES

Sinking grave 1.83m deep	$100.00
Each additional 0.3m	$ 20.00
Sinking oversize grave	$ 35.00
Cancellation of order to sink (if commenced)	$ 20.00
Reopening grave (no cover)	$100.00
Reopening grave (with cover)	$110.00

MISCELLANEOUS CHARGES

Interment fee	$ 30.00
Interment outside prescribed hours, or on Saturdays, Sundays or Public Holidays or without due notice	$ 40.00
Certificate of Right of Burial	$ 5.00
Number Plate or Brick	$ 10.00
Permission to erect a headstone or monument	5% of cost with a minimum of $10.00
Permission to construct a brick grave or to erect any stone kerb, brick tile-work or concrete	5% of cost with a minimum of $10.00
Exhuming the remains of a body (when authorised)	$200.00
Interment of ashes in a private grave	$ 30.00
Memorial Wall Niche and Plaque	$100.00

PLEASE DELETE ANY FEES THAT YOUR TRUST CONSIDERS TO BE INAPPLICABLE TO YOUR CEMETERY.

JANUARY 1983

HEALTH COMMISSION OF VICTORIA

PUBLIC HEALTH DIVISION

DRAFT SCALES OF FEES FOR LARGER COUNTRY CEMETERY

In pursuance of the powers conferred upon them by the Cemeteries Act 1958, the Trustees of Public Cemetery hereby make the following Scale of Fees, which shall come into operation upon publication in the Government Gazette, and from and after such publication every Scale of Fees heretofore made by the said Trustees shall be and is hereby rescinded to the extent to which it conflicts with this scale: -

PUBLIC GRAVES

Interment in grave without exclusive right - Stillborn Child	$ 30.00
Interment in grave without exclusive right - Others	$ 60.00
Number Peg or Label	$ 10.00

PRIVATE GRAVES

Land, 2.44m x 1.22m	$110.00
Own selection of site (extra)	$ 50.00

SINKING CHARGES FOR PRIVATE GRAVES

Sinking grave 1.83m deep	$100.00
Each additional 0.3m	$ 20.00
Sinking oversize grave	$ 35.00
Cancellation of order to sink (if commenced)	$ 20.00
Reopening grave (no cover)	$100.00
Reopening grave (with cover or kerb)	$110.00

MISCELLANEOUS CHARGES

Interment fee	$ 30.00
Interment not in the prescribed hours or on Saturdays, Sundays or Public Holidays or without due notice	$ 40.00
Late fee (per half-hour or part thereof in excess of first fifteen minutes)	$ 10.00
Certificate of Right of Burial	$ 5.00
Number Plate or brick	$ 10.00
Annual maintenance (single grave) if required by holder of Right of Burial (optional)	$ 30.00
Permission to erect a headstone or monument	5% of cost with a minimum of $10.00
Permission to construct a brick grave or to erect any stone kerb, brick tilework or concrete	$ 20.00
Grave renovations or additional inscription	$ 10.00
Exhuming the remains of a body (when authorised)	$200.00
Interment of ashes in a private grave	$ 30.00
Memorial Wall Niche and Plaque	$100.00

PLEASE DELETE ANY FEES THAT YOUR TRUST CONSIDERS TO BE INAPPLICABLE TO YOUR CEMETERY.

LAWN SECTION : 2.44m x 1.22 m $300-00

GUIDELINES

FOR

THE ADMINISTRATION OF CEMETERIES

Issued by the
HEALTH COMMISSION OF VICTORIA

CONTENTS

DUTIES AND LIABILITIES OF TRUSTEES

It is a Trustee's duty to administer the cemetery in accordance with the powers set out in the Cemeteries Act and Regulations.

1. The duties and liabilities of trustees are well expressed in the following extract from Jacob's Law of Trusts (Australian 4th Edition): -

> ".....trustees should adhere strictly to the terms of their trust and in carrying out their duties as trustees they must act diligently and prudently in regard to the business of the trust. From this it follows naturally that any departure from the terms of the trust and any negligence, whether of act or omission in the performance of the duties of the trust, will be a breach of trust. A trustee will also be liable for breach of trust if his co-trustee or co-trustees do acts in contravention of the terms of the trust instrument or if any trustees neglect their duties and loss falls upon the trust estate if the loss may be said to have occurred through his own wilful default and neglect. For example, it is a breach of trust to invest trust moneys in a contributory mortgage, to keep trust moneys uninvested for an unnecessarily long time, or to leave them longer than is necessary in the hands or under the control of a co-trustee or third party, to be dilatory in calling in moneys owing to the trust estate, to invest trust funds in securities not authorised by law or by the terms of the trust instrument as proper investments, to lend trust moneys to a co-trustee."

2. Vested pecuniary interest by a trustee -

Generally, no trustee should serve to gain any direct or indirect pecuniary interest from his position of trust. If any such pecuniary interest becomes evident and if the trustee is present at a meeting of the trust or any committee of the trust at which any such business or dealings are being considered, he shall at the meeting as soon as possible disclose his interest and shall not remain in the room in which the meeting is being held during any consideration or any question with respect thereof.

3. Vacancies on the Trust -

When vacancies occur on a trust, or where the trust wishes to appoint a further member(s), a replacement should be sought from the local community. It is not mandatory for trustees to be nominated from local church groups. Instead, trustees should be nominated on the basis of their particular abilities and skills which could be of assistance to the Trust.

DUTIES AND LIABILITIES OF TRUSTEES: (Cont'd)

Applications for appointment of Trustees should be forwarded to the Health Commission of Victoria on the appropriate "Application for appointment as a Trustee" form. A sample Application form is attached as Appendix 2. Trustees are appointed by the Governor in Council for a five-years term and are not eligible for appointment or re-appointment once they have reached the age of 72 except that on reaching the age of 72, trustees may be re-appointed on a yearly basis until the age of 77 years on the recommendation of the Trust subject to the approval of the Governor in Council.

Meetings -

The Trustees shall conduct meetings to transact business. At least one formal meeting must be held each year with further meetings as necessary. A quorum of three members shall be necessary for each such meeting and decisions shall be resolved by the majority present with the Chairman having a casting vote where necessary. At each annual meeting, a Chairman and Secretary should be appointed. Proper minutes should be kept of each meeting. If considered necessary, a Treasurer may be appointed.

Appointment of Staff -

The Trust must appoint an Administrator, Manager or Secretary to attend to routine business matters of the Trust. This person may be paid a salary or wage commensurate with his duties and the financial position of the Trust. A Trustee may be appointed as an Administrator, Manager or Secretary, on condition that he does not receive payment other than for expenses incurred. The Trust should also appoint such other staff (permanent, part-time or casual) as it considers necessary to administer the cemetery efficiently within the financial constraints of the Trust.

Authorised Officer -

The Cemeteries Act provides for the authorisation of officers by the Trustees. This enables the Trust to authorise particular persons, who need not necessarily be trustees, to permit a grave to be dug, burial or cremation to take place and to approve of plans submitted of monuments to be erected within the cemetery. The authorised officer is empowered to withhold his permission to prevent the erection or placing of any monument which appears to him to be inappropriate, unsafe or dangerous and to refuse a permit for a grave to be dug and a burial or cremation to take place where some good reason becomes apparent.
An application for memorial work is attached as Appendix 3.

BANK ACCOUNTS:

The Trust should open such bank accounts (cheque, savings or deposit) as it considers necessary for its day to day operations.

A cemetery trust is entitled to open an interest bearing cheque account at most Banks. However, some Banks do not automatically open such an account and this matter should be discussed with the Bank's Manager at the time the account is opened.

The Trust should authorise three officers (e.g. 2 Trustees and the Secretary) to be the Trust's Cheque Account Signatories with any two to sign.

FINANCIAL INSTITUTIONS DUTY

The Financial Institutions Duty Act 1982 imposes a duty on all deposits (including transfers between accounts, subscriptions, loan repayments and other credit entries) lodged with financial institutions (Banks, Building Societies, Credit Unions, etc) on and from 1 December 1982. This duty is being charged at a rate of .03 per cent (3 cents per $100.00), with a ceiling of $300 in duty for any one receipt. Banks have been passing this amount on to customers either at the time of receipt by the bank or by debit to customers' accounts.

The Health Commission of Victoria has successfully negotiated the exemption of all Victorian public cemetery trusts from this duty under Section 25 (12)d of the Financial Institutions Duty Act 1982.

To obtain an exemption certificate for your Trust's accounts, application must be made to:-

The Commissioner,
Financial Institutions Duty,
436 Lonsdale Street,
MELBOURNE, 3000

The Commissioner for Financial Institutions Duty will then issue you with an exemption certificate which should be presented to your bank or other financial institution.

BANK ACCOUNT DEBITS TAX

The Commonwealth Government's Bank Account Debits Tax Administration Act 1983 imposes rates of duty on amounts drawn from cheque accounts unless a Certificate of Exemption from tax has been issued by the Commissioner of Taxation.

The Health Commission of Victoria has been negotiating the exemption of cheque accounts operated by Cemetery Trusts from this Bank Account Debits Tax.

However, the Deputy Commissioner of Taxation has decided that under Section 3 of the Act, Cemetery Trusts are not exempt organizations and must pay the rates of duty as prescribed. The appropriate amounts will be automatically deducted by your Bank.

SALES TAX

Under the provisions of Item 78 of the Sales Tax (Exemptions and Classifications) Act, First Schedule, Cemetery Trusts are entitled to exemptions from sales tax. In order to claim this exemption, a Certificate to this effect must be obtained from the Australian Taxation Office, 350 Collins Street, Melbourne, 3000.

INVESTMENTS

The Trust should not allow trust funds to remain uninvested or to leave them in the hands or under the control of a co-trustee or third party. Trust funds must be invested only in accordance with the Trustee Act. Some of the more often used approved investments are: -

1. Commonwealth or State Government securities.

2. Debentures or Inscribed Stock issued by any Victorian municipality or Securities issued by the Geelong Waterworks and Sewerage Trust, State Bank, Metropolitan Fire Brigades Board, Country Fire Authority, Western Metropolitan Market Trust, and others similar.

3. Term or Fixed deposit with a bank.

4. Bank certificates e.g. negotiable, convertible.

5. Building Societies approved by the Office of Management and Budget under the Trustee Act 1958.

A full listing of authorised investments is detailed in Section 4 of the Trustee Act 1958.

SALARIES

Salaries for your Trust's employees are subject to a Determination of a Conciliation and Arbitration Board. This Award sets out the minimum amount payable.

If you can not ascertain from the Award the salary payable to your Trust's employees, this may be ascertained from the Ministry of Industrial Affairs, 31 Spring Street, Melbourne. (Telephone 651.3733).

Salaries for your employees may be varied periodically by changes in the Award.

In accordance with the requirements of the Cemetery Employees Conciliation and Arbitration Board salaries must be paid at least every week. Deductions must be made for Income Tax, Superannuation,etc.

Salaries and wages cheques should be drawn and sealed in a salary envelope, of the sort available from most banks. It is preferable to use a cheque but the use of cash is acceptable and may be mandatory under certain awards.

The Secretary/Manager, or a responsible member of the Trust should hand the pay envelope to each employee personally and a signature should be obtained in a pay record book.

Administrators must ensure that payroll tax is paid, if applicable to their cemetery.

CEMETERY EMPLOYEES AWARD

Employment of your Trust's staff is subject to wages and conditions set out in the Cemetery Employees Award.

This Award is negotiated by the Conciliation and Arbitration Board on which there are three cemetery representatives. These representatives are nominated by The Necropolis, Springvale, Fawkner Crematorium and Memorial Park Trusts and the Cemeteries and Crematoria Association of Victoria. Any queries on the Award may be directed to any of the representatives of these Trusts or the Association.

It should be noted that it is your responsibility as an employer to have displayed a copy of the current Award applicable to each category of employee at your Cemetery.

Copies of Awards and variations thereto are available from:

Ministry of Industrial Affairs,
31 Spring Street,
MELBOURNE, Victoria. 3000

Telephone: 651 3733

or,

The Government Printing Office;

or, a subscription may be arranged with the: -

Government Printing Office,
41 St. Andrew's Place,
EAST MELBOURNE, Victoria. 3002

Telephone: 651 2353

which will post you copies of all variations to a particular Award during the year for a small charge.

SUPERANNUATION

Under the provisions of the Local Authorities Superannuation Act 1958, it is compulsory for all permanent employees of public cemeteries to be members of a Local Authorities Superannuation Scheme.

The following types of benefits exist: -

(a) Retirement at age 65;

(b) Early retirement between age 60 and 64;

(c) Death;

(d) Disability;

(e) Resignation.

Each type of benefit has a Lump Sum and a Pension component and contributions to the funds are made by employee and employer. The employing authority pays all contributions to the Local Authorities Superannuation Board yearly in advance on 1st March and deducts the employee's contribution from salaries or wages over the course of the year.

For further details on benefits available, contributions and other superannuation matters contact: -

Local Authorities Superannuation Board
Rigby House,
15 Queens Road,
MELBOURNE, 3004

Telephone (03) 267-1444

LONG SERVICE LEAVE

Long Service Leave is payable in accordance with the Labour and Industry Act 1958 (as amended), the present situation being that an employee shall be entitled to thirteen weeks Long Service Leave after fifteen years continuous service with the one employer. (Note: Some variation applies where service commenced prior to 1st January, 1965). In accordance with the Act, Long Service Leave is payable at the rate of pay applicable when the Leave is taken and is applicable to your permanent staff.

A pro rata entitlement accrues to the employee if you terminate his/her service after ten years continuous service other than for serious and wilful misconduct or if after that time he/she dies, or resigns on account of illness, incapacity or any pressing domestic necessity.

Long Service Leave continues to accrue after the initial fifteen years, the entitlement being 4-1/3 weeks leave on completion of each additional five years continuous service with the same employer.

It remains the responsibility of the employer to pay the employee in respect of Long Service Leave, in accordance with the Act, usually prior to the employee proceeding on leave.

Inquiries relating to Long Service Leave should be directed to the Ministry of Industrial Affairs, 31 Spring Street, Melbourne (Telephone 651.3733).

TENDERS:

Except in cases of emergency, or in the case of a contract with any public statutory corporation or body, before any contract for the execution of any work or the purchase or sale of any goods, machinery, equipment or material costing an amount specified in the Cemeteries Regulations is entered into by the trustees, at least seven day's notice must be given in some newspaper generally circulating in the neighbourhood expressing the purpose of the contract and inviting tenders.

The trustees should accept the most advantageous tender but need not necessarily accept the lowest tender. Where considered desirable,security to the extent of say 10% of the stated contract price for the proper performance of the contract may be taken from the successful tenderer.

The requirement as to the calling of tenders does not apply to a contract entered into by the trustees with a municipality or with a public statutory corporation or body.

In purchasing any goods, machinery or material, the trustees must give effective and substantial preference to those manufactured in Victoria.

The Trust must ensure that the necessary facilities and safeguards are provided to enable complete secrecy and security until the date and time of opening tenders received.

AUDIT:

To ensure that the affairs of the Trust are in order it is necessary to have the records audited each year. This procedure protects the members of the Trust and its administrative staff.

Each year, the Trust should appoint its auditor for the forthcoming year.

The person appointed to undertake the Audit should be a qualified Accountant, or other suitably qualified person independent to the Trust. An audit fee should be negotiated.

The Auditor will require that all payments have been properly authorised in accordance with the Trust's resolutions and will require access to the various bank accounts and investments held by the Trust. The Auditor should assist the Trust to consider such matters as the adequacy of the insurance cover on the buildings and equipment, that there are current policies of insurance covering Workers' Compensation, the adequacy of the allocations for Cumulative Sick Leave and Long Service Leave and many other facets apart from the accuracy of the accounting for receipts and payments.

A qualified Accountant who certifies that the affairs of the Trust appear to be in order may be liable to damages for negligence if there have been defalcations which he could reasonably have been expected to uncover.

A copy of the audited statement duly certified by the Auditor must accompany the annual abstract of accounts.

PREPARATION OF ANNUAL ACCOUNTS:

The Financial Year runs from 1st October to 30th September and at the end of this period the Trust's annual financial statement must be prepared and an annual abstract of the Trust's accounts must be submitted to the Health Commission of Victoria no later than 30th November of the same year.

The Abstract of Accounts must be signed by the Chairman and the Secretary/Manager. A copy of the audited statement duly certified by the Auditor must accompany the abstract of accounts with other information as detailed (e.g. names of trustees, number of burials held, number of gravesites sold, number of gravesites remaining, works proposed for the forthcoming year etc.) A sample Abstract of Accounts form is attached as Appendix 4.

INSURANCES:

Trustees may become personally liable if they do not insure. Therefore, the Trust is strongly advised to seek appropriate and competent advice from the Insurance Industry. The following insurances are important and must be considered. A review of all insurances should be made at least every three years.

1. Workers' Compensation Insurance -

   An employer is required by the Workers' Compensation Act to insure in respect of his liability to his employees under that Act and at Common Law. The Act provides that certain benefits are payable to an employee who is injured or becomes ill as a result of employment, or, to his representatives in the event of death. In addition it provides for the payment of medical and hospital costs resulting from such injury or illness, and, in the event of a consequent claim for damages at Common Law, payment of the damages, if any, and the resultant legal costs.

   The premium is assessed on the wages actually paid to the employees, including cleaners and gardeners, and it may be payable even though such persons are employed on a contract basis.

   Many Wages Board determinations now provide for payment of full award pay to the employee who is or deemed to be totally incapacitated within the meaning of the Workers' Compensation Act and arising from an injury for a period of twenty six weeks, or, in some determinations, up to thirty nine (39) weeks.

   The liability to which the Trust may become liable under this provision may be insured as an extension to the Workers' Compensation Insurance Policy for a small additional premium.

2. Personal Accident Insurance -

   As there is no "Contract of Service" for persons who attend the cemetery to assist on working bees, etc., they are not covered by the Workers' Compensation Insurance Policy. However as these people are working for the benefit of the cemetery in a voluntary capacity, the Trust would certainly have a moral obligation to them in the event of an accident. Such an obligation could be met by obtaining a Personal Accident policy on a group basis to provide a weekly benefit, or, a lump sum payment in the event of death.

   A similar Personal Accident policy could also be taken out to cover the Trustees.

3. Public Risk Insurance -

   Public Risk insurance covers the Trust against accidents and injuries caused to members of the public while they are within the confines of a cemetery reserve(s) under the Trust's control.

3. Public Risk Insurance. (Cont'd)

The need for such a policy was clearly demonstrated in 1973, when a young child was killed because he accidentally dislodged a large monument at a Victorian cemetery. Fortunately for the Cemetery Trust, no claim for compensation was lodged. The need for such a policy becomes obvious when one considers the number of unstable monuments and the growing number of cemetery visitors.

The Health Commission of Victoria has, in conjunction with the Department of Conservation, Forests and Lands, negotiated a bulk public risk cover for all public cemeteries.

The insurance policy has been taken out through the State Insurance Office and automatically covers all public cemetery trusts. The policy covers standard public risk items and affords a maximum cover of $5 million, on any one claim. When the present policy expires, a renewal will be negotiated for a further period.

A nominal premium is payable for this policy and your Trust will be notified of the amount due. The premium must be paid to the Lands Division office in your Region. A listing of all Lands Division Offices is given on Appendix 5.

All claims made under the policy must be forwarded to the Health Commission of Victoria for consideration.

4. Other Insurance -

Depending on circumstances, the Trust should also insure buildings, fences, equipment etc. against fire, burglary, damage etc.

RECORD KEEPING

Record keeping is a most important function of the cemetery trust and proper care must be taken to ensure: -

(a) that records are accurately and neatly entered;

(b) that records and other important documents are stored in a safe, fireproof place. It is recommended that a photocopy or transcription be made of the Trust's burial register. The copy should then be used for day to day dealings, including searching, while the original is kept in a safe place.

The following records must be kept: -

1. Minute Book -

A minute book can be obtained from a local printer or newsagent and should be used to record all matters discussed and business transacted at Trust meetings. Each set of minutes must be confirmed at the next Trust meeting and be signed by the Chairman as a true and correct record.

2. Burial Register -

All burials that take place in the cemetery and all cremated remains that are interred must be properly recorded in a Register. The Register should be alphabetically indexed and cross-referenced to the cemetery plan to facilitate searches for entries. The entries that should be made in a typical burial register are full name of deceased, age, date of burial and grave number or location. Other items such as religious denomination, cause of death, occupation, time of funeral, name of officiating clergyman and funeral director etc., may be included.

3. Register of Burial Rights issued -

Except for public burials, a Certificate of Right of Burial must be issued for each site. Such rights are transferable only with the consent of the Trustees. A sample Certificate of Right of Burial is attached as Appendix 6. All burial rights sold by the Trust must be recorded in a separate register. This register should include the following entries - full name and address of purchaser, date of purchase, amount paid, cross-reference to receipt issued, grave number or location. A cross-reference to the Burial Register and cemetery plan may be advisable.

4. Cemetery Plan -

The Trust must have an accurate, detailed surveyed plan of the cemetery drawn showing the location of all known graves, buildings, roadways, boundaries and permanent reference marks.

RECORD KEEPING (Cont'd)

5. Accounting -

The Trust must keep full details of all its financial transactions. Separate Cash Received and Cash Payments Journals, available from most stationers, should be used to record all relevant information. A sample list of items (chart of accounts) which could be recorded by cemetery trusts is provided below.

SAMPLE CHART OF ACCOUNTS

1. INCOME ACCOUNTS

Administrations -

- Interest Received
- Sundry Income (e.g. discount received)

Interment

- Interment Fee (includes grave digging)
- Interment of Cremated Remains
- Exhumation

Plaques

- Plaques and Flower containers

Cemetery and Memorial Gardens

- Monumental Grave Fee
- Lawn Grave Fee
- Monument Construction Fee
- Maintenance Fee
- Cremation Memorials

2. EXPENSE ACCOUNTS

- Audit Fees
- Depreciation of Plant and Equipment
- Electricity and Power
- General Expenses
- Insurances

EXPENSE ACCOUNTS (Cont'd)

Long Service Leave
Motorised Plant and Vehicle Expenses
Payroll Tax
Plaque and Flower Containers
- Purchase and installation
Postage/Telephone expenses
Salaries and Wages of all Staff
Superannuation (Trust contribution)

3. ASSET ACCOUNTS.

Bank Accounts - Trading/Investment
Petty Cash/Stamps
Stock in hand
Debtors and Pre-Payments
Suspense Accounts - e.g. Superannuation
(Employee contribution)
Buildings, Plant and Equipment

4. LIABILITY ACCOUNTS.

Creditors and Accruals
Income Tax
Provision for Holiday Pay, Long Service Leave,
Depreciation, Future Maintenance
Capital Works Proposed
Outstanding Loans

5. PRE-NEED ACCOUNTS

Interment Fees
Cremation Memorials
Plaques/Flower Containers
Monumental Graves
Lawn Graves

6. FUTURE MAINTENANCE

Funds set aside for future maintenance of the cemetery.

STAFF LEAVE RECORDS:

Standard Forms (such as an Employee's History Card) are available from most Stationers on which to record Annual Leave, Sick Leave, Long Service Leave and other relevant employee details.

Annual Leave and Sick Leave:

The Labour and Industry Act 1958 requires an employer to maintain adequate records in respect of each employee showing entitlements to Annual Leave and Sick Leave not taken and recording such leave as is taken.

An employee must be paid in advance before proceeding on leave for the holiday period.

Where practicable sick leave to which the employee is entitled should be paid on the normal pay day throughout the period of absence.

Long Service Leave:

The Act provides that an employer must maintain a register in which is recorded the Long Service Leave entitlement of each employee and any Long Service Leave taken.

In accordance with the Act, Long Service Leave must be paid in full when the employee commences leave.

Public holidays occurring while the employee is on Long Service Leave are inclusive in the leave and not subject to additional payment by the employer.

EXHUMATION

Exhumation is defined in the Cemeteries Act as "the opening of any grave, lined grave, vault or mausoleum to remove the coffin and remains of any corpse or to disturb the remains of any corpse by the opening of the coffin".

An exhumation may take place only when directed by an Order issued under the Coroner's Act 1962 or by a licence issued under the Cemeteries Act.

Application for exhumation -

Applications for exhumation licences must be made to the Health Commission on the standard form by the executor of the estate of the deceased or the person applying for letters of administration of the estate of the deceased. A certified copy of the death certificate and the exhumation licence fee must accompany the application. A sample application form is attached as Appendix 7.

Procedure -

On receipt of the application, the matter will be investigated by the Health Commission with the following factors being taken into consideration: -

(a) Period of interment.

(b) Cause of death, with particular reference to whether an infectious disease was involved.

(c) Embalming, with information being sought as to whether the corpse was embalmed and, to what degree.

(d) Coffin, with information being sought as to the type of coffin used, the material used in its manufacture and as to any metal linings that may be present.

(e) Terrain of the grave, with information being sought from the cemetery trust as to the type of soil, terrain, situation and drainage of the area in which the grave is located. The weather immediately prior to the proposed date of exhumation will be taken into consideration and the possibility of postponing an approved exhumation which is to take place during or immediately following a period of wet weather will be examined.

Cemetery trusts will be asked to inform the Commission of any objection they may have to the issue of an exhumation licence by the Health Commission.

If investigation shows that offensive circumstances are likely to be encountered, then a recommendation for exhumation would be made only if very strong reasons exist in favour of exhumation. Normally, no licence will be issued for an exhumation within a two-years period of interment, unless very special circumstances are involved. Every licence shall be valid for three months from the date of issue.

Licence -

An exhumation licence, when issued, will have a number of conditions; these will depend on the particular circumstances. One standard condition is that the exhumation be carried out in the presence of an authorised officer of the cemetery concerned and under the supervision of an authorised officer of the Health Commission. It is no longer necessary for the local Medical Officer of Health to be present at the exhumation.

When exhumed remains are to be transported from one cemetery to another, a condition of the licence would be that the remains be enclosed in a polythene-lined replacement coffin or an outer polythene-lined shell of aluminium or galvanised iron, or other approved material, and be securely sealed or soldered before removal. Depending on circumstances, it may not be necessary for a new coffin or outer shell to be used when exhumed remains are to be transferred from one grave to another in the same cemetery. However as it is impossible to judge the necessity before opening the grave, the attending Funeral Director should have a new coffin or outer shell available.

MAINTENANCE GRANTS

The Health Commission of Victoria is allocated limited funds by the Department of Management and Budget each year specifically for the purpose of maintenance grants for cemeteries.

The demand for these funds is great and always exceeds the allocation ($18,000 in 1983/84). For this reason only applications which meet the following criteria can be considered: -

(1) Grants are normally only provided for maintenance works such as clearing, fencing, weed control etc. not for capital works such as the construction of toilet blocks or the development of lawn sections.

(2) The cemetery should be a small country cemetery with only a few burials each year.

(3) The cemetery should be charging "realistic" approved fees, for gravesites, digging, etc. in an effort to raise its own funds.

(4) The cemetery should have spent, as far as possible, all previous grants allocated by the Commission.

The allocation of grant money is made annually in October and Trusts which apply for a grant will be advised of the outcome as soon as possible.

If your Trust wishes to apply for a grant a written request detailing the following items should be made to The Secretary, Public Health Division (Cemeteries Section), Health Commission of Victoria, 555 Collins Street, Melbourne, 3000: -

- specific maintenance works proposed.
- amount sought.
- total cost of works proposed.
- any supporting documents, e.g. quotes.
- current balance of moneys held by the Trust.

Applications for grants must be received no later than 30th November and requests received after this date will not be considered until the following year.

APPENDIX X

JOINT RESOLUTION

Tuesday, 21 September, 1982

That the resolution of the House of 1 July 1982 appointing the Mortuary Industry and Cemeteries Administration Committee and providing that four members constitute a quorum of the Committee, be amended so far as to provide that three members shall constitute the quorum of the Committee.

TERMS OF REFERENCE

JOINT RESOLUTION OF LEGISLATIVE ASSEMBLY AND LEGISLATIVE COUNCIL - 11 OCTOBER 1983

That the resolution of the House of 1 July 1982 appointing the Mortuary Industry and Cemeteries Administration Committee and providing that the Committee be required to present its Final Report to the Parliament no later than 31 December 1983, be amended so far as to require the Final Report to be presented to the Parliament no later than 31 March 1985.

EXTRACTED FROM THE MINUTES OF THE PROCEEDINGS OF THE LEGISLATIVE COUNCIL

FRIDAY, 2 JULY, 1982

MORTUARY INDUSTRY AND CEMETERIES ADMINISTRATION COMMITTEE - The Honourable W.A. Landeryou moved, by leave, That the Honourables C.J. Kennedy and R. Lawson be members of the Mortuary Industry and Cemeteries Administration Committee.

Question-put and resolved in the affirmative.

EXTRACTED FROM THE VOTES AND PROCEEDINGS OF THE LEGISLATIVE ASSEMBLY

Thursday, 1 July, 1982

COMMITTEE APPOINTMENTS - Motion made, by leave, and question - That, contingent upon the Legislative Council concurring with the Resolutions of this House dated 1 July 1982 establishing the respective committees-

* *

(b) Mr Culpin, Mr Kirkwood, Mr Lieberman and Mr Ross-Edwards be appointed members of the Mortuary Industry and Cemeteries Administration Committee-

-(Mr. Fordham)-put and agreed to.

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