
CHAPTER 12:

**BUYING BACK SUPERANNUATION
ENTITLEMENTS:**

**THE MARRIAGE BAR AND OTHER DISCRIMINATORY
PRACTICES**

What happened to their employer contributions?¹

12.1 Past discriminatory employment practices have resulted in a disentitlement to superannuation benefits that would have been available but for those practices. Those whose superannuation has been affected by these practices are now seeking to buy back the entitlements that were lost.

12.2 This chapter examines the steps that are being taken in a number of jurisdictions to address the impact of past discriminatory practices. Two particular examples of past employment practices that lead to superannuation disentitlement brought to the Committee's attention are:

- (i) the marriage bar; and
- (ii) the absence of working arrangements such as casual or part-time employment which would accommodate women caring for children.

12.3 The Committee concludes that where current public sector employees, who lost employer contributions as a result of past discriminatory employment practices, should be given the opportunity to buy back their superannuation entitlements at a rate less than the total cost of employer and employee contributions. That is, the rate should be somewhat concessional as well as being actuarially sustainable for the fund.

Discrimination principles

12.4 An important principle of discrimination law is to compensate for injustices or disadvantages experienced by particular groups in society. Anti-discrimination laws are not retrospective, but where past discrimination

¹ Tracey A, Evidence, p 402

continues to have ongoing effects then anti-discrimination laws may be used to address those continuing effects.

12.5 Without prejudice to actions which individual women may take, the Committee was concerned whether there was a need for Commonwealth legislative or other action in relation to any perpetuating injustice in women's superannuation resulting from the former marriage bar. The Sex Discrimination Commissioner said, 'My view is that it would be an act of good faith for the Federal Government to compensate these women in some form.'²

Indirect discrimination

12.6 Indirect sex discrimination occurs when apparently neutral policies and practices adversely affect a higher proportion of people of one sex or marital status. It is assessed on the basis of outcomes not intentions.³

12.7 For example, it was suggested that it may be possible for women who suffered discrimination as the result of the marriage bar to successfully bring a case of indirect discrimination on the grounds of sex or marital status:

The argument could be made that a woman forced out of her superannuation scheme when she married and who then returned to the same employer, faced the perpetuation of the previous discrimination, because her years of service prior to her marriage are not recognised for superannuation purposes, whereas men who had served the same or less years of service, did have their period of service prior to their marriage recognised.⁴

The marriage bar

A woman who was an employee of the Commonwealth Government between 1961 and 1965, was forced to leave when she married in 1965. She was repaid her superannuation payments made over that period, but without interest. She subsequently rejoined the Commonwealth Public Service after the marriage bar had been removed, and wish to 'buy back' her earlier years of service.⁵

² SW Sub No 89

³ Sex Discrimination Commissioner, *Further Guidance for Employers and Trustees with regard to the 1993 Superannuation Amendments*, Human Rights and Equal Opportunity Commission, 1995, p 10

⁴ *ibid.*, p 37

⁵ Sex Discrimination Commissioner, *Buyback and Retrospectivity Guidelines*

Background

12.8 The 'marriage bar' describes the practice that prevented women in certain sectors of the workforce from continuing in employment after they married. The Committee heard evidence from people who had been either State government or Commonwealth employees and who were affected by the marriage bar as it operated in Queensland, Tasmania, and the Australian Capital Territory.

12.9 While the specific impact of marriage bar varied between individual witnesses according to their employment and residence, it was noted that one form of its expression was under the *Public Service Act 1992* (Commonwealth), which prohibited married women from working as permanent employees in the Commonwealth public service.

The number affected in the Commonwealth

12.10 According to the 1966-67 Annual Report of the Public Service Board, just under 5 000 women left the Commonwealth public service in the three years 1964 to 1966 under the separation category 'marriage retirement'. In each year this represented between one quarter and one third of all female permanent staff leaving the service in those years. The majority of these women worked in the 'Fourth Division', which included telephonists, typists, stenographers, clerical assistants etc.⁶

12.11 At June 1967, 2 027 married women were employed as permanent officers in the service, representing 7.5 per cent of female officers. This more than doubled in the following year, with 4 832 married women (representing 15.4 per cent of female officers) being employed as permanent officers at June 1968.⁷

The impact on superannuation

12.12 Although such discriminatory provisions are no longer in effect under State or Commonwealth law, it was argued that the deferred nature of superannuation benefits meant that the consequences of past discrimination affect the superannuation entitlements of a number of women.

⁶ Public Service Board *Forty Third Annual Report 1966-67*, p 93

⁷ Public Service Board *Annual Report 1969*, p 125

12.13 This form of discrimination has resulted in other disadvantages and loss of entitlements, such as accrual of leave and long service leave. The Commonwealth Government has since corrected for lost entitlements in certain areas such as sick leave, which have been recredited.⁸ 'There has also been some recognition of prior service on retrenchment'.⁹

12.14 The marriage bar for Commonwealth employees was lifted in 1966. (Some parts of the private sector did not eliminate the marriage bar until after 1971.)¹⁰ A number of women who were affected and who rejoined the public service after a break of some years are naturally eager to maximise their superannuation.

12.15 The Committee examined the case of Ms Kaye Jenner as an example of a woman with a broken employment history with the Australian Public Service. Ms Jenner's first period of employment was terminated by the marriage bar; and the second before the birth of a child, was prior to the introduction of maternity leave provisions. She was now in her third period of employment. Ms Jenner argued that:

the number of years that I am able to participate in the paid workforce was restricted by the marriage bar ... and the lack of maternity leave entitlements before 1971. By comparison, on these points the male workforce was not affected.¹¹

12.16 The general proposal put before the Committee was that such women be given the opportunity to buy back their past superannuation entitlements.

12.17 It was put to the Committee that the matter of recognition of marriage bar service is not as clear-cut as first appears. Mr Lindsay gave a hypothetical situation of a person affected by the marriage bar who may be better off than a person who actually stayed in the CSS for the whole period. This is because the CSS system was front loaded, with earlier years attracting a much higher benefit; the first 20 years at two per cent accrual of final salary (if retirement is taken at 65), the next 10 years at one per cent, and the next 10 at one quarter per cent. For people 'who were members before 1 July 1976, 20 years counts as 30'.¹²

⁸ Jenner K. Evidence, p 434

⁹ Sex Discrimination Commissioner, SW Sub No 89

¹⁰ Lindsay D, Evidence, p 677

¹¹ SW Sub No 72

¹² Evidence, p 678

12.18 Providing the member rejoined before 1 July 1976 and could reach a 20 year threshold, they could still pick up a 50 per cent pension, and they would have had access to the early contributions to pay off other commitments. However, Mr Lindsay added:

That said, I can well imagine there would be others who are still inside their 20-year period who would suffer very greatly by not having the marriage bar recognised.¹³

12.19 If the marriage bar service was recognised for those now back in Australian Public Service employment, the following points were raised in regard to other relevant groups:

{W}hat about those who have rejoined and subsequently retired? What about those people who actually joined Commonwealth employment as temporaries, because married women were not allowed to be permanents, but had the married bar not existed would have been permanents and could have picked up perhaps five or 10 years service? How do you restore the equity of those?¹⁴

12.20 The Committee recognised that there were problems of equity in buy backs per se, as well as difficult actuarial questions relating to the level of contribution required to finance any buy back arrangements. It is necessary to draw a distinction between discrimination relating to employment and that relating to superannuation.

(Note: There was substantial evidence relating to cases of people allegedly misled or uninformed about their preservation options after 1971, and subsequently wishing to buy back. The Committee did not regard this evidence as relevant to this chapter.)

Experience from state schemes

12.21 The Queensland Teacher's Union (QTU) estimated that nearly 1 000 of their female members have been the 'victims of past discrimination as a result of the policies, practices and legislation of the 1960s and 1970s'. Ms Mertens of QTU told the Committee that the former section 32 of the Public Sector Superannuation Act stated:

¹³ Evidence, p 678

¹⁴ Lindsay D, Evidence, p 678

A married women who becomes an officer is not entitled to contribute to the fund. A female officer who marries is deemed to have resigned on the date of her marriage.¹⁵

12.22 Discrimination experienced by teachers took the form of female teachers being required to resign on marriage, married women teachers not being granted permanency, and teachers being 'required to resign to take time to raise a family'.¹⁶ According to the QTU, until 1987 the Queensland public sector superannuation scheme paid those teachers who resigned a refund of personal contributions plus a very small amount of interest. The QTU submitted that no vesting arrangements existed.¹⁷

12.23 The (QTU) supported buy back arrangements and:

has sought provisions to allow teachers who were forced to resign on marriage ... to repay refunded contributions to the superannuation office and have all previous crown service recognised for superannuation purposes. These 'buy-back' provisions have been refused.¹⁸

12.24 One of the issues raised in the Queensland experience was the effect on other members of a fund should buy back options be permitted. In a funded scheme the employer contributions and accrued earnings of those who resigned, and received only their own contributions with or without interest, remain with the fund to help provide the benefits enjoyed by others. The fund could argue that 'it could not afford to pay out the benefits it had promised to those with unbroken service' if it was required to fund benefits for those who bought back on the basis (say) of paying back the refunded employee contributions. The QTU recognised that any actuarial surplus would be insufficient to fund buy backs without substantial injection of money from the State Government.¹⁹

The absence of flexible working arrangements

12.25 Evidence was presented to the Committee relating to the experiences of women forced to resign from permanent teaching positions to accommodate their family responsibilities in the absence of provisions such as leave without

¹⁵ Evidence, p 396

¹⁶ SW Sub No 11

¹⁷ *ibid*

¹⁸ *ibid*

¹⁹ Evidence, p 398

pay. The ACT Branch of the Australian Education Union was supporting some 25 members, mainly female, in their proposals to buy back into the CSS:

via the late preservation benefits option that was available during the late 1970s/early 1980s ... At this stage ComSuper has refused late election of preservation to most applicants thus the activation of AAT appeals mechanisms.²⁰

These ACT cases relate to people in the late 1970s and early 1980s who left the teaching service mainly for family reasons.²¹

12.26 It was not until 1971 that people resigning from Commonwealth employment had the option of preserving their benefits in the Commonwealth Superannuation Scheme (CSS). 'Prior to 1971 that option was not available'.²² This creates real difficulties when buy back is being proposed, as it was not just married women who have been penalised in the past. An example given by Mr David Lindsay, of the Department of Finance, was that of public servants (male and female) who enlisted in the armed services, who were not permitted to contribute during their war service and were never offered a buy back option.²³ Mr Lindsay said:

One issue is how far a government goes to redress employment or other practices that were acceptable at the time - or tolerated ... might be a better way of phrasing it - but are now considered to be unacceptable.²⁴

12.27 The Tasmanian experience was also examined by the Committee. The Australian Education Union (AEU), Tasmanian Branch, advised of a campaign to persuade the State Government to correct a perceived injustice prior to 1968, when 'women teachers who became pregnant were forced to resign from their employment'.²⁵ This was because there was no maternity leave until late 1968 and no provision for leave without pay. When they resigned, superannuation contributions were refunded without interest and with an administration fee deducted.

²⁰ SW Sub No 25

²¹ Haggart C, Evidence, p 515

²² Searson K, Evidence, p 676

²³ Evidence, p 677

²⁴ *ibid*

²⁵ SW Sub No 24

12.28 The introduction of a new Tasmanian public sector superannuation scheme in 1994 made it possible to purchase periods of pre-resignation service. The objection raised by the AEU was that the full actuarial cost had to be paid 'despite the fact that the employee was forced to resign'.²⁶ Accordingly, the AEU was asking the State Government, as the employer, to bear most of the cost of allowing the pre-resignation benefit to be included for retirement benefit purposes. A proposed alternative was for the Commonwealth Government to bear the employer cost (15 per cent of current annual salary for each year of service) in a one-off grant.²⁷

Can buy backs be a solution to past discrimination

12.29 As described in the above paragraph, the new Tasmanian scheme allows for the buy back of pre-resignation service at full actuarial cost. While an obvious improvement on the pre-1994 scheme, the AEU argued that an employee accepting such an arrangement should only be required to pay the employee cost of the contributions that were made during the period of service.²⁸

12.30 The Committee agrees with the Federal Secretary of the AEU, Mr Robert Durbridge, who considered that although direct discriminatory practices have now been removed, there is still an impact on many women teachers in relation to superannuation and retirement benefits. Mr Durbridge recommended that:

Where possible, all previously ineligible employees have the option of purchasing foregone contribution entitlements.²⁹

Conclusion

12.31 The Committee considers that, where possible, those women who were forced to resign from their public sector employment by the marriage bar, and who have subsequently returned to the public sector, be given the option of purchasing greater superannuation entitlements at an indexed employee contribution cost which is actuarially sustainable to the fund.

²⁶ ibid

²⁷ ibid

²⁸ ibid

²⁹ SW Sub No 93