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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

LAW AND JUSTICE LEGISLATION AMENDMENT BILL (NO. 3) 1992

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General, the Honourable Michael Duffy, M.P.)

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LAW AND JUSTICE LEGISLATION AMENDMENT BILL (No. 3) 1992

GENERAL OUTLINE

This Bill makes amendments of a minor policy nature to legislation within the Attorney-General's portfolio and also makes some minor technical amendments to legislation.

The amendments to be made by the Bill will

(i) include in the Administrative Appeals Tribunal Act 1975 a requirement that persons affected by reviewable decisions be notified in writing of the decisions and of their rights of review

(ii) amend the Freedom of Information Act 1982 so as to

- provide that the corporate bodies established under the legislation listed in the new Part III of Schedule 2 are exempt from the operation of the Act in relation to documents on the competitive commercial activities of those bodies
- exempt from access under the Act documents which are open to public access in a State or Territory land titles register subject to a fee or charge
- add a requirement that a Minister who lays before each House of the Parliament a notice relating to his or her refusal to revoke a conclusive certificate after an adverse AAT finding, shall read the notice to the House in which he or she sits
- omit bodies which have been abolished from the list of agencies exempt from the Act
- omit from the list of agencies exempt from the Act in respect of particular documents primary

industry bodies which are now covered by Part III and bodies which have been abolished

- insert in Schedule 2 Part II additional bodies which will be exempt in relation to documents in respect of their competitive commercial activities
- list in the new Part III of Schedule 2 legislation establishing corporate bodies which will be exempt from the operation of the Act for documents on their competitive commercial activities

(iii) amend the Judiciary Act 1903 so as to

- allow the Attorney-General of the Australian Capital Territory to seek, as of right, removal of a cause involving a constitutional issue to the High Court
- provide legally qualified staff of the Attorney-General's Department with a clear statutory right to practice as a barrister, solicitor or barrister and solicitor in a federal court or a court of a State or Territory, and confirm the entitlement of the Department to charge its clients (where appropriate) for services, including counsel services, and for such clients as successful parties in litigation to recover those costs

(iv) amend the Jurisdiction of Courts (Cross-Vesting) Act 1987 so as to

- add to the definition of "special federal matter" proceedings under the Family Law Act 1975 for consent to step-parent adoption proceedings
- ensure that proceedings involving a special federal matter are only heard by State and Territory Supreme Courts in exceptional circumstances

(v) correct a typographical error in the heading of section 14 of the Parliamentary Privileges Act 1987

(vi) correct a drafting oversight which has resulted in double mention of paragraph 27(1)(h) of the Privacy Act 1988 in subsection 32(1) of the Act

(vii) amend the Racial Discrimination Act 1975 to provide that where the Race Discrimination Commissioner decides not to inquire into a complaint because it is stale, frivolous, vexatious, misconceived or lacking in substance or because those aggrieved by the act do not wish the Commissioner to hold an inquiry, a review of that decision may be conducted by the President of the Human Rights and Equal Opportunity Commission

(viii) amend the Sex Discrimination Act 1984 to

- provide access for insurance clients to the actuarial or statistical data on which sex discrimination in insurance policies is based
- give the Human Rights and Equal Opportunity Commission a new power to grant exemptions from the requirement to supply such data
- remove the phrase "any other relevant factors" from the subsection which exempts discrimination in insurance so that all such discrimination must be justified by actuarial or statistical data
- provide that where the Sex Discrimination Commissioner decides not to inquire into a complaint because it is stale, frivolous, vexatious, misconceived or lacking in substance or because those aggrieved by the act do not wish the Commissioner to hold an inquiry, a review of that decision may be conducted by the President of the Human Rights and Equal Opportunity Commission

(ix) amend the Statutory Declarations Act 1959 to bring the penalties for a person who wilfully makes a false statement in a statutory declaration into line with current criminal law policy.

FINANCIAL STATEMENT

The proposed amendments will not have any significant financial impact. It should be noted, however, that once the proposed amendments to section 55E of the Judiciary Act 1903 are in place and the Attorney-General's Department has consolidated its existing in-house expertise and made it available to all clients, the Department will be able to constrain the Commonwealth's expenditure on counsel's fees.

NOTES ON CLAUSES

Clause 1 - Short title

1. This clause provides for the Act to be cited as the Law and Justice Legislation Amendment Act (No. 3) 1992.

Clause 2 - Commencement

2. This clause provides for the commencement of the Act. By subclause 2(1), where not otherwise provided, the Act will commence on the date of Royal Assent.

3. Subclauses 2(2) and 2(3) provide that the amendments of the Administrative Appeals Tribunal Act 1975 will commence on a day to be fixed by Proclamation, or six months after Royal Assent, whichever is earlier.

4. Subclause 2(4) provides that the amendments of the Jurisdiction of Courts (Cross-Vesting) Act 1987 will not commence until a date fixed by proclamation. As the cross-vesting scheme is based on the enactment of complementary State and Federal legislation, a proclamation will not be made until reciprocal legislation has been enacted by the States and Territories. Subclause 2(5) provides for commencement after 12 months should a proclamation not be made within that time under subclause 2(4). This will allow time for the States and Territories to enact the necessary amendments to their legislation.

5. Subclause 2(6) provides that the amendment of the Privacy Amendment Act 1990 will be taken to have commenced immediately after the commencement of section 18 of that Act.

6. Subclause 2(7) provides that Part 2 of the Schedule, i.e. the amendments of the Racial Discrimination Act 1975, some of

the amendments of the Sex Discrimination Act 1984, and the amendments of the Statutory Declarations Act 1959, will commence 28 days after Royal Assent.

7. Subclause 2(8) provides that Part 3 of the Schedule, i.e. the remaining amendments of the Sex Discrimination Act, will commence immediately after the commencement of section 9 of the Sex Discrimination Amendment Act 1991 on 25 June 1993.

Clause 3 - Application

8. Clause 3(1) provides that the Jurisdiction of Courts (Cross-Vesting) Act 1987 as in force prior to the amendments will continue to apply in relation to a proceeding pending in a court to which section 6 applied before those amendments.

9. Clause 3(2) provides that the amendments of section 24 of the Racial Discrimination Act 1975 will apply in relation to a decision of the Race Discrimination Commissioner under subsection 24(2) not to inquire into a complaint if notice is given under subsection 24(3) after the commencement of the amendments.

10. Clause 3(3) provides that the amendments of section 52 of the Sex Discrimination Act 1984 will apply in relation to a decision of the Sex Discrimination Commissioner under subsection 52(2) not to inquire into a complaint if notice is given under subsection 52(3) after the commencement of the amendments.

11. Clause 3(4) provides that the amendment of section 87 of the Sex Discrimination Act 1984 will apply in relation to an act of discrimination that occurs after the commencement of that amendment.

Clause 4 - Amendments of Acts

12. Clause 4 provides that the Acts specified in the Schedule are to be amended as set out in the Schedule.

SCHEDULE

PART 1

ADMINISTRATIVE APPEALS TRIBUNAL ACT 1975

New subsection 27A(1) will provide that, subject to specified exceptions, a person who makes a reviewable decision must take reasonable steps to give to any person whose interests are affected by the decision notice of the making of the decision and of the right to have the decision reviewed.

New subsection 27A(2) will specify the following exemptions to the general principle

- where a decision is deemed to have been made, i.e. where a decision maker has failed to act within the period prescribed by an enactment

- where the relevant legislation provides for notification of review rights

- where the decision does not adversely affect the rights or interests of a particular person, such as

  - a decision not to impose a liability or a penalty on a person

  - a decision adjusting the level of periodic payments to be paid to a person as a member of a class of persons, e.g. an increase or reduction in a benefit which is paid to all people entitled to such a benefit

  - where an enactment establishes several categories of entitlements to monetary benefits

and the decision determines a person to be in the most favourable of those categories.

New section 27A(3) will provide that failure to comply with this section will not affect the validity of the decision.

New section 27A(4) will define a reviewable decision to mean a decision that is subject to review by the Administrative Appeals either immediately or up to two steps prior to review by the Administrative Appeals Tribunal. For example, the review process may be primary decision, internal review, first tier review (e.g. by the Social Security Appeals Tribunal, Veterans' Review Board, or Student Assistant Review Tribunal), then review by the Administrative Appeals Tribunal. In such cases a "reviewable decision" would include all of the decisions prior to review by the Administrative Appeals Tribunal.

New subsection 27B(1) will provide that the Attorney-General may determine a Code of Practice for facilitating the operation of new subsection 27A(1). It will set out standards relating to the content of notices of rights of review, staging of notification, use of plain English and similar matters.

New subsection 27B(2) will provide that a person taking action under new subsection 27A(1) must have regard to any Code of Practice in force. Pursuant to new subsection 27B(3), a Code of Practice will be a disallowable instrument

- it must be tabled in both Houses of Parliament within 15 sittings days of its making
- either House may move to disallow it within a further 15 sitting days, and
- any changes to it must also be tabled and may also be disallowed.

FREEDOM OF INFORMATION ACT 1982

The Schedule will make a number of amendments to section 7. The first amendment will insert subsection 7(2AA) to provide that corporate bodies established under legislation listed in new Schedule 2 Part III of the Act are exempt from the operation of the Act in relation to documents dealing with the competitive commercial activities of the bodies. The second and third amendments will make consequential changes to subsections 7(3) and 7(4).

The Schedule will add a new paragraph (c) to subsection 12 (1), which currently exempts from access documents which are otherwise available, e.g. under the Archives Act 1983 or documents in publicly accessible registers where a fee or a charge is made for that access. The new clause will extend the exemption to documents forming part of land titles registers maintained by each State and Territory. A consequential amendment will be made to paragraph 12(1)(a).

Amendments will be made to section 16, which provides for transfer of requests for access to documents, and to section 51C, which provides for transfer of requests for amendment or annotation of personal records. The amendments will ensure that those provisions also apply to agencies established under the legislation listed in new Part III of Schedule 2.

The Schedule will add a new paragraph (c) to subsection 58A(3). Section 58A is concerned with the procedure upon a finding of the Administrative Appeals Tribunal that there are no reasonable grounds for a certificate of a Minister or the appropriate officer which conclusively determines that a document is exempt. The new paragraph will require a Minister who decides not to revoke a conclusive certificate, despite a finding by the Administrative Appeals Tribunal, to read a notice to that effect to the House of Parliament in which he or she sits.

Part I of Schedule 2 of the Act, which lists bodies which are exempt from the operation of the Act, is to be amended by deleting two bodies, the Canberra Commercial Development Authority and the Superannuation Fund Investment Trust, both of which have been abolished.

Part II of Schedule 2 of the Act, which lists bodies which are exempt from the operation of the Act in relation to particular documents, is to be amended by inserting the Attorney-General's Department, the Australian Government Solicitor and the Australian Pork Corporation in relation to documents in respect of their competitive commercial activities. The Australian Apple and Pear Corporation and the Australian Canned Fruits Corporation, both of which have been abolished, are to be deleted, as well as other primary industry bodies which will now be covered by the operation of the new Part III of Schedule 2.

A new Part III is to be added to Schedule 2 of the Act. It will list legislation which establishes bodies which are exempt from access for documents in respect of the competitive commercial activities of the bodies, as provided in new subsection 7(2AA).

JUDICIARY ACT 1903

The amendment of subsection 40(1) of the Act will allow the Attorney-General of the Australian Capital Territory to seek, as of right, removal of a cause of action involving a constitutional issue to the High Court. At the time of self-government, subsection 40(1) of the Act was not amended to allow for the Attorney-General of the Australian Capital Territory to have this right. This amendment will put the Attorney-General of the Australian Capital Territory on the same footing as the Commonwealth, State and Northern Territory Attorneys-General.

This Bill will also provide for amendments to the Act dealing with

- the right of lawyers in the Attorney-General's Department to appear in Federal, State or Territory courts and other tribunals, and
- the recovery by the Australian Government Solicitor of its professional fees and costs under the user pays system.

As the term "Australian Government Solicitor" will appear in sections other than section 55E it is necessary to provide for the term in the interpretation section of the Act (section 2).

The amendments to subsection 55E(3) will make it clear that the Australian Government Solicitor ("AGS") is authorised to practise as a barrister, as a solicitor or barrister and solicitor. For the purpose of acting for the clients described in subsection 55E(3), the AGS will be entitled to practise in any court and to all the rights and privileges of a barrister, solicitor or barrister and solicitor in each State or Territory. This approach is consistent with the approach in sections 15 and 16 of the Director of Public Prosecutions Act 1983.

The amendments to subsection 55E(8) are necessary as a consequence of the amendment to subsection 55E(3). They will ensure that the Secretary to the Attorney-General's Department and persons appointed by the Secretary to act in the name of the AGS have the same rights and privileges as the AGS. In practice a Deputy Secretary (locally designated as the Australian Government Solicitor), the Directors of Regional Offices and Office and Division Heads in the Central Office of the Department will be appointed to act in the name of the AGS.

The amendment to subsection 55E(9) is a consequential amendment to ensure that the Secretary to the Attorney-General's Department and the persons appointed to act in the name of the AGS have the same duties and obligations as barristers, as solicitors or as

barristers and solicitors in the States and Territories in which they practise. It will ensure that they are placed on a similar footing to lawyers in private practice.

Whilst the Directors of Regional Offices and Office and Division Heads in the Central Office of the Department have the responsibility for legal services provided to clients of the AGS, lawyers within the Department appear in courts and tribunals across Australia on behalf of those clients. The Department's lawyers are admitted variously as barristers, solicitors, barristers and solicitors or legal practitioners (effectively barristers and solicitors).

New subsections 55E(10A) to (10D) will ensure that the Department's lawyers who represent those clients in legal proceedings may practise as and have the rights and privileges of barristers, solicitors, or barristers and solicitors in the courts and tribunals in which they appear. It will ensure that they are placed on a similar footing to lawyers in private practice.

These new subsections will also ensure that the Departmental lawyers who represent the clients of the AGS have the same duties and obligations as barristers, as solicitors or as barristers and solicitors in the States and Territories in which they practise. These lawyers will therefore be placed on a similar footing to lawyers in private practice.

The Attorney-General's Department moves to a user pays system for many of its services from 1 July 1992. New section 55F will ensure

- the entitlement of the AGS to charge for its services and to recover those costs
- the entitlement of the clients of the AGS as successful parties to recover an amount representing the costs of the services so provided
- the mechanisms for justification of the amount representing the costs of the services so provided (e.g.,

the means of establishment to the satisfaction of a taxing officer that an amount may be allowed equivalent to a fee paid to a barrister at the private bar in the absence of the payment of any such fee and consequently of any evidence of such payment).

JURISDICTION OF COURTS (CROSS-VESTING) ACT 1987

The Schedule will add to the definition of special federal matters in subsection 3(1) a matter arising under section 60AA of the Family Law Act 1975. Under section 60AA of the Family Law Act, the Family Court, the Supreme Court of the Northern Territory or the Family Court of a State may grant leave for proceedings to be commenced in the appropriate State court for the adoption of a child by a step-parent.

Section 6 of the Jurisdiction of Courts (Cross-vesting) Act currently provides that a State or Territory Supreme Court shall transfer a proceeding in which a special federal matter arises to the Federal Court, unless the Supreme Court is satisfied that it is both not appropriate that the proceedings be transferred and that it is appropriate that the proceedings be heard by the Supreme Court. In addition, the Commonwealth Attorney-General is to be notified of the proceedings. The Attorney-General can require the transfer of the proceedings. The Schedule will repeal the existing section and make a number of amendments to the above procedure.

New subsections 6(1) and (3) will require the State or Territory Supreme Court to transfer proceedings involving special federal matters unless the Court is satisfied that there are special reasons for the Court to hear the matter in the particular circumstances of the case. The convenience of the parties will not be a reason justifying the non-transfer of proceedings.

The amendment made by new subsection 6(2) will be consequential on the amendment to the definition of special federal matter. That subsection will provide that where proceedings are to be

transferred, those involving existing special federal matters are to be transferred to the Federal Court, and those involving the seeking of leave for step-parent adoptions are to be transferred to the Family Court, the Family Court of Western Australia or the Supreme Court of the Northern Territory, as appropriate.

New subsection 6(4) will require reasonable notice of a proceeding to be given to the Commonwealth Attorney-General and the relevant State or Territory Attorney-General to enable consideration of whether to put submissions to the court on the transfer issue. The Commonwealth Attorney-General will no longer have the power to compel the transfer of proceedings.

New subsection 6(5) will restate existing subsection 6(4) which enables an adjournment to be ordered for the purpose of complying with the notification requirements of amended subsection 6(4).

New subsection 6(6) will provide that a State or Territory Supreme Court, in considering whether to transfer proceedings involving a special federal matter, must have regard to the general rule that special federal matters should be heard by a federal court. The submissions of an Attorney-General on the transfer issue must also be taken into account.

New subsection 6(7) will restate existing subsection 6(5) which permits the Attorney-General of the Commonwealth to authorise payment of costs arising out of an adjournment of a proceeding under section 6.

New subsection 6(8) will restate existing subsection 6(6) which enables the court to grant urgent interlocutory relief notwithstanding non-compliance with section 6.

New subsection 6(9) will restate existing subsection 6(8) which provides that if a Supreme Court proceeds through inadvertence to determine a proceeding to which subsection 6(1) applies, its decision in the proceeding is not invalidated by the failure to comply with section 6.

Subsection 6(10) will provide that the section does not apply to appellate proceedings in a State Full Supreme Court if the court below has made an order under subsection 6(3), or subsection 6(1) as in force before the current amendments.

PRIVACY AMENDMENT ACT 1990

The repeal of section 18 of the Privacy Amendment Act 1990 and its substitution by a new section 18 is necessary to correct a drafting error.

The Privacy Amendment Act 1990 was assented to on 24 December 1990 but did not commence until 24 September 1991. After its enactment but before its commencement, the Data-matching Program (Assistance and Tax) Act 1990 was passed and commenced. Both Acts amended section 32 of the Privacy Act 1988.

Because the Data-matching Program (Assistance and Tax) Act 1990 commenced before the Privacy Amendment Act 1990, its amendment of section 32 of the Privacy Act 1988 changed the provision of that section before the Privacy Amendment Act 1990 amendments had effect. As the Privacy Amendment Act 1990 had been drafted on the basis of the original words of section 32 of the Privacy Act 1988, the amendment it purported to make was meaningless.

This amendment is necessary to give meaning to section 18 of the Privacy Amendment Act 1990.

PART 2

RACIAL DISCRIMINATION ACT 1975

The amendments of subsection 24(4) of the Act will provide that a complainant may require referral to the President of the Human Rights and Equal Opportunity Commission of decisions made not to inquire or continue to inquire into a complaint where the Race Discrimination Commissioner is satisfied that persons aggrieved by the act do not wish the inquiry to be made or continued, or that the complaint is frivolous, vexatious, misconceived or lacking in substance, or where more than 12 months has passed since the act which is the subject of the complaint. The present system whereby a complainant may require referral to the Commission of decisions made not to inquire or continue to inquire into a complaint where the Commissioner is satisfied that the act is not unlawful under the Act will not be affected.

The addition of two new subsections after subsection 24(5) is consequential on the amendment of subsection 24(4). New subsection 24(5A) will provide that where the Commissioner receives a notice from a person requiring the referral to the President of a decision made under new paragraph 24(4)(b), the Commissioner must refer that complaint to the President together with a report about the decision. New subsection 24(5B) will provide that a report made for the purposes of new subsection 24(5A) must not contain anything said or done in the course of conciliation proceedings under the Act.

New section 24AA will set out the procedures for review by the President of a decision by the Commissioner which is referred to the President under new subsection 24(5A).

New subsection 24AA(1) will apply new section 24AA when a decision by the Commissioner is referred to the President under new subsection 24(5A).

New subsection 24AA(2) will provide that the President must review the decision of the Commissioner which has been referred under new subsection 24(5A) and either confirm the Commissioner's decision, or set it aside and direct the Commissioner to inquire into the act which was the subject of the decision.

New subsection 24AA(3) will provide that the President may refuse to review the Commissioner's decision even where it has been referred for review, unless the complainant provides relevant information required by the President.

New subsection 24AA(4) will require the President to give the complainant and the Commissioner written notice of the President's decision either to confirm the decision of the Commissioner or to set aside the Commissioner's decision and direct the Commissioner to conduct an inquiry into the act in question.

New subsection 24AA(5) will provide that the President's written notice given under new subsection 24(4) must set out the reasons for his or her decision.

New subsection 24AA(6) will require the Commissioner to comply with a direction of the President to inquire into the complaint, unless the complainants notify the Commissioner that they do not wish the inquiry to be held. New subsection 24(6) will apply in spite of subsection 24(2), in order to preclude a fresh decision by the Commissioner not to inquire at that stage.

New section 24AB will allow for interim determinations to be made during the period when a decision of the Commissioner has been referred to the President for review.

New subsection 24AB(1) will provide that the section applies when a decision by the Commissioner is referred to the President under new subsection 24(5A).

New subsection 24AB(2) will allow an interim determination to be made by the President or by the Commission and will limit the time in which such a determination may be made until completion by the President of the review of the Commissioner's decision. The subsection will set out the ambit of an interim determination, in the same terms as the provision for interim determinations in existing section 25Y.

New subsection 24AB(3) will provide that the Commission or the President may vary or revoke an interim determination made under new subsection 24AB. The subsection is drafted to make comparable provision for variation or revocation as is made by existing section 24A.

New subsection 24AB(4) will provide that the Commission may only make, vary or revoke interim determinations where the President makes an application for an interim determination to be made, varied or revoked.

New subsection 24AB(5) will provide that the President may only make, vary or revoke interim determinations on his or her own initiative and where he or she thinks it expedient to do so.

New subsection 24AB(6) will provide for the non-binding effect of an interim determination in the same terms as the provision for interim determinations in existing section 25Y.

The amendment of subsection 25ZA(1) is consequential on the insertion of new section 24AB. It will allow interim determinations made under new section 24AB to be the subject of enforcement proceedings in the Federal Court in the same way as interim determinations made under existing section 25Y.

SEX DISCRIMINATION ACT 1984

The proposed new subsection 41(4) will narrow the existing exemption in the Act for discrimination on the ground of sex in the terms of an insurance policy. Such discrimination will only be allowed where the discrimination is based on actuarial or statistical data on which it is reasonable for the insurer to rely, the discrimination is reasonable with regard to that data, and the data on which the discrimination is based are provided to or made available to the insurance client upon written request by that client. Currently subsection 41(4) provides an exemption where discrimination is on the ground of sex, based upon actuarial or statistical data from a source on which it is reasonable to rely and where the discrimination is reasonable having regard to the matter of the data and 'any other relevant factors'. The new subsection 41(4) will remove the reference to 'any other relevant factors' and thus narrow the scope of the exemption. The new subsection will also require that in order to gain the exemption, if the client gives the insurer a written request for access to the data, the insurer must either give the client a document containing the data or allow the client to inspect the document containing the data and allow the client to make a copy of or take extracts from the document.

New subsection 41(5) will provide that new paragraph 41(4)(e), which requires insurers to supply certain actuarial or statistical data on request, does not apply where the Human Rights and Equal Opportunity Commission has granted an exemption under section 44 from the requirement to supply the data.

The amendment of subsection 44(1) is consequential on the amendment of subsection 41(4). Section 44 currently provides a means by which exemptions may be granted for acts which would otherwise be unlawful. The new form of subsection 41(4) will require insurers to supply to a client upon request the actuarial or statistical data on which discrimination in insurance on the ground

of sex is based. The amendment of subsection 44(1) will allow the Commission to grant an exemption from that requirement.

The amendment of subsection 44(2) is consequential on the amendments of subsection 41(4) and subsection 44(1). The amendment of subsection 44(2) will allow the Commission to grant a further exemption from the requirement to supply such actuarial and statistical data.

The amendment of subsection 44(3) is consequential on the amendments of subsections 41(4), 44(1) and 44(2). The amendment of subsection 44(3) will provide that exemptions granted under subsections 44(1) or 44(2) from the operation of paragraph 41(4)(e) may be granted for up to five years and may be subject to specified terms or conditions, or may apply only in specified circumstances or in relation to specified activities.

The amendments of subsection 52(4) will provide that a complainant may require referral to the President of decisions made not to inquire or continue to inquire into a complaint where the Commissioner is satisfied that persons aggrieved by the act do not wish the inquiry to be made or continued, or that the complaint is frivolous, vexatious, misconceived or lacking in substance, or where more than 12 months has passed since the act which is the subject of the complaint. The present system whereby a complainant may require referral to the Commission of decisions made not to inquire or continue to inquire into a complaint where the Sex Discrimination Commissioner is satisfied that the act is not unlawful under the Act will not be affected.

The addition of two new subsections after subsection 52(5) is consequential on the amendment of subsection 52(4). New subsection 52(5A) will provide that where the Commissioner receives a notice from a person requiring the referral to the President of a decision made under new paragraph 52(4)(b), the Commissioner must refer that complaint to the President together with a report about the decision. New subsection 52(5B) will provide that a report made for the purposes of new subsection

52(5A) must not contain anything said or done in the course of conciliation proceedings under the Act.

New section 52A will set out the procedures for review by the President of a decision by the Commissioner which is referred to the President under new subsection 52(5A).

New subsection 52A(1) will provide that the section applies when a decision by the Commissioner is referred to the President under new subsection 52(5A).

New subsection 52A(2) will provide that the President must review the decision of the Commissioner which has been referred under new subsection 52(5A) and either confirm the Commissioner's decision or set aside the decision and direct the Commissioner to inquire into the act which was the subject of the decision.

New subsection 52A(3) will provide that the President may refuse to review the Commissioner's decision even where it has been referred for review, unless the complainant provides relevant information required by the President.

New subsection 52A(4) will require the President to give the complainant and the Commissioner written notice of the President's decision either to confirm the decision of the Commissioner or to set aside the Commissioner's decision and direct the Commissioner to conduct an inquiry into the act in question.

New subsection 52A(5) will provide that the President's written notice given under new subsection 52A(4) must set out the reasons for the President's decision.

New subsection 52A(6) will require the Commissioner to comply with a direction of the President to inquire into the complaint, unless the complainants notify the Commissioner that they do not wish the inquiry to be held. New subsection 52A(6) will apply in

spite of subsection 52(2), in order to preclude a fresh decision by the Commissioner not to inquire at that stage.

New section 52B will allow for interim determinations to be made during the period when a decision of the Commissioner has been referred to the President for review.

New subsection 52B(1) will apply new section 52B when a decision by the Commissioner is referred to the President under new subsection 52(5A).

New subsection 52B(2) will allow an interim determination to be made by the President or by the Commission and will limit the time in which such a determination may be made until completion by the President of the review of the Commissioner's decision. The subsection will set out the ambit of an interim determination, in the same terms as the provision for interim determinations in existing section 80.

New subsection 52B(3) will provide that the Commission or the President may vary or revoke an interim determination made under new subsection 52B(2). The subsection is drafted to make comparable provision for variation or revocation as is made by existing section 53.

New subsection 52B(4) will provide that the Commission may only make, vary or revoke interim determinations where the President makes an application for an interim determination to be made, varied or revoked.

New subsection 52B(5) will provide that the President may only make, vary or revoke interim determinations on his or her own initiative and where he or she thinks it expedient to do so.

New subsection 52B(6) will provide for the non-binding effect of an interim determination in the same terms as the provision for interim determinations in existing section 80.

The amendment of subsection 82(1) is consequential on the insertion of new section 52B. It will allow interim determinations made under new section 52B to be the subject of enforcement proceedings in the Federal Court in the same way as interim determinations made under existing section 80.

The amendment of subparagraph 92(1)(b)(i) is consequential on the amendments inserting sections 52A and 52B. The amendment in subparagraph 92(1)(b)(ia) will prohibit the communication of particulars of the complaint where the President decides under new subparagraph 52A(2)(b)(i) to confirm the Commissioner's decision not to inquire into the act, until written notice of the President's decision is given to the complainant. There is no need for the amendments to deal with the other kind of decision which may be referred to the President - a decision by the Commissioner not to continue to inquire into an act - as section 92(1)(a) provides that the prohibition does not apply after the Commissioner has commenced to inquire into the act.

The amendment will also prohibit the communication of particulars of the complaint where the President decides under subparagraph 52A(2)(b)(ii) to direct the Commissioner to inquire into the act, until either the Commissioner commences to inquire into the act or the complainant notifies the Commissioner that the complainant does not wish the inquiry to be held, whichever is the earlier.

STATUTORY DECLARATIONS ACT 1959

Section 11 of the Act will be repealed. Subsection 11(1) currently provides that a person who wilfully makes a false statement in a statutory declaration is guilty of an offence against the Act. Subsection 11(2) provides that this offence may be prosecuted either summarily or upon indictment, and subsection 11(3) provides penalties of

- a fine of $200 or imprisonment for not more than 6 months where the offence is prosecuted summarily, or
- four years imprisonment where the offence is prosecuted upon indictment.

These penalties have not been amended since 1966 and have therefore fallen behind current criminal law policy as expressed in the Crimes Act 1914.

The new section 11 will provide that a person must not wilfully make a false statement in a statutory declaration. The penalty for making a false statement will be imprisonment for four years. As a consequence, section 4B of the Crimes Act 1914 will apply so that a court may impose, instead of or in addition to a term of imprisonment, a fine of $24,000. Section 4J of the Crimes Act will also apply to allow a court to deal with an offence summarily, in which case the maximum penalty would be imprisonment for a period not exceeding 12 months or a fine not exceeding $6,000, or both.

PART 3

SEX DISCRIMINATION ACT 1984

Subsection 41(4) will cease to operate when the Sex Discrimination Amendment Act 1991 commences on 25 June 1993. That Act rewrites subsection 41(4) and reinserts it as subsection 41(1). The amendments in Part 3 of the Schedule will commence immediately after the commencement of the Sex Discrimination Amendment Act 1991 and will effect the same amendments for new subsection 41(1) as will be made by Part 2 of the Schedule for subsection 41(4).

The proposed new subsection 41(1) will provide that discrimination on the ground of sex in the terms of an insurance policy will only be allowed where the discrimination is based on actuarial or statistical data on which it is reasonable for the insurer to rely, the discrimination is reasonable with regard to that data, and the data on which the discrimination is based are provided to or made available to the insurance client upon written request by that client. The new subsection will require that, if the client gives the insurer a written request for access to the data, the insurer must either give the client a document containing the data or allow the client to inspect the document containing the data and to make a copy of or take extracts from the document.

New subsection 41(1A) will provide that new paragraph 41(1)(e), which requires insurers to supply certain actuarial or statistical data on request, does not apply where the Human Rights and Equal Opportunity Commission has granted an exemption under section 44.

The amendments of sections 44 and 87 are consequential on the replacement of subsection 41(4) by subsection 41(1).

NOTE ABOUT SECTION HEADING

The note corrects a typographical error in the heading to section 14 of the Parliamentary Privileges Act 1987.

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