

advises, for reasons unspecified, that the Committee's objections are unfounded.

B. Instruments the Committee does not see

(i) These are of two kinds: unpublished statutory instruments (or those published but unknown to the Committee) and documents which the Department of Justice considers are not statutory instruments and hence beyond the Committee's purview.

(ii) To any of the unpublished statutory instruments or to any that are published but in forms and places other than the Canada Gazette, and which actually get before the Committee, the points made under A, above, apply.

(iii) The most serious problem, however, is to get the documents where the Committee's right of scrutiny is denied by the Government on the ground that they are not statutory instruments. The Committee may want to see these documents, in order to decide whether, in *its* opinion, they *are* statutory instruments.

(iv) It requests production. The legal officer of the department or authority refuses. The Committee asks why. He says that the document is not a statutory instrument, but that he can not demonstrate this or give the reasons for his assertion because to do so would be to give a "legal opinion", that is to say, the application of section 2 (1) (d) of the Statutory Instruments Act to the document in question. Or, alternatively, he may say that the Department of Justice has given an opinion, which the Committee may not see, that the document in question is not a statutory instrument.

(v) The Committee asks why it may not see the Department of Justice's opinion, or why the officer may not show that the document lies outside the scope of section 2 (1) (d) of the Statutory Instruments Act. The officer refers to the Deputy Minister of Justice's views on the role of the Department of Justice which preclude the divulging of such information to the Committee.

(vi) The Committee, not being able to see the document for itself and being given no reasons, is utterly thwarted. Reference to outside counsel or to the Law Clerks is useless because the Department of Justice must surely not afford to them what it has withheld from the Committee.

(vii) A report to the two Houses is impracticable on a document the Committee has not seen and in respect of which the Government relies on an undisclosed opinion of the Department of Justice.

77. The Committee had by November 1976 reached the position in which its scrutiny of a number of documents^{16B} which appeared to it as questionable in some one or more particulars, or as possibly constituting statutory instruments, was hampered by the actions of officers of the Department of Justice in declining to afford to the Committee what they considered to be "legal opinions" in response to requests by the Committee for information and reasons. In two instances—Immigration Guidelines and Divisional Instructions and Standing Orders of the Penitentiary Service—the Committee had been informed that these classes of documents were not

statutory instruments, but had not seen the documents in question and could form no opinion as to their status for the purposes of the Statutory Instruments Act.

78. The Committee formed the view that all Instruments Officers who are officers of the Department of Justice should be replaced by departmental officers. The Committee regards it as essential that it be given complete explanations, including detailed reasons to support the position taken by the Department as to why any particular document is not a statutory instrument, that all documents the legal status of which is in doubt be produced to the Committee and that either the Committee itself, or some other body patterned on the Statutory Instruments Reference Committee at Westminster, be empowered to issue a definitive ruling as to whether any particular document or class of document is or is not a statutory instrument or statutory instruments.

79. The Minister of Justice and his Deputy Minister appeared before the Committee on 18th November 1976. Members of the Committee were at pains to make clear that they were not seeking the release of confidential legal opinions already given by Department of Justice officers, but rather the Committee wanted to be told the reasons which lay behind any assertion that a statutory instrument was *intra vires*, proper or clear and unambiguous in the same way that lawyers on behalf of their clients give grounds or reasons to support legal positions taken by their clients. The Minister undertook to have the existing instances of refusals of information by legal officers reviewed by a senior officer of the Department of Justice. The results of that review have in part been given to the Committee which has them under advisement as at the date of this Report.

80. By letter addressed to the Committee's Joint Chairmen on 13th January 1977 the Minister of Justice wrote:

"In discussing this matter with yourselves and the Committee, my mind has generally focussed on the narrow issue of the tabling of legal advice given by my Department to the Government. But my officials and I have considered more generally some of the difficulties which I understand the Committee is experiencing and as a result I have recommended to my colleagues in Cabinet a system which I believe is practical and will result in the Committee obtaining more complete information when it has questions related to statutory instruments.

I have proposed that departments and agencies nominate a senior official, perhaps at the deputy-minister level, to whom request for explanations concerning statutory instruments would be directed. This official would then provide the requested explanations having regard to the department's policy and legal position. Naturally, in many cases there will be consultation between the department concerned and the Department of Justice. It must, however, be understood that the explanations provided, including any explanation as to the legality of the instrument, would be the sole responsibility of the responding department and that legal advice given to those departments by the Department of Justice will not be disclosed. It is my hope that this system will provide for responses that will allow the Committee to perform its