

CHAPTER 3

BACKGROUND TO THE LEGISLATION

Social pressures to remove discrimination

3.1 The existence of discrimination in relation to same sex couples has been an issue for some time and has been raised in various forums at both the Commonwealth and State levels where a number of parliamentary committees and equal opportunity commissions have considered and made recommendations to remove discriminatory provisions in both Commonwealth and State legislation.

3.2 Acceptance of non-traditional family structures has meant that pressure has been brought to change legislation which discriminates against such groups. As such, various pieces of Commonwealth and State legislation have been changed to ensure that those in same sex relationships are not treated any differently from those in opposite sex relationships.

3.3 At the State level, for example, the Equal Opportunity Commission in Victoria completed a study in 1998¹ in which it identified a number of areas where discrimination against same sex couples still currently exist in that State and canvassed a number of possible solutions to removing such discrimination from the swathe of legislation containing it.

3.4 In NSW, the NSW Legislative Council's Standing Committee on Social Issues, when inquiring into de facto relationship legislation in NSW, noted that:

When the De Facto Relationships Act 1984 was introduced it was seen by many as a significant step forward in the area of domestic relationships law, and as an acknowledgment of changing social practices and mores. As the community developed broader attitudes to personal relationships, calls were made for reform in the area of gay and lesbian relationships. Although homosexuality had been decriminalised and the Anti-Discrimination Act 1977 had been amended to make discrimination on the basis of homosexuality unlawful, same sex relationships were not legally recognised and were not covered by the De Facto Relationships Act 1984. Organisations such as the Gay and Lesbian Rights Lobby began making submissions on the issue to the New South Wales Government in the early 1990's. Legislation recognising a wider range of domestic relationships was passed in the ACT in 1994 and gave further impetus to those proposing change in (NSW).²

3.5 Changes in relation to superannuation have also been made, or are being made, in response to changing work and social patterns and the recognition of the increasing importance of superannuation for the whole community in terms of retirement income. For example, the Commonwealth Government is proposing to reform legislation concerning the

1 Equal Opportunity Commission, Victoria, *Same Sex Relationships and the Law*, March 1998.

2 NSW Legislative Council Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform, Inquiry into De Facto Relationships Legislation*, NSW Parliament, Report No. 20, December 1999, p. 16.

distribution of superannuation upon marriage breakdown. However, to date, there has been no change to the discrimination against same sex couples.

3.6 Prior to the passage of the *New South Wales Property (Relationships) Legislation Amendment Act 1999*, the most significant reform within Australia to extend legal protection to those in non-traditional interdependent personal relationships, was enacted in the ACT (the *Domestic Relationships Act 1994*). Certain initiatives were also embarked upon in Queensland, Western Australia and Victoria, but to date their implementation has been somewhat limited.³

Legislative reform for superannuation

3.7 In September 1994, the Senate Select Committee on Superannuation was asked to inquire into, *inter alia*, initiatives to address equity issues which arose during the contributions and benefits phases of the retirement incomes cycle. Whilst this was principally interpreted to apply to women who more often experience intermittent work patterns, the Committee included equity issues in relation to marital status and other relationships.

3.8 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, which means that when they die, lower benefits are paid to those left behind.⁴

3.9 The Committee's report, *Super and Broken Work Patterns*, was presented in 1995. In it, the Senate Select Committee on Superannuation concluded with respect to this type of discrimination 'that the Commonwealth [should] 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.'⁵

3.10 The Committee went on to recommend:

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.⁶

3.11 In the period following that report, further debate has continued. In 1998, the Senate Legal and Constitutional References Committee released a report titled *Inquiry into Sexuality Discrimination*. That Committee recommended:

3 NSW Legislative Council Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform, Inquiry into De Facto Relationships Legislation*, NSW Parliament, Report No. 20, December 1999, p. 29.

4 Senate Select Committee on Superannuation, *Super and Broken Work Patterns*, Parliament of the Commonwealth of Australia, Canberra, November 1995, p. 143.

5 Senate Select Committee on Superannuation, *Super and Broken Work Patterns*, Parliament of the Commonwealth of Australia, Canberra, November 1995, p. 152.

6 Senate Select Committee on Superannuation, *Super and Broken Work Patterns*, Parliament of the Commonwealth of Australia, Canberra, November 1995, p. 152.

That all couples or personal partnerships achieve legal recognition at Commonwealth level.

That all Commonwealth superannuation legislation, and any related legislation, directly or indirectly affecting payment to people on the grounds of their sexuality or their gender status, be reviewed and amended.

That the Senate Select Committee on Superannuation be asked to consider and report further on any barriers to superannuation contributors being able to nominate a specific beneficiary or beneficiaries of lump sums, pensions or other payments. In particular, the Committee is asked to examine the situation of persons who, whether or not previously married or in a de facto relationship (including a same sex or transgender relationship) are single at the time of death.⁷

Omnibus anti-discrimination legislation

3.12 At the same time as the Select Committee on Superannuation concluded its inquiry (November 1995), Senator Spindler, of the Australian Democrats, introduced a private senator's bill into the Senate - the Sexuality Discrimination Bill 1995. This Bill was broad in its scope. It aimed at prohibiting discrimination on the grounds of sexuality or transgender identity and provided for relationship recognition by granting same sex couples the same rights as de facto heterosexual couples. It also provided for a review of all Commonwealth laws to identify and amend provisions that discriminate on the basis of sexuality.⁸

3.13 Aspects of this Bill were referred to the Senate Legal and Constitutional References Committee for inquiry and report. In its report (December 1997) that Committee recommended legal recognition of all couples or personal partnerships (at Commonwealth level) and:

That a working group be established to review all Commonwealth legislation, with priority being given to legislation affecting social security, taxation, superannuation, health and family programs and services and family law matters.⁹

Same sex superannuation legislation

3.14 During this time, Mr Albanese, MP, Member for Grayndler, gave a speech in the House of Representatives in December 1996 in support of changes to superannuation legislation to prevent discrimination on the grounds of sexuality or gender.

3.15 Mr Albanese introduced his private member's bill, Superannuation (Entitlements of same sex couples) Bill, into the House of Representatives on three occasions – June 1998, December 1998 and November 1999. The Government has not brought on the debate on the Bill in the House.

7 Senate Legal and Constitutional References Committee, *Inquiry into Sexuality Discrimination*, Parliament of Australia, Canberra, 1998, Summary of Recommendations, pp. 8-9.

8 NSW Legislative Council Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform, Inquiry into De Facto Relationships Legislation*, NSW Parliament, Report No 20, December 1999, p. 32.

9 NSW Legislative Council Standing Committee on Social Issues, *Domestic Relationships: Issues for Reform, Inquiry into De Facto Relationships Legislation*, NSW Parliament, Report No 20, December 1999, p. 32.

3.16 The same Bill was introduced into the Senate by Senator Conroy in February 2000 as a private senator's bill, where it was referred to the Select Committee on Superannuation and Financial Services for inquiry and report.

International conventions

3.17 The Human Rights and Equal Opportunity Commission (HREOC) reported in April 1999 that some current Commonwealth superannuation legislation breaches two international conventions to which Australia is a signatory - the International Covenant on Civil and Political Rights and the International Labour Organisation Discrimination (Employment and Occupation) Convention.¹⁰

3.18 According to HREOC, the breaches occur because the current superannuation provisions, which limit benefits to 'spouses' so defined, discriminate against persons living in a bona fide domestic same sex relationship in a way that violates Australia's international human rights undertakings.

3.19 The Commission recommended that the relevant sections of four Acts be amended to remove provisions which impair equality of opportunity in employment and deny equal protection before the law. In particular, the Commission recommended the removal of gender specific terms, such as 'husband', 'wife' and 'spouse' which are used to determine eligibility for a spouse benefit, and their replacement with gender neutral terminology so that benefits apply equally to opposite sex and same sex partners.¹¹

10 Human Rights and Equal Opportunity Commission, *Superannuation Entitlements of Same-Sex Couples*, Report of Examination of Federal Legislation, Report No 7, April 1999. The Commonwealth legislation referred to is: *Superannuation Act 1976* and its replacement, the *Superannuation Act 1990*, the *Defence Force Retirement and Death Benefits Act 1973* and its replacement, the *Military Superannuation and Benefits Act 1991*.

11 Human Rights and Equal Opportunity Commission, *Superannuation Entitlements of Same-Sex Couples*, Report of Examination of Federal Legislation, Report No 7, April 1999.