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SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES

REPORT ON SCRUTINY BY THE COMMITTEE
OF REGULATIONS MADE UNDER THE
SEX DISCRIMINATION ACT 1984

EIGHTY-NINTH REPORT

OCTOBER 1991

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**SENATE STANDING COMMITTEE ON
REGULATIONS AND ORDINANCES**

MEMBERS OF THE COMMITTEE

Senator Patricia Giles (Chair)
Senator Bronwyn Bishop (Deputy Chairman)
Senator Mal Colston
Senator Bill O'Chee
Senator Kay Patterson
Senator Olive Zakharov

PRINCIPLES OF THE COMMITTEE

(Adopted 1932: Amended 1979)

The Committee scrutinises delegated legislation to ensure:

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

INTRODUCTION

This Report of the Senate Standing Committee on Regulations and Ordinances is intended as a case study of the scrutiny by the Committee of a succession of instruments of delegated legislation which appeared to breach parliamentary propriety.

The delegated legislation in question was initially considered to be defective because it breached the first of the Committee's four principles, or terms of reference, which are now included in the Standing Orders of the Senate and which appear at the start of this and every other Report of the Committee. This principle is that *delegated legislation must be in accordance with the parent Act*. The principle is interpreted broadly to mean (*among many other things*) *not only that an instrument must be legally valid, but also that it must not breach the spirit of an Act*. This was the area of concern first raised by the Committee with the Minister.

However, after some years of dealing with this succession of instruments, all of which appeared to breach the spirit of the parent Act, the Committee considered that the general scheme was so defective that it breached the fourth of the Committee's principles. This principle is that *delegated legislation must not contain matter more appropriate for parliamentary enactment*.

This principle is *not often raised by the Committee*. Indeed, it is the least invoked of the four principles. Nevertheless, it is an important principle, relating as it does to parliamentary propriety.

This case study illustrates other aspects of the work of the Committee. It is an example of the tenacity of the Committee; exactly seven years passed between the coming into operation of the principal *Sex Discrimination Act 1984* on 1 August

1984 and the coming into operation of the *Sex Discrimination Amendment Act 1991*, the relevant provisions of which commenced on 1 August 1991. During those seven years the Committee maintained its scrutiny of delegated legislation made under the principal Act until the final resolution of the question to its satisfaction.

Next, the Committee's scrutiny illustrates its method of operation. In the course of its consideration of regulations made under the parent Act the Committee considered reports by its independent legal adviser, Emeritus Professor Douglas Whalan, wrote to Ministers, gave a protective notice of motion of disallowance, accepted an undertaking to include a "sunset clause" in the regulations, asked for an additional special report from Professor Whalan, was briefed by senior officials from the Attorney-General's Department, accepted an undertaking to amend the parent Act, and monitored the implementation of that undertaking.

The case study also shows the high level of cooperation received by the Committee from Ministers. During its scrutiny of regulations made under the parent Act the Committee dealt with three Ministers: the then Attorney-General, the Hon Lionel Bowen MP; the Attorney-General, the Hon Michael Duffy MP; and the Minister for Justice and Consumer Affairs, Senator the Hon Michael Tate. These Ministers were helpful in their dealings with the Committee, which commends them for this courtesy.

Finally, the case study is an example of how legislation is improved by the actions of the Committee. Following the non-partisan intervention of the Committee, an open-ended discretion granted to the executive to extend indefinitely the operation of discriminatory Commonwealth, State and Territory laws, was first limited and then removed. The Committee is pleased to report to the Senate with this detailed study on how it carries out the important task entrusted to it of ensuring that delegated legislation is of the highest technical quality.

CHAPTER 1

THE SEX DISCRIMINATION ACT 1984

1. The *Sex Discrimination Act 1984* (“the Act”) received assent on 21 March 1984 and was proclaimed to come into operation on 1 August 1984.
2. The objects of the Act, set out in section 3, were:
 - (a) to give effect to certain provisions of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women;
 - (b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status or pregnancy in the areas of work, accommodation, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs;
 - (c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace and in educational institutions; and
 - (d) to promote recognition and acceptance within the community of the principle of the equality of men and women.
3. To effect these objects, the Act proscribed discrimination generally on the ground of sex, marital status or pregnancy against applicants for jobs and employees, against applicants for admission as a student or against students and in the provision of goods and services.

4. The Act also specifically proscribed sexual harassment.
5. Administration of the Act was vested in the Human Rights Commission which, together with a Sex Discrimination Commissioner established by the Act, were given powers with respect to complaints and inquiries. Provision was made for the Human Rights Commission to make determinations in individual cases, which could be enforced in the Federal Court of Australia.
6. The Act included the usual regulation making power in the standard form; section 116 providing that the Governor-General may make regulations, not inconsistent with the Act, required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.
7. The Act also included reference to particular matters in respect of which regulations could be made. Thus, section 87 provided for a notice in writing served on a person as prescribed; and sections 90 and 98 each provided for two separate procedural matters to be prescribed.
8. The Act also provided for more substantive matters to be dealt with by regulation. These related to exemptions from the general prohibitions on discrimination based on sex, as follows:
 - (a) subsection 30(1) exempted discrimination involving a genuine occupational qualification. Paragraph 30(2)(h) provided that the regulations may declare positions where to be a person of a particular sex is such a qualification.
 - (b) subsection 41(1) exempted discrimination in the conditions of a superannuation fund. Subsection 41(2) provided that, after two years, subsection (1) could be repealed by regulation.
 - (c) subsection 42(1) exempted discrimination in participation in competitive sport. Subsection 42(2) provided that the regulations may prescribe sports to which

the exemption does not apply.

- (d) subsection 43(1) exempted discrimination against women in relation to combat or combat related duties in the Defence Force. Subsections 43(1) and (2) provided that the regulations may prescribe the circumstances of such exemption and definitions of both combat and combat related duties.

9. However, the most important regulation making power was provided as part of the general scheme of section 40, "Acts done under statutory authority". That section provided exemption from the general prohibitions on discrimination based on sex for anything done under any other Commonwealth Act, any State Act, or any law of a Territory, in force at the commencement of the Act. This exemption included any delegated legislation made under such Acts and in force at the commencement of the Act (paragraphs 40(1)(a) and (b)). Apart from five specified Acts, these exemptions were only to continue for two years after the commencement of the Act, except to the extent that regulations otherwise provide (subsection 40(2)).

10. In general summary, section 40 provided a two year phasing in period after which all Commonwealth, State and Territory Acts and delegated legislation would come within the net of the Act. However, that section also provided that the regulations may exempt any such laws from the provisions of the Act. It was both the existence and the manner of the exercise of this regulation making power which concerned the Committee.

CHAPTER 2

THE SEX DISCRIMINATION (OPERATION OF LEGISLATION)

(NO.1) REGULATIONS

STATUTORY RULES 1986 NO.191

1. Before the two year phasing in period for Commonwealth, State and Territory laws was due to expire on 1 August 1986 regulations were made which exempted specified discriminatory laws from the relevant provisions of the Act.
2. These regulations were:
 - (a) the Sex Discrimination (Operation of Legislation) (No.1) Regulations, Statutory Rules 1986 No.191;
 - (b) the Sex Discrimination (Operation of Legislation) (No.2) Regulations, Statutory Rules 1986 No.192; and
 - (c) the Sex Discrimination (Operation of Legislation) (No.3) Regulations, Statutory Rules 1986 No.196.
3. The Committee did not raise any concerns about the two latter sets of Regulations, which merely extended the exemption of some laws for six months and some others for 12 months, after the general phasing in date of 1 August 1986. The Committee considered that this was reasonable in the circumstances, providing as they did for a definite end to these discriminatory provisions.
4. However, the Committee was concerned at the Sex Discrimination (Operation of Legislation) (No.1) Regulations, which extended indefinitely specified

Commonwealth and Territory legislation from the operation of the Act. The Committee considered a report on the Regulations prepared by its independent legal adviser, Professor Douglas Whalan of the Law Faculty of the Australian National University. That report advised, in part, that although the Regulations did not technically breach Principle (a) of the Committee, which is that delegated legislation must be in accordance with its parent statute, "they seem to press the statutory power to its limit". Professor Whalan considered that although the exemptions did not breach the letter of the law, they appeared to breach the spirit of the Act.

5. Accordingly, the Committee wrote to the Minister as follows:

' 4 September 1986

The Hon Lionel Bowen, MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

At its meeting on 21 August 1986, the Committee considered the Sex Discrimination (Operation of Legislation) (No.1) Regulations (being Statutory Rules 1986 No.191, tabled in the Senate on 19 August 1986). The Committee is required to assess the Regulations to determine whether they have been made in breach of the spirit of the *Sex Discrimination Act 1984* and whether they therefore may infringe Principle (a) of the Committee's terms of reference by not being "in accordance with the statute".

Subsections 40(1) and (2) of the Sex Discrimination Act provide that except in relation to the operation of the *Social Security Act 1947* and four other named Acts nothing in those sections of the Act outlawing sex discrimination shall, for two years after the commencement of the Act, affect anything done by a person in direct compliance with any other Act or regulation. This exemption from the provisions of the Act ceases to be in force at the expiration of two years except in relation to

the named Acts and “except to the extent that regulations made for the purposes of this subsection, otherwise provide”. Subsection 40(3) provides that regulations may apply generally to the legislation described in subsection 40(1) or only in relation to specified legislation.

Regulations 3 and 4 of the Sex Discrimination (Operation of Legislation) (No.1) Regulations provide that, for the purposes of subsection 40(2) of the Act, the exemption from the provisions of the Act outlawing discrimination shall not cease to be in force at the expiration of two years after the commencement of the Act in relation to the legislation specified in the Schedule and all delegated legislation made under it. The Committee notes that these are indefinite exemptions which place the specified legislation into the same category of permanent exemption as the Social Security Act and the four other Acts named in the Sex Discrimination Act itself.

This permanent exemption is in contrast to the provisions of regulations 3 and 4 of the Sex Discrimination (Operation of Legislation) (No.2) Regulations which exempt for a limited period only, the application of the Sex Discrimination Act to certain Acts and regulations.

The Committee acknowledges that the (No.1) and (No.2) Regulations are the product of careful research and legal drafting. However, it is not immediately apparent to the Committee, nor does the Explanatory Statement elucidate, why decisions under the provisions in the Schedule to the (No.1) Regulations are to be permanently exempted from the application of measures to eliminate sex discrimination. The only justification for drafting these Regulations without a sunset clause would be that each provision permanently exempted refers to a decision which by legislative definition, requirement or necessity involves an unavoidable taking into account of gender-specific criteria. If this is not the case in regard to each exempted provision, then the use of delegated legislation to exempt permanently from prohibition an unjustifiable discriminatory decision may be at variance with the spirit and intention of the regulation making power conferred by section 40 of the Sex Discrimination Act.

It may be that this justification exists and that a more adequate Explanatory Statement could have allayed all of the Committee's concerns. The Committee would be very grateful if you could advise it of the reasons why each provision of the legislation exempted by the (No.1) Regulations has been permanently so exempted from the anti-discrimination law.

Yours sincerely
Barney Cooney
Chairman'

6. In order to preserve the option to recommend appropriate action to the Senate, on 14 October 1986 Senator Cooney moved a protective notice of motion of disallowance in respect of the Regulations, as the 15 sitting day period during which such notices must be moved was about to expire.

7. On 17 October 1986 the Attorney-General replied to the Committee's letter. The letter helpfully provided detailed reasons why the Regulations permanently exempted the specified discriminatory provisions. The full letter is too lengthy to reproduce, but the opening paragraphs were as follows:

' 17 October 1986

Senator Barney Cooney
Chairman
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to your letter of 4 September 1986 in which you sought reasons why the legislation listed in the Schedule to the Sex Discrimination (Operation of

Legislation) (No.1) Regulations, Statutory Rules 1986 No.191 ("the Regulations"), has been permanently exempted from the operation of the *Sex Discrimination Act 1984*. The delay in replying to you is regretted but was necessitated by the need to consult further with those Departments at whose request various exemptions had been included in the Regulations.

The Schedule to the Regulations lists Commonwealth Acts and Territory legislation to be exempted from the Sex Discrimination Act. Section 40 of the Sex Discrimination Act enables such regulations to be made to exempt legislation of a kind referred to in paragraph 40(1)(a) or (b) either generally or in respect of specified legislation. No limitation is placed on the duration of regulations made for the purposes of section 40.

I note that the Committee's concerns are primarily with the indefinite duration of the exemptions provided in the Regulations. I have examined each of these exemptions and consider them to be justified either on the basis of cost or because of the essential nature of the provisions.

I turn now to consider the particular legislative enactments and provisions referred to in the Schedule to the Regulations...

Yours sincerely
Lionel Bowen'

8. The Committee considered the Attorney-General's letter and replied as follows:

24 October 1986

The Hon Lionel Bowen, MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

At its meeting on 23 October 1986, the Committee considered your letter of 17 October 1986 concerning the Sex Discrimination (Operation of Legislation) (No.1) Regulations, Statutory Rules 1986 No.191. The Committee thanks you for the demonstrable care and skill which has gone into the preparation of your reply. The Committee notes in particular that during the course of your Department's further examination of the Regulations, it has been realised that some legislation was incorrectly included and that, as a matter of priority, such appropriate action as is necessary will be taken to rectify this.

The Committee devoted some time to a consideration of the implications for sex equality of the provisions in the Regulations which permanently exempt from the operation of the Sex Discrimination Act, decisions made under certain legislation. The Committee noted that, by contrast, the continuing exemptions made by the Sex Discrimination (Operation of Legislation) (No.2) Regulations, Statutory Rules 1986 No.192, were all time-limited. The Committee was concerned that the exemptions listed in the (No.1) Regulations were not also made subject to a sunset clause which would have ensured that the very complex issues of principle, policy, cost, and administration pertaining to those exemptions, would have been the subject of continuing review and reassessment. The Committee noted that many of the permanent exemptions are matters of considerable moment and potential controversy in the context of the objects set out in section 3 of the *Sex Discrimination Act 1984*.

As you know, Principle (a) of the Committee's terms of reference require it to scrutinise delegated legislation to ensure that it is "in accordance with the statute". Principle (d) refers to the question whether an instrument contains matter more appropriate for parliamentary enactment.

In its *Seventy-sixth Report* (Parliamentary Paper No.507/1985, Appendix 1) the Committee set out its approach to the application of Principle (a) which implies not merely legal validity but also parliamentary propriety. In its *Seventy-seventh Report* (Parliamentary Paper No.172/1986, Chapter 2) the Committee referred to guidelines which it considers in determining whether to apply Principle (d) to particular delegated legislation.

The Committee has some concern that, given the width and significance of the decisions which, under the Regulations, are to be exempted permanently from the application of the Sex Discrimination Act, these matters should either be made the subject of continuing review or be made subject to positive parliamentary approval. For example, since subsection 40(2) of the Act expressly lists legislation which is to be exempted permanently from the operation of the Act, it may be inappropriate for subordinate legislation to be used to widen that list.

However, the Committee has some reservations about applying Principle (d) to these Regulations. Thus, it supports the view that a two year sunset clause should be placed in the Regulations to guarantee that reviews mentioned in your letter as being currently under way would be purposive, and matters not yet under review would be studied in the light of changing circumstances.

The Committee would respectfully ask you to amend the Regulations by providing that they cease to have effect within two years, during which time the implications of continuing to exempt the legislation can be reassessed. The Committee feels quite *strongly about the possible conflicts that exist between, on the one hand, the high ideals of the Sex Discrimination Act, and on the other hand, the consequences for the rights and liberties of individuals, of the use of delegated legislation to produce*

permanent exclusions from the scope of that Act.

The Committee respectfully asks you to give this request your serious consideration. It believes that it is important that the Act not be seen to be unduly weakened by subordinate legislation at a time when complex issues crucial to the ideals of sex equality are still under review.

Yours sincerely
Barney Cooney
Chairman'

9. The Attorney-General accepted the Committee's suggestion, replying as follows:

'13 November 1986

Senator Barney Cooney
Chairman
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Cooney

I refer to your letter of 24 October 1986 in which you request that I agree to take the necessary action to amend the Sex Discrimination (*Operation of Legislation*) (No.1) Regulations, Statutory Rules 1986 No.191, to provide that they will cease to have effect within two years.

I have given careful consideration to the views of your Committee and I am prepared to agree to the Committee's request. I have accordingly instructed my Department to prepare a further set of Regulations to amend the Sex Discrimination (*Operation*

of Legislation) (No.1) Regulations to provide that the exemptions provided therein will cease to have effect two years after the date on which they came into operation, i.e. 28 July 1988.

Yours sincerely
Lionel Bowen'

10. Following this undertaking by the Minister, on 18 November 1986 Senator Cooney removed the protective notice of motion of disallowance in respect of the Regulations.

11. Finally, the Committee thanked the Attorney-General for his undertaking to amend the Regulations to limit the exemptions to a two year period after the date on which the Regulations came into operation, as follows:

' 18 November 1986

The Hon Lionel Bowen, MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

The Committee has considered your letter of 13 November 1986 concerning the Sex Discrimination (Operation of Legislation) (No.1) Regulations, Statutory Rules 1986 No.191, and the question whether potentially sex discriminatory decisions made under certain legislation should be permanently excluded from the operation of the *Sex Discrimination Act 1984*.

The Committee regards your decision, after careful consideration, to accept the Committee's suggestion that a sunset clause should time-limit the exclusions to two

years, as one of very considerable significance to the cause of sex equality. The Committee is not unmindful that some of the sex equality issues arising from legislation listed in the Schedule to the Regulations are problematic. The Committee commends you, however, for the way in which you quickly determined that such issues should remain under continuing review in the context of the important ideals of the Sex Discrimination Act.

The Committee thanks you for the advice you have given and for your undertaking to amend the regulations.

Yours sincerely
Barney Cooney
Chairman'

12. In summary, the Committee had achieved considerable success in its scrutiny of the Sex Discrimination (Operation of Legislation) (No.1) Regulations. It had obtained detailed explanations of the reasons why the executive had prolonged the operation of discriminatory laws and had received an undertaking to limit the operation of such exemption. It had also placed on notice its concern that the general operation of these exemptions could breach parliamentary propriety in that they may not be in accordance with the parent Act and that they may contain matter more appropriate for parliamentary enactment.

CHAPTER 3

THE SEX DISCRIMINATION (OPERATION OF LEGISLATION) REGULATIONS STATUTORY RULES 1988 NO.183

1. The undertaking by the Attorney-General to amend the Sex Discrimination (Operation of Legislation) (No.1) Regulations to meet the concerns of the Committee by limiting the operation of the Regulations to two years was implemented by the Sex Discrimination (Operation of Legislation) (No.1) Regulations (Amendment), Statutory Rules 1987 No.8, made on 30 January 1987.

2. During 1987, there were further changes to delegated legislation extending the operation of discriminatory Commonwealth, State and Territory legislation. On 30 January 1987 amendments of the Sex Discrimination (Operation of Legislation) (No.2) Regulations and the Sex Discrimination (Operation of Legislation) (No.3) Regulations extended the general operation of those Regulations and changed the schedules of exempted State legislation. On 22 July 1987 the Sex Discrimination (Operation of Legislation) (No.2) Regulations consolidated into one instrument all provisions of the previous Sex Discrimination (Operation of Legislation) (No.2) Regulations and Sex Discrimination (Operation of Legislation) (No.3) Regulations and repealed those principal Regulations.

3. A similar process of consolidation continued in 1988. The Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1988 No.183, (called "the Regulations" in this Chapter) consolidated all the remaining provisions of the Sex Discrimination (Operation of Legislation) (No.1) Regulations and the Sex Discrimination (Operation of Legislation) (No.2) Regulations and repealed those principal Regulations.

4. The result was that all executive instruments extending discriminatory laws were now located in one set of principal regulations, the Sex Discrimination (Operation of Legislation) Regulations. This was a positive development, improving on the previous situation where such provisions were placed in first three, and later two, sets of principal regulations.

5. The Explanatory Statement which accompanied the Regulations gave a detailed explanation of the reasons for the continuation, in whole or part, of the 13 Commonwealth Acts, 17 Territory Acts, Ordinances and Codes and 12 State Acts, together with associated regulations, exempted by the Regulations. Indeed, much of the Explanatory Statement was identical to the Minister's letter to the Committee of 17 October 1986, even to the extent that the explanation for the *Student Assistance Act 1973* repeated word for word references to the Tertiary Education Assistance Scheme, which had been abolished by the *Student Assistance Amendment Act 1986*.

6. However, the Regulations also extended the original sunset period for their operation by a further 12 months, to 31 July 1989. The Committee was concerned at this further extension by the executive of discriminatory laws.

7. Therefore, the Committee wrote to the Minister for Justice on 1 September 1988, noting that, "at the expiry of the extension period granted by these Regulations, five years will have elapsed since the provisions of the Sex Discrimination Act were proclaimed. The Committee is of the view that, by the conclusion of this period, the necessity for such elongated extensions of discriminatory provisions should be at an end".

8. The Committee regarded the matter as so serious that on 7 September 1988 it asked Professor Whalan for a special report on the Regulations. This report suggested that it was not unreasonable for the Committee to decide that the "amber light" had appeared for the Regulations.

9. The Minister replied to the Committee as follows:

28 September 1988

Senator the Hon Bob Collins
Chairman
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Collins

Thank you for your letter of 1 September 1988 conveying the views of the Standing Committee on Regulations and Ordinances in relation to the Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1988 No.183.

In regard to the second issue raised by the Committee, I share its concern at the length of time the exemptions under the Act have been continued. However, I am also aware of the difficulties involved in finding an alternative to the present procedure of ongoing review with the extension of the exemptions where necessary. In relation to this matter, I understand that the Attorney-General has written to the relevant State Governments drawing attention to the five year period that will have elapsed at the expiration of the current exemptions since the passage of the Act. The Attorney-General has asked those Governments to monitor developments in this area and to keep his Department informed of any progress being made which would alleviate the need to continue current exemptions for State legislation.

While in principle it would be desirable not to continue to extend exemptions via regulations under the Act, the alternative would involve the need to make an amendment to the Act, in order to continue a number of the current exemptions where it is not feasible in the immediate future to make those laws non-discriminatory. I think it would be fair to say that there would be a number of pieces

of legislation to which this might apply. However, I do not believe the Attorney-General would desire bringing forward such an amendment until he is satisfied that no improvement in the foreseeable future may be achieved. Certainly, one of the advantages of the current regulations procedure is that the continuing need to exempt discriminatory legislation is brought periodically under review.

I would appreciate you bringing a copy of my response to your letter to the attention of the Honourable Senators of the Committee.

Yours sincerely
Michael Tate'

10. The Committee accepted this advice from the Minister. The position now was that while the Committee remained seriously concerned that the Regulations may breach parliamentary propriety, the Regulations at least only extended discriminatory legislation by a further 12 months. In addition, the Minister had agreed in principle with the view of the Committee that extension by regulation was not desirable. Although the general situation was not satisfactory, the Committee could review any fresh extensions after only 12 months, instead of the 24 months in the previous provisions and, of course, instead of the unlimited extensions originally provided which would not have been reviewable at all after 15 sitting days from tabling.

CHAPTER 4

THE SEX DISCRIMINATION (OPERATION OF LEGISLATION) REGULATIONS STATUTORY RULES 1989 NO.200

1. The substantive provisions of the Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1988 No.183, expired on 31 July 1989. They were then repealed and replaced by the Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1989 No.200 (called "the Regulations" in this Chapter). The Regulations extended the operation of discriminatory laws for yet a further 12 months, to 31 July 1990.

2. By now there was a definite feeling among the Committee that, after the expiry of the Regulations, Parliament should be given the opportunity to debate any further extension of legislative discrimination. Accordingly, the Committee wrote to the Minister for Justice as follows:

'5 September 1989

Senator the Hon Michael Tate
Minister for Justice
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to the Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1989 No.200, tabled in the Senate on 17 August 1989 and considered by the Committee at its meeting of 31 August 1989.

The Committee noted that the Regulations prolong the existence of certain legislation which would otherwise be in breach of the *Sex Discrimination Act 1984*. The Committee has considered similar Regulations in the past and its general position might be summed up by my letter to you of 1 September 1988, which stated, "The Committee also notes that, at the expiry of the extension period granted by these Regulations (on 31 July 1989), five years will have elapsed since the provisions of the Sex Discrimination Act were proclaimed. The Committee is of the view that, by the conclusion of the period, the necessity for such elongated extensions of discriminatory provisions should be at an end".

The Committee does acknowledge that, on comparing last year's Regulations with the present Regulations, there has been some improvement in provisions relating to the States, with deletions out-numbering the additions. In respect of the Territories, there have been some deletions and no additions, and in the Commonwealth area, apart from spelling out particular provisions, there have been two deletions.

The Explanatory Statement, in relation to Commonwealth legislation, advised that the Government will consider amendment of the Sex Discrimination Act to entrench most of the discriminatory elements of Commonwealth legislation that are extended by these Regulations. This was mooted in your helpful reply of 28 September 1988 to my letter of 1 September 1988. This suggestion of an amending Act also fits in with the views of the Committee expressed in a letter by Senator Cooney, the then Chairman of the Committee, in his letter of 24 October 1986 which said, "these matters should either be made the subject of continuing review or be made subject to positive parliamentary approval". If a Bill to amend the Sex Discrimination Act itself eventuates, there will, of course, be an opportunity for direct Parliamentary scrutiny of any proposals for entrenching discrimination in Commonwealth legislation.

At the expiration of these present Regulations on 31 July 1990, six years will have passed since the Act came into operation. The Committee accepts the advice in the Explanatory Statement that action is in prospect, but respectfully suggests that

because of the long delay in finalising this matter, it would be appropriate for an amending Bill to be introduced into the Parliament before their expiration.

The Committee would appreciate your advice.

Yours sincerely

Bob Collins

Chairman'

3. The Minister replied to the Committee as follows:

'4 October 1989

Senator Bob Collins
Chairman
Standing Committee on Regulations
and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Collins

I refer to your letter of 5 September 1989 concerning the Sex Discrimination (Operation of Legislation) Regulations (Statutory Rules 1989 No.200). In your letter you discuss the desirability of an amendment to the *Sex Discrimination Act 1984* to, in effect, replace the current process of extending exemptions for inconsistent legislation to the Act by regulations.

I am advised that it is the Attorney-General's intention to introduce legislation next year to insert indefinite exemptions into the Act. There are a number of difficulties in introducing such legislation. The first difficulty is the tightness of the legislative timetable and the related difficulties of gaining the necessary priority for the legislation.

The other difficulty, which may prove more truculent, is the question of the exemptions for State legislation dealing with manual handling and lead processing. It may well be that Worksafe Australia will not have finalised its lead and manual handling standards in time to prepare the amending Bill. In order to meet these difficulties it may be necessary for the Government to leave open the option of using the regulation procedures to extend further the current exemptions.

I would appreciate you circulating a copy of this letter to the members of your Committee.

Yours sincerely
Michael Tate'

4. The Committee again wrote to the Minister as follows:

' 31 October 1989

Senator the Hon Michael Tate
Minister for Justice
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to your letter of 4 October 1989 concerning aspects raised by the Committee of the Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1989 No.200, considered by the Committee at its meeting of 26 October 1989.

The Committee is grateful for your advice that it is the Attorney-General's intention to introduce legislation next year to insert indefinite exemptions into the parent Act. The Committee believes this is an advance on the advice in the Explanatory Statement to the present Regulations that the government would merely consider legislation to entrench discrimination in Commonwealth legislation.

Your letter then discusses various difficulties in the introduction of such legislation.

The first difficulty you mention is the tight legislative program and the problem of obtaining the necessary priority for the legislation. The Committee believes that legislative provisions such as these, affecting as they do personal rights and liberties and Parliamentary proprieties commented upon by the Committee over a period of years, should ensure a high priority on the legislation program. This belief is in accordance with the Committee's scrutiny of legislative policy. The Committee would be disappointed if the proposed legislation was delayed for this reason.

The second difficulty is exemptions for State legislation dealing with manual handling and lead processing. You advise that Worksafe Australia will not have finished its lead and manual handling standards in time to prepare the amending Bill. The Committee notes that Worksafe Australia is part of the portfolio responsibility of the Minister for Industrial Relations, the Hon Peter Morris MP. The Committee asks whether you would write to your colleague setting out the position, including the unanimity of view of the Attorney-General and the Committee, and requesting that Worksafe Australia be directed, as far as this is possible within the terms of its enabling legislation, to give this matter urgent priority. Perhaps you could also advise the Committee of the length and nature of these standards. The Committee believes that prompt action now may be able to see the introduction of the legislation. The Committee notes that from now until the expiry of the present Regulations on 31 July 1990 is nine months. The Committee assumes that this means that the amending legislation need not be passed until the end of the Autumn Sitzings next year.

In conclusion, the Committee is grateful for the progress made in this general area, progress acknowledged in my letter to you of 5 September 1989. The intentions of the Attorney-General and yourself to remedy the situation are also appreciated. The Committee does not see, however, that the two difficulties you outlined should necessarily delay the legislation, and would look closely at any proposed further extensions of the exemptions.

Yours sincerely

Bob Collins

Chairman'

5. In summary, the Committee had achieved another considerable success. The Minister had acknowledged that the most appropriate way of dealing with exemptions from the Sex Discrimination Act was by amendment of the Act, rather than by executive law-making. However, problems of timing remained; the Committee expressing a preference for an amending Act to come into operation before the Regulations expired in 12 months, while the Minister was less certain whether this was practicable.

CHAPTER 5

THE SEX DISCRIMINATION (OPERATION OF LEGISLATION) REGULATIONS STATUTORY RULES 1990 NO.244

1. Before the expiry on 31 July 1990 of the then existing Sex Discrimination (Operation of Legislation) Regulations the Attorney-General wrote to the Committee as follows:

18 June 1990

Senator Mal Colston
Chairman
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Colston

I am writing to you concerning the *Sex Discrimination (Operation of Legislation) Regulations* made under the *Sex Discrimination Act 1984*. The Regulations provide for exemptions from the Act for acts done in compliance with certain Commonwealth, State and Territory legislation. The present Regulations will expire on 31 July 1990.

I am aware that the Senate Standing Committee on Regulations and Ordinances has expressed concern at the continuation of the process of exemption by regulation given the time that has elapsed since the proclamation of the Act. I share this

concern. Unfortunately, as foreshadowed as a possibility in Senator Tate's letter to the Committee last year, it will be necessary to make Regulations again. I have nevertheless put in train action which should ensure that upon the expiry of the 1990 Regulations, no further such regulations will be made.

The detailed reasons for the continuation of the exemptions will be given in the explanatory material for the new Regulations. In short, it has not proved possible to introduce permanent exemptions, as planned, to replace the temporary exemptions in some cases, before 31 July 1990. Some State legislation has had to await the finalisation of a national standard on lead processing and a code of practice on manual handling, matters which have been delayed. I am satisfied that where a further exemption is sought this year, there is a genuine need and that failure to allow the exemptions could have very serious consequences.

I trust you will understand the reasons which have led me to approve the making of the Regulations this year. I would appreciate your circulating this letter to members of the Committee.

Yours sincerely
Michael Duffy'

2. Following the expiry of the then Regulations on 31 July 1990 they were repealed and replaced by the Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1990 No.244 (called "the Regulations" in this Chapter). After the Regulations were made the Committee replied to the Attorney-General's letter of 18 June 1990 as follows:

'24 August 1990

The Hon Michael Duffy MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to your letter of 18 June 1990, on what is now the Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1990 No.244. The Committee considered both your letter and the Regulations at its meeting of 23 August 1990.

The Committee appreciates your courtesy in writing in advance of making the present Regulations. Nevertheless, these Regulations prolong the existence of discriminatory Commonwealth, State and Territory legislation. At the expiry of the present extension, seven years will have passed since the provisions of the Sex Discrimination Act were proclaimed.

The Committee is also grateful for your advice that action has been initiated which should ensure that upon the expiry of the present Regulations no further such regulations will be made. The Committee would, however, welcome further advice on the progress made on this matter.

Both the Regulations themselves and the Explanatory Statement for them are very similar to last year's Regulations and Explanatory Statement except with the date "1990" replacing "1989" and the expiry date "1991" in place of "1990". Indeed, the Explanatory Statement even states, incorrectly, that the present Regulations are to commence on 1 August 1989.

Much of the present Explanatory Statement is repeated almost verbatim with last year's advice. Thus the Explanatory Statement repeats advice that two sections of

the *Marriage Act 1961* would “be amended to conform with the *Sex Discrimination Act 1984* in the near future”. Again, with the Muslims Ordinance in force in Christmas Island and the Cocos (Keeling) Islands, advice is repeated that “it is expected that the Ordinance will be amended shortly after consultation with local Muslim communities”.

Changes have been made to the Regulations but these are comparatively minor. Some discriminatory provisions of the *Defence Service Homes Act 1918* have been removed, but some remain. The *Crimes Act 1990* of NSW as in force in Norfolk Island has disappeared, although the Explanatory Statement does not appear to advise why. The name of the ACT Adoption of Children Ordinance 1965 has been changed, one year late, to the *ACT Adoption of Children Act 1965*, although this has no effect on the substance of the issue.

The Committee notes, therefore, that there has been apparently less progress in this area over the last 12 months than there was in the 12 months before that. In respect of those areas where the Explanatory Statement merely repeats last year's Explanatory Statement the Committee would be grateful of more detailed advice on progress made, such as whether drafting instructions have been issued and whether a place has been sought for suitable Bills in the Government's legislation program.

Once again, the Committee is grateful for your letter and for your helpful assurance. The Committee emphasises, however, that it believes that the time is now suitable either for an end to this discriminatory legislation or for the Parliament to be given an opportunity to debate the entrenching of the discrimination in Commonwealth legislation.

Your advice would be appreciated.

Yours sincerely
Mal Colston
Chairman'

3. The Attorney-General replied to the Committee's letter as follows:

4 12 November 1990

Senator Mal Colston
Chairman
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Colston

I refer to your letter of 24 August 1990 concerning the Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1990 No.244. Your letter makes a number of comments and seeks further advice on a number of issues.

The Committee has asked for further advice on the progress which has been made towards ensuring that the current Regulations will be the last regulations extending the exemptions. The issues you have raised are currently under review and I will write to you when I have finalised a position in regard to the continuation of a number of the current exemptions. One proposal under consideration is to insert non-controversial indefinite exemptions into the *Sex Discrimination Act 1984* (SDA). The detail as to the content of the proposed indefinite exemptions has not been finalised. Another option which is also under consideration is to assess whether it would be appropriate for exemptions to be considered under s.44 of the SDA, which provides that the Human Rights and Equal Opportunity Commission may grant limited term exemptions.

In regard to the forecast changes to the *Tax Assessment Act 1936* I understand that a Bill to amend the Act will be introduced shortly into Parliament.

The Committee noted that both the Regulations themselves and the Explanatory

Statement were similar to last year's Regulations and Explanatory Statement and that there has been apparently "less progress" in this area over the last 12 months than there was in the 12 months before. While it is true that a particular effort had been made in 1989 in order to narrow the number of exemptions, the "lack of progress" reflects generally the difficulty in making headway concerning the remaining exemptions.

In regard to the exemptions concerning the Indian Ocean Territories (IOTs) my Department has sought additional information from the Department of Arts, Sport, the Environment, Tourism and Territories. That Department has advised that the House of Representatives Standing Committee on Legal and Constitutional Affairs is expected to report very shortly on the legal regimes for the IOTs. Subject to consideration of this report, the Government's aim is to introduce a completely new legal regime for the IOTs which will replace Singapore laws with those of a mainland jurisdiction, e.g. Western Australia.

For the Muslim communities of the IOTs, the proposed reforms would represent the largest change in the legal basis of social life that has occurred in over 30 years of Australian administration. Consultation with the local communities, on general principles and specific rules, is needed before the change is made. This process is well advanced and it is hoped to complete it in time for the new regime to be introduced in mid-1991.

In regard to the Married Women and Children (Maintenance) Ordinance, and the Penal Code, these cases are entirely obsolete by modern Australian standards. Their complete repeal and replacement with mainland laws is intended. This should be achieved, as part of the complete reform of the legal regime, by mid-1991. As regards the sex-specific provisions of the Crimes Act as it applies to Norfolk Island, the Crimes Act is in the process of being amended following review of the Act by the Norfolk Island Government. The discriminatory provisions are, in any case, very rarely invoked.

In regard to the Family Law Act, I am currently examining the relevant issues and will advise the Committee of any proposals for reform at a later stage.

I would appreciate you circulating this letter to members of the Committee.

Yours sincerely
Michael Duffy'

4. The Committee now considered that it would be useful for officials of Attorney-General's Department to brief it further on the existing position. Therefore, it wrote to the Attorney-General as follows:

'29 November 1990

The Hon Michael Duffy MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to your letter of 12 November 1990 on aspects raised by the Committee of the Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1990 No.244. The Committee considered the letter at its meeting of 29 November 1990.

The Committee is grateful for your advice. As mentioned in the Committee's earlier letter of 24 August 1990, your courtesy in writing to the Committee on 18 June 1990 prior to making the present Regulations is also appreciated.

Nevertheless, there are some further aspects of the Regulations upon which the Committee would appreciate advice. In particular, your letter of 18 June 1990 advised that action had been put in train which should ensure that upon the expiry of the present Regulations that no further regulations would be made. The

Committee believes that this outcome would be desirable. It would bring to an end a seven year period during which discriminatory legislation was prolonged by the executive. The Committee asks whether the advice that the present Regulations should be the last, is still applicable.

Your letter mentions that a proposal is being considered to insert indefinite exemptions into the parent Act. This also is a useful suggestion. It would mean, of course, that Parliament would be able to debate the entrenching of some forms of discrimination. However, the Committee is disappointed that this proposal only extends to what you refer to as non-controversial exemptions. The Committee considers that it may be more appropriate to give the Parliament an opportunity to debate all exemptions.

The option for the Human Rights and Equal Opportunity Commission to consider exemptions would be satisfactory only insofar as it displaced the present position under which the executive prescribes exemptions. The Committee notes that decisions under section 44 are subject to AAT review.

The Committee noted your advice that there is difficulty making headway with the remaining exemptions, and your detailed and helpful background to some Territory legislation. Do these difficulties include the State and other Territory legislation included in Schedule 1 of the Regulations?

The Committee is grateful for your advice that you will write further on the position with exemptions. However, it may be helpful if officers of your Department could brief the Committee on matters raised in your letters. Accordingly, it would be appreciated if you could arrange for two or three suitably senior officers to attend the next meeting of the Committee. The officers should come to the Senate entrance of Parliament House at 8.15 am on Thursday 6 December 1990. Perhaps your office or the Department could contact the Secretary of this Committee beforehand on 2773066 to notify the names of the officers attending.

Your cooperation would be appreciated.

Yours sincerely
Patricia Giles
Chair'

5. On 6 December 1990 officials of the Attorney-General's Department briefed the Committee, following which the Chair wrote to the Attorney-General as follows:

'21 December 1990

The Hon Michael Duffy MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to my letter of 29 November 1990 on aspects raised by the Committee of the Sex Discrimination (Operation of Legislation) Regulations, Statutory Rules 1990 No.244, and to your reply of 4 December 1990. In that letter I asked if you could *nominate senior officers of your Department* to attend a meeting of the Committee to discuss these aspects. On 6 December 1990 Joan Sheedy and Peter Thomson of the Human Rights Branch of your Department briefed the Committee. The Committee is grateful for your cooperation in this matter. I attach a Hansard record of the meeting.

The Committee believes that the meeting with your officials was helpful. The officials confirmed earlier advice that it was still intended that the present Regulations should be the last in this extensive series, that Commonwealth, State and Territory agencies had been put on notice of this intention, and that a place had been reserved in the Government's legislation program for Autumn 1991 for any required legislation.

The Committee looks forward to the expiry of the main provisions of these Regulations on 31 July 1991, which will bring to an end seven years of this extension by executive action of discriminatory legislation in Australia.

Yours sincerely
Patricia Giles
Chair'

6. The consideration by the Committee of the Regulations and the instruments which preceded them was now virtually complete. The Committee had obtained an undertaking that the Regulations, the substantive provisions of which were to expire on 31 July 1991, would not be replaced. Also, the principal Act would be amended so that any exemptions from its provisions would be contained in that Act itself. It only remained for the Committee to monitor the implementation of these undertakings.

CHAPTER 6

THE SEX DISCRIMINATION AMENDMENT ACT 1991

NO.71 OF 1991

1. The *Sex Discrimination Amendment Act 1991* received assent on 25 June 1991. Among other things, that Act repealed paragraphs 40(1)(a) and (b) of the principal *Sex Discrimination Act 1984* as from 1 August 1991, immediately after the expiry of the Sex Discrimination (Operation of Legislation) Regulations on 31 July 1991. Following this repeal it was no longer possible for the executive to prolong discriminatory provisions in Commonwealth, State and Territory legislation. Any exemptions of specific laws were now expressly set out in the principal Act itself and had been debated by Parliament.

2. The Minister who moved the Second Reading of the Bill for the *Sex Discrimination Amendment Act 1991* was Senator the Hon Bob Collins, Minister for Shipping and Aviation Support and Minister Assisting the Prime Minister for Northern Australia. Senator Collins was a former Chair of the Committee and one of the four Chairs who pursued this matter to its eventual satisfactory conclusion. The Second Reading Speech for the Bill acknowledged the role of the Committee in the repeal of the power to extend exemptions by regulation.

3. On 8 July 1991 the Minister for Justice and Consumer Affairs, Senator the Hon Michael Tate, wrote to the Chair of the Committee, Senator Patricia Giles, advising that the *Sex Discrimination Amendment Act 1991* had implemented the Minister's undertaking to amend the Act to meet the concerns of the Committee.

4. The Committee scrutinised the relevant provisions of the *Sex Discrimination Amendment Act 1991*, confirmed that it met all of its concerns, and declared the matter closed.

A handwritten signature in cursive script, reading "Patricia Giles".

~~Patricia Giles~~
Chair