

CHAPTER 14:

MARITAL STATUS AND OTHER RELATIONSHIPS

It is the differential treatment that is of concern¹

The environment

14.1 Persons in formal or de facto marriage relationships currently enjoy benefits from superannuation funds often not available to single people.² Early in its inquiry, the Committee was made aware of allegations of discrimination against people in a relationship with someone of the same sex, because of an inability to benefit from their partners' superannuation entitlements in the same way as a heterosexual couple. Under current superannuation and tax law, somebody in a same sex relationship is treated as a single person,³ which means that when they die, lower benefits are paid to those left behind.⁴

14.2 A member of the Victorian State Government (Revised) Superannuation Scheme appeared before the Committee. He had nominated his same sex partner of 18 years as his dependant for superannuation purposes. However, the fund 'refused to acknowledge that nomination on the grounds that its definition of "dependant" has to be of the opposite sex'.⁵ Two issues arise:

the nomination issue is one issue, the benefits payable to single people is another issue. In a lot of superannuation funds there is a benefit payable, whether or not there is any dependants or spouse. The benefit passes to the estate. If, for example, a superannuation fund member dies and they belong to an accumulation scheme, there is a refund of contributions and interest and there is an insured death benefit that is payable. The trustees look for a spouse and dependants and if they can find none, they pay them to the estate. Where the estate misses out is that they are subject to the tax regime, whereas if there is a spouse they are not.

The other way they do miss out is in a lot of defined benefit funds, government schemes like the Commonwealth super scheme, where there is an additional benefit payable only if there is a spouse or children. You are right. If that discrimination was removed, then I do not think you would have much of an

¹ Berrill J, Evidence, p 665

² Noble Park Special Development School, SW Sub No 94

³ Scahill A, Evidence, p 661

⁴ Tasmanian Gay and Lesbian Rights Group, SW Sub No 96

⁵ Shaw D, Evidence, p 3, and see SW Sub No 2

argument from the gay and lesbian community about it. It is the differential treatment that is of concern.

One other point there is that superannuation arose out of the charitable trusts that occurred centuries ago and all the schemes were about providing for those who were left behind. So you are overturning centuries of charitable trusts, equity law, in doing that. I am not saying that that is impossible to do but it is a problem.⁶

14.3 Therefore, despite making identical contributions to superannuation during their working lives, the superannuation benefit of one member can be different from another simply on the grounds of marital status. The payment of disability and death payments may be of substantial value to a potential beneficiary and was of obvious concern to Mr Davydd Shaw who made the submission referred to above.

14.4 Mr Shaw agreed that the provision of death benefits can discriminate against single people, as well as sex same couples. Mr Shaw pointed out that:

discrimination is faced not just by same sex couples but by single people who have paid the same contribution rates all their working lives. At present, if someone who is unmarried dies just prior to retirement or within retirement ... their estate only gets back their contributions plus a small amount of interest payable on it ... but if they are married the spouse gets their benefits as of right. There is no qualification about being a dependant.⁷

14.5 Evidence received by the Committee covered the issue of whether discrimination occurred, and where it had, whether it was justified.

The SIS Act

14.6 The payment of a pension or benefit by a superannuation fund to a member's spouse or dependant is determined according to the provisions of the trust deed, or in the case of Commonwealth and State funds established for public servants, and acts of the relevant Parliaments. However, trustees must also comply with the *Superannuation Industry (Supervision) Act 1993* (the SIS Act), and other law relating to taxation and trusts.

14.7 The SIS Act provides for supervision of those superannuation funds which attract concessional taxation treatment as a result of compliance with its

⁶ Berrill J, Evidence, pp 664, 665

⁷ Evidence, p 4

provisions. Section 62 is significant in that it requires the trustees to maintain the fund solely for one or more of a number of listed core or ancillary purposes.

14.8 These purposes include:

The provision of benefits in respect of each member of the fund on or after the member's death, if: ...

(A) ...

(B) the benefits are provided to the member's legal personal representative, to any or all of the member's **dependants**, or to both.⁸

14.9 **Dependant** is defined in section 10 of the Act as:

"dependant", in relation to a person, includes the **spouse** and child of the person.

14.10 **Spouse** is defined in section 10 as:

"spouse", in relation to a person, includes another person who, although not legally married to the person, lives with the person on a genuine domestic basis as the husband or wife of the person.

14.11 The Gay and Lesbian Rights Lobby (GLRL) said most fund trustees interpret sections 10 and 62 to exclude the payment of death benefits to a same sex partner, even if that partner had been named as the nominated beneficiary by the deceased.⁹ The consequences of this with respect to same sex partners and single people are discussed below.

14.12 From the evidence received, it appears that current regulations place trustees of a superannuation fund in the invidious position of risking their fund's complying status should they pay a death benefit to a same sex partner. Treasury agreed that there does seem to be a discrimination in the sense that the fund itself loses complying status if it makes such a payment.¹⁰

14.13 This serious dilemma was well covered by the Sex Discrimination Commissioner when she said:

⁸ Section 62(1)(a)(iv), Emphasis added

⁹ SW Sub No 85 (Supp)

¹⁰ Edsor L., Evidence, p 605

what a trustee is required to do under SIS may not necessarily fit comfortably with some of the resolutions to discriminatory problems in funds that we have been looking at.¹¹

14.14 The GLRL stated what is the fundamental area of concern:

The partners of lesbian and gay men are commonly denied payment of death and disability benefits upon the death or disablement of their contributor partner by the trustees of their superannuation fund. The consistent offenders in this respect are the compulsory superannuation plans for Commonwealth and State employees.¹²

14.15 This submission went on to point out the commitments and legislation undertaken by the Commonwealth which 'promise' non-discriminatory treatment for workers on grounds of sexual preference. It cited the *Public Service Act 1922* (Section 33); *Human Rights and Equal Opportunity Commission Act 1986* (Regulation 4(a)(ix)); and *Industrial Relations Reform Act 1993* (Section 3(g)). The submission argued that 'current superannuation practice in relation to same sex couples, especially in the schemes for Commonwealth employees, contradicts the spirit of this legislation'.¹³

The uncertainty problem

14.16 The availability of death benefits to same sex partners appears uncertain.

14.17 Within the bounds set by the trust deed administering a fund, section 62 of the SIS Act permits a fund trustee to pay death benefits to a deceased member's personal legal representative or to one or more of that member's dependants.

14.18 A death benefit is a payment accrued by one person in consequence of the death of a superannuation fund member. Characterisation of the benefit as a payment directly to a dependant can be critical, as it may determine whether any benefit is paid at all, the amount paid by the fund, and whether the amount is paid direct or received as part of the deceased's estate.

¹¹ Evidence, p 652

¹² SW Sub No 85 (Supp)

¹³ *ibid*

14.19 Although section 10 of SIS defines a dependant as including any person including a spouse, the current interpretation of spouse as considered in Brown's case¹⁴ appears to preclude a partner of the same sex.

14.20 The fact that the definition of dependant is taken to include a spouse suggests that a person who is not a spouse, but is nevertheless in a dependent relationship at the time of the member's death, may fall within the bounds prescribed by section 62. As the 1995 *NIB case*¹⁵ affirmed, the word 'dependant' need not be limited to financial dependence, and furthermore, in determining whether a member falls within its ambit, trustees must be certain that they do not breach discrimination laws in coming to their conclusion.

14.21 In light of the *Brown* and *NIB cases*, the question of whether a partner of the same sex is considered a "dependant" appears to create a delicate boundary within which trustees may lawfully exercise their discretion. There are significant consequences in the way that discretion falls.

14.22 The Committee is of the opinion that this uncertainty places a difficult burden on trustees and may place same sex partners in a situation of significant uncertainty regards their respective entitlements. As such a situation is very likely to place those members at a disadvantage with respect to their capacity to make responsible financial plans for their future, failure to address this issue appears counter to the aim of providing greater certainty of retirement income.¹⁶

The alleged discrimination

14.23 According to Mr John Berrill of Maurice, Blackburn & Co., the payment of death benefits available under superannuation schemes to people in same sex relationships are limited by discrimination in three ways:

- where death benefits are only payable to the spouse, de facto spouse or children;
- where there are competing claims for death benefits from a heterosexual spouse or family members; and

¹⁴ *Brown v Commissioner of Superannuation*, Administrative Appeals Tribunal, No V94/638, 15 May 1995

¹⁵ *Hope & Anor v NIB Health Funds Ltd.*, Equal Opportunity Tribunal (NSW), 20 July 1995

¹⁶ *HomoDefactos Assoc*, SW Sub No 87

- in the tax treatment of death benefits paid to persons who do not qualify as a spouse, children or dependants, and who get the death benefits via the estate.¹⁷ (Note: Section 27AAA of the *Income Tax Assessment Act 1936* provides concessional treatment for death benefits that are paid in relation to dependants.)

14.24 Mr Berrill told the Committee that same sex partners may miss out in a lot of defined benefit schemes such as the Commonwealth superannuation schemes, where there is an additional benefit payable only if there is a spouse or children.¹⁸ According to Ms Scahill of GLRL:

the gay and lesbian community are not enjoying the same benefits from superannuation as are their heterosexual workmates ... specifically because the death benefits that apply to the same contributions are not paid, generally speaking, to the partner of a gay man or lesbian.¹⁹

14.25 The Committee notes that single people similarly do not enjoy these same benefits.

14.26 The best illustration of this interaction is the traditional payment of a pension or lump sum to a surviving spouse, while denying an equivalent payment to a nominated beneficiary of a single person or to a person in a same sex relationship.

The problems illustrated

14.27 Two recent cases heard before tribunals were brought to the Committee's attention and were found to highlight some of the issues in this area.

*Brown's Case*²⁰

14.28 Mr Brown sought a review by the Administrative Appeals Tribunal of a decision by his superannuation fund to reject his claim for a spouse benefit under section 81(1) of the *Superannuation Act 1976* (the 1976 Act which relates to Commonwealth superannuation schemes). Mr Brown had lived in a permanent, homosexual, de facto relationship with Mr Corva from 1982 until Mr Corva's death in 1993.

¹⁷ Evidence, p 656

¹⁸ Evidence, p 665

¹⁹ Evidence, p 659

²⁰ *Brown v Commissioner of Superannuation*, op cit

14.29 Mr Corva was a member of the Commonwealth Superannuation Scheme, which provided for a refund of contributions and interest and a separate death benefit payable if there was a spouse or child of the deceased. Mr Corva had made Mr Brown his nominee in the superannuation fund and had a will in which his estate was to be given to Mr Brown.

14.30 Mr Brown, as nominee, made a successful claim for the accumulated contributions and interest. However, his claim for the death benefit was rejected by the trustees on the basis that he could not qualify as a de facto spouse.²¹ It was this decision that was the subject of the appeal.

14.31 In order for Mr Brown to obtain a benefit as a spouse, the phrase 'marital relationship' in the definition of spouse in section 8B of the 1976 Act, would need to include a homosexual relationship. This meant the terms "husband" and "wife" would have to include partners of the same sex.

14.32 Mr Brown was unsuccessful in his appeal. The Tribunal held that:

whatever other changes the words, 'husband' and 'wife', may have undergone over the years they retain ... their complementary gender connotations. A 'wife' is the female partner of a marital relationship and a 'husband' the male partner.

In so finding, the Tribunal queried in relation to same sex partners 'which, then would be the "husband" and which the "wife"?'²²

14.33 The Tribunal stated that it gave them no joy to deny Mr Brown the spouse benefit entitlement:

...we must affirm the decision under review. It gives us no joy to do so. There is no doubt that the applicant and Mr Corva had a close marriage-like relationship... Yet the 1992 amendments, which were designed to remove discrimination on the ground of marital status, provide no redress in relation to the form of discrimination which is illustrated by this case.²³

²¹ Berrill J, Evidence, p 664

²² Reported in *Australian Super News*, CCH Australia Limited, 8 September 1995, p 10

²³ SW Sub No 85 (Supp)

*The NIB Case*²⁴

14.34 In this case the Equal Opportunity Tribunal found that they had been discrimination on the grounds of homosexuality within the meaning of the *Anti-Discrimination Act 1977* (NSW).

14.35 The appeal, by Mr Hope and Mr Brown, who had a homosexual relationship that exhibited ‘the hallmarks of a permanent and bona fide domestic relationship’, was against NIB’s refusal to grant a concessional family membership rate to them.²⁵

14.36 In reaching its decision the Tribunal considered that the ordinary meaning of the word “dependant” included:

connotations of reliance and need, trust, confidence, favour and aid in sickness and in health including social and financial support and its normal meaning is not limited to financial dependence...²⁶

Then, in considering financial dependency as only one aspect of the ordinary meaning of dependency, the Tribunal stated:

with a joint tenancy, a joint mortgage, pooled resources and shared debts, Mr Hope and Mr Brown were financial dependants to a substantial degree, one on the other.²⁷

14.37 The Committee notes the following implications for superannuation entities from these cases:

- Superannuation funds will need to consider the scope of benefits provided to spouses and dependants under their deeds to ensure discrimination laws are not breached.
- In exercising discretions, trustees will need to take care that decisions do not breach discrimination laws - as the *NIB case* evidenced.
- The words “husband” and “wife”, on the basis of both *Brown’s case* and the *NIB case*, refer to a relationship between people of the opposite sex.
- The ordinary meaning of the word “dependant” is not restricted to financial dependency.²⁸

²⁴ *Hope & Anor v NIB Health Funds Ltd*, op cit

²⁵ Reported in *Australian Super News*, op cit

²⁶ *ibid*

²⁷ *ibid*, p 11

Can positive discrimination in favour of heterosexual couples be justified?

14.38 Firstly, the Committee notes that the fact that Commonwealth schemes do not recognise same sex partners appears to flow from:

a deliberate decision taken a couple of years ago, when the Sex Discrimination Act was amended and there was a working party chaired by Attorney-General's ... At that stage and currently, the government does not recognise same-sex partners.²⁹

14.39 The Committee heard strong evidence that heterosexual married and de facto couples are often treated more generously by superannuation funds when compared to single people or same sex couples. This was particularly evident in the administration of death benefits as was outlined earlier in this chapter. It is clear to the Committee that, at least in part, the contributions of single people and members of a same sex relationship to defined benefit schemes are subsidising the benefits of other members of their superannuation funds purely on the basis of their marital status.

14.40 The benefits of superannuation include death and disability provisions applicable to individual funds and available to spouses and dependants of fund members. However, the rules governing the payment of such benefits are geared toward providing for traditional and de facto heterosexual family structures.

14.41 People in non-traditional relationships (such as same sex) and single people in no formal domestic relationship at all, are mostly excluded from death and related benefits available to this other group.

14.42 The Committee has concluded that it is clear that less advantageous treatment is applied to those who are classified as single. This can include those in same sex relationships. It is preferable that all contributors be treated equally.

Dependants and beneficiaries

14.43 From the evidence presented to the Committee, it is clear that much of the differential treatment in the payment of death benefits stems from whether the potential recipient can be defined as being a "dependant" of the deceased member.

²⁸ *ibid*

²⁹ Lindsay E, Evidence, p 669

14.44 The Committee proposed the following solution to this problem. In order to prevent discrimination between those members in a recognised relationship and those not, fund members without a spouse or dependant as presently defined should be able to nominate a beneficiary for their superannuation entitlements to whom the fund would pay those benefits currently available only to a spouse or dependant.

Finally

14.45 Mr Peter Cox, on the basis of his involvement for over 20 years in superannuation policy and administration, noted that the recognition in New South Wales of gay couples as families will impact on superannuation rules, particularly with respect to many of the old closed schemes in which 'there are all sorts of discriminations that effectively hark back to the Dark Ages'.³⁰

14.46 Mr Cox told the Committee that for the last 'two or three years' he has been an adviser to the NSW State Superannuation Investment and Management Corporation, which provides the investment and superannuation management services to the State's employees. While he could not comment on what the New South Wales Government policy might be in relation to discrimination in superannuation he did say:

The options, as I understand it, are for the schemes to change or for the members to be offered an alternative, non-discriminatory scheme.³¹

14.47 The Committee proposes that the Commonwealth take the lead by removing the discrimination in Commonwealth superannuation law and practice against single people, and against those in relationships unsupported by current arrangements.

Recommendation 14.1:

The Committee recommends that the superannuation regulations be amended so that those in bona fide domestic relationships and single people are treated in the same manner as married and de facto superannuants.

³⁰ Evidence, p 236

³¹ Evidence, p 237

Reversionary pensions

14.48 Another area in which marital status, or the timing of a change in marital status, impacts upon superannuation entitlements is that of reversionary pensions. As noted in Chapter 7, reversionary pensions are provided by some funds to the surviving spouses of those superannuants who die while in receipt of a pension.

14.49 Perhaps the most significant difficulty with reversionary pensions schemes relates to the effect on the reversion of divorce by the superannuant. In the simplest case, should a superannuant divorce then die, the former spouse would be denied a reversionary pension, whereas there would of course be no change to the benefits of the superannuant on divorce, or on the death of the spouse.³²

14.50 In a situation where a superannuant marries after retirement then dies, the situation with the surviving spouse is difficult. Generally, the spouse would not be entitled to a reversionary pension. Mr Bob Day, President of the Retired Police Association of New South Wales, gave evidence relating to the situation of his members' experience with their State fund. He described special circumstances in which a serving member may be retired and marry and be out of the police force for 3 years before the member is 60. In those circumstances, should the member die 'the surviving spouse is then considered to be in the same position as if he [the member] had a wife at the time he retired'.³³

14.51 However, these are special circumstances and relate only to police officers in this scheme. The general rule still applies that it is difficult for a 'new' spouse to claim reversionary pension rights.

³² SW Sub No 71

³³ Evidence, p 509