come before the Committee if it is published in the Gazette or by chance.

29. It may be noted in passing that the criteria by which the Legal Advisers to the Privy Council Office scrutinize draft regulations are set out in section 3 (2) of the Act as follows:

"(*a*) it is authorized by the statute pursuant to which it is to be made;

(*b*) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;

(*c*) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Bill of Rights*; and

(*d*) the form and draftsmanship of the proposed regulation are in accordance with established standards."

It will be readily seen that these criteria are both less numerous and more restricted than those used by the Committee for the subsequent scrutiny of the same regulations after they have been made (and almost invariably after they have already entered into effect).

30. The problem caused by the silence of the Statutory Instruments Act as to how statutory instruments, which are not regulations or are not published in the Canada Gazette, are to become known to the Committee would be serious enough if the Committee, on learning of the existence of a document, could determine readily whether it were a statutory instrument or not. But this the Committee can not do and the problem is accordingly critical. The definition of a statutory instrument provided in the Act is incomprehensible. The Committee has devoted a great amount of time and effort to trying to glean from the words of section 2 (1) (*d*) of the Statutory Instruments Act a clear meaning and a clear definition of a statutory instrument. The effort has been wasted and legislative action is necessary.

31. For expository purposes it is true that a statutory instrument may be taken as meaning a document which embodies subordinate legislation authorized by statute or a rule made in the exercise of the Royal Prerogative. It is equally true that, if a statute is the ultimate authority for a document, that document is potentially a statutory instrument. But the Committee needs to know with precision whether a document is a statutory instrument, for if it is not it has no business considering it. And if it is no one can attempt to deny or to thwart the Committee's scrutiny. Unfortunately, the definition of a statutory instrument is so hedged about with exceptions, at one and the same time explicit in nature but obscure in meaning, and with qualifications direct and indirect, and is so flawed with a triple negative that it is useless.

32. Section 2 (1) (*d*) of the Statutory Instruments Act reads as follows:

"(*d*) "statutory instrument" means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(i) in the execution of a power conferred by or under an Act of Parliament, by or under which such instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which such instrument relates, or

(ii) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament,

but does not include

(iii) any such instrument issued, made or established by a corporation incorporated by or under an Act of Parliament unless

(A) the instrument is a regulation and the corporation by which it is made is one that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, or

(B) the instrument is one for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

(iv) any such instrument issued, made or established by a judicial or quasi-judicial body, unless the instrument is a rule, order or regulation governing the practice or procedure in proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament,

(v) any such instrument in respect of which, or in respect of the production or other disclosure of which, any privilege exists by law or whose contents are limited to advice or information intended only for use or assistance in the making of a decision or the determination of policy, or in the ascertainment of any matter necessarily incidental thereto, or

(vi) an ordinance of the Yukon Territory or the Northwest Territories or any instrument issued, made or established thereunder."

The Committee's main concern has been with paragraph (i) but it must also note that it can give no clear meaning to the words following the words "exists by law" in sub-paragraph (v), a matter to which this Report will return.

33. Turning to sub-paragraph (i) of section 2 (1) (*d*) these words have been interpreted by the Legal Advisers to the Privy Council Office, a section of the Department of Justice, as meaning:

(i) No instrument can be a statutory instrument unless the enabling power under which it is made expressly names a type of document in the form of which the instrument is to be issued. This has come to be known to the Committee as the magic formula approach for unless an enabling power reads that the Governor in Council (Minister, Commission, etc.) may "*by Order*", "*by rule*", "*by regulation*", "*by warrant*", "*by tariff*" and so on, there can be no statutory instrument. This interpretation would remove from the class of statutory instruments, and hence from the Committee's scrutiny, instruments made under enabling powers now in very common use, for example: "... according to terms and conditions as the Governor in Council may prescribe ...", "...