

CHAPTER 4

ISSUES

Overview

4.1 Superannuation is important as a financial support mechanism for individuals in retirement. Superannuation in Australia is compulsory for most employees and as such employers are required by law to contribute.

4.2 The amount of funds in superannuation is large. The Australian Prudential Regulatory Authority (APRA) estimated that in September 1999, there were around 200,700 separate superannuation funds in Australia managing AUD \$415.1 billion in assets on behalf of 20.3 million member accounts. APRA also estimated that around 81 per cent of all workers in Australia are covered by superannuation.¹ The average member balance ranges from \$14,914 for industry funds through to \$151,635 for corporate funds. Projections made by the Retirement Income and Modelling Unit of The Treasury estimate that the grand total of all funds in current prices could reach \$931,211 billion by 2010 and \$1,699,344 billion by 2030. (These figures are particularly sensitive to economic assumptions such as the level of return achieved by various funds.)²

4.3 The Australian Government Actuary has estimated the number of contributors to Commonwealth public sector and defence force funds to be 210,610 as at June 1999.³

4.4 Statistics on the number of same sex couples are more difficult to obtain, however, witnesses to the inquiry estimated that the proportion of the Australian population involved in same sex relationships could be in the region of 10-25 per cent.⁴

4.5 The majority of submissions and witnesses to the inquiry supported the Bill, in particular because it was seen as a first step in an important process of eliminating discrimination. However, a significant number of issues relating to aspects of the Bill were raised which witnesses considered could have the potential to reduce the effectiveness of the intent of the Bill. These primarily related to the inequitable treatment of same-sex couples, generally, the appropriateness of the proposed definitions, some possible unintended consequences of the proposed definitions, and the adequacy of the provisions of the Bill to eliminate current discrimination.

4.6 Other issues raised during the inquiry are discussed in turn below.

1 APRA, Superannuation Market Statistics.

2 The Retirement Income Modelling Unit, The Treasury.

3 Australian Government Actuary.

4 Committee Hansard, p. 21 and Committee Hansard, p. 38.

Inequitable treatment of same sex couples

4.7 The inequitable treatment of same sex couples has been an evolving issue. As mentioned in Chapter 2, the current superannuation arrangements are discriminatory in respect of same sex couples. As mentioned in Chapter 3, the issue has been examined by a number of parliamentary committees including the previous Senate Select Committee on Superannuation in its report *Super and Broken Work Patterns* and by the Senate Legal and Constitutional References Committee in its report *Inquiry into Sexuality Discrimination*. These reports found that same sex couples are treated differently from traditional heterosexual couples and this inequitable treatment is a major concern to human rights activists.

4.8 The majority of submissions and correspondence provided to the Committee pointed out that gays and lesbians are required to contribute to superannuation in the same way as others. However, they are discriminated against when making decisions about the disbursement of those funds when they die. Superannuation, as noted in these submissions, is now the major means of savings for retirement and discrimination in this area is of particular concern to same sex couples who seek equitable treatment.

4.9 In evidence to the Committee, for example, the Gay and Lesbian Rights Lobby (NSW) advised the Committee that the problems which arise are ‘mostly in relation to payment of death benefits where a person who is a party to a relationship dies ... (and) there are problems with the surviving partner accessing those benefits.’⁵

4.10 In expressing its support for the removal of inequitable treatment of same sex couples, the CPSU advised that:

One of the key issues in terms of equity is that under current superannuation law, heterosexual surviving partners whether married or de facto are considered to be ‘dependent’ without any test and can gain access to superannuation death benefits. However, this is not the case for the surviving same sex partner who are either closed off from such benefits or they would have to demonstrate financial dependence upon the deceased partner.

This means the surviving same sex partner upon the death of the contributor would not be paid death benefits by the superannuation funds which may have been able to be accessed either as a lump sum payment or reversionary pension payment.

There is also an impact in terms of the children of a lesbian and gay male workers. This can occur when superannuation funds do not recognise a claim for dependency on behalf of such children.

Death and disability insurance cover has become a key component of the superannuation entitlements of Australian workers. Heterosexual families have the certainty of being able to plan their future financial position to cover the position in cases where the superannuation contributor dies.

However lesbian and gay male partners have to make alternative arrangements to seek to ensure the future financial wellbeing of their partner if the surviving partner

5 Committee Hansard, p. 6.

cannot access death benefits from the relevant superannuation fund. This can mean a major cost impact on same sex couples.⁶

4.11 A number of union groups and associations - including the Australian Council of Trade Unions (ACTU), the Australian Education Union (AEU) and the National Tertiary Education Union (NTEU) – expressed their support for the Bill because it was consistent with their own policies of removal of discriminatory practices.⁷

4.12 For example, the ACTU advised that it strongly supported the Bill because of the Council's 'longstanding commitment to equality of opportunity and opposition to discrimination, both in the workplace and in society generally, and its longstanding support for superannuation entitlements for all Australian workers.'⁸ The ACTU saw the Bill as a further step in terms of both anti-discrimination reform and superannuation reform.⁹

4.13 The NSW Teachers Federation also submitted that superannuation was not the only area in which discrimination occurred, citing a number of everyday situations where discrimination still exists. These include: property division on relationship breakdown, inheritance, decision-making in the case of incapacity or death, workers' and accident compensation.¹⁰

4.14 A number of organisations, such as the AIDS Council of NSW (ACON) and the Australian National Council on AIDS, Hepatitis C and Related Diseases (ANCAHRD) also supported the recognition of same sex partners under superannuation laws, as they considered that this would help to create an environment which supports HIV prevention efforts by protecting the rights of people living with HIV and their partners.¹¹

4.15 Despite the general view that current arrangements are discriminatory and that same sex couples deserve equitable treatment, the Superannuation Complaints Tribunal advised the Committee that it receives very few complaints involving same sex partners and that it only has one active complaint involving a same sex partner in relation to the payment of a death benefit. The Tribunal further advised that, without the proposed amendments to the definition of 'dependant' in the Bill, it will inevitably be confronted by more complaints.¹²

Proposed definitions

4.16 As mentioned in Chapter 2, the definitions of 'dependant' and 'spouse' in the *Superannuation Industry (Supervision) Act 1993* (SIS Act) can preclude same sex couples from accessing the death benefits or sharing in retirement benefits available to couples of the opposite sex who are married or in a de facto relationship. Dependency, in the SIS Act, is defined in terms of financial dependence rather than emotional dependence.

6 Submission No. 18, p 3.

7 For example, see Committee Hansard, p. 25; Submission No. 14, p. 1; Submission No. 32, p. 1.

8 Committee Hansard, p. 25.

9 Committee Hansard, p. 27.

10 Submission No. 15, p. 1.

11 Submission No. 6 and Submission No. 36.

12 Submission No. 34, pp. 1-3.

4.17 The Bill seeks to redefine relationships to include same sex couples such as gay or lesbian couples who have lived together and become financially dependant upon one another.

4.18 Notwithstanding the definitions in the SIS legislation, a number of funds (for example, the Retail Employees Superannuation Fund¹³ and AMP Superannuation) currently do recognise dependency between same-sex couples and benefits are currently being paid to same sex partners where they are proven to be financially dependant. It is incumbent upon the same sex partner nominated as beneficiary to establish a degree of dependence, and this can be partial to full dependence.

4.19 In giving evidence to the Committee, a representative of AMP Financial Services noted:

AMP provides superannuation benefits to approximately one and half million Australians. Through its insurance arm it also provides the insurance of the death benefits for around another two million Australians whose benefits are managed by corporate and industry funds.

In its capacity as a trustee, each year AMP Superannuation Limited is responsible for determining the beneficiaries to receive the benefits for between 1,000 and 1,500 members who die. In determining who are the rightful beneficiaries, trustees must abide by the requirements of the Superannuation Industry (Supervision) Act which states the trustees can pay the benefit to a dependent of the deceased or to his or her estate. In many cases trustees seek to pay a dependent, rather than the estate, as this allows the benefits to be paid directly and generally in a more timely manner than if the benefit was to clear probate and be distributed via the deceased's will.

The SIS Act currently defines a benefit as including a spouse, which includes a de facto spouse, a child, including ex-nuptial and adopted children; or any other person who is partially or wholly financially dependent on the deceased at the date of death. Under this definition, a spouse, de facto partner or child is an automatic dependent of the deceased and does not have to demonstrate financial dependency. This definition excludes a same sex partner from being an automatic dependent. However, a same sex partner is able to be included as a dependent and trustees are able to pay a benefit directly to the partner if there is a partial or total financial dependence established.

Generally, if two persons, regardless of sex, are cohabiting, at least partial financial dependency can be established and a benefit paid. This financial dependence must be established to the trustee's satisfaction. In AMP Superannuation Limited's experience, this is able to be achieved in all cases where they have been aware that there has been a same sex partnership. Therefore, in practical terms AMP does not believe that the existing definition precludes same sex partners from being regarded as a dependent. However, if the parliament determines that a same sex partnership should qualify for automatic dependency, AMP has no concerns.¹⁴

4.20 Despite the evidence that some funds do recognise dependency between same sex couples, the Gay and Lesbian Rights Lobby (NSW) pointed out that, in its experience,

13 Rebecca Kennedy, 'Call for clarity on spouse benefits', in, *Superfunds*, September, 1998, No 218 p. 31.

14 Committee Hansard, p. 40.

superannuation funds are reluctant to follow this course of action as it may leave them subject to legal challenges.¹⁵ The AMP responded to this suggestion by advising the Committee that, although it might be difficult and require sensitive treatment, trustees administering trusts do have to make some very difficult decisions and have to 'wear the result of those decisions' which at times means being legally challenged.¹⁶

4.21 The representative of AMP went on to note that in practical terms, AMP did not believe that the existing definition of 'dependant' precluded same sex couples, but understood that Government may wish to ensure there is no doubt in relation to automatic dependency. However, whilst it was felt that the proposed changes would effect this, AMP sought further amendments to subsection 10(1) to include other relationships. It advised the Committee that:

AMP would like to see the words 'or any other person who is financially dependent on the deceased at the date of death' added to the definition of 'dependent' in item 1.¹⁷

4.22 In elaborating on the need for the definition to apply to the date of death, the AMP advised that:

To establish financial dependency, it must be at the time the benefit becomes payable, not at the time you get the notice from the member, because at the time you get a notice from the member, they may indeed have a person who is financially dependent who, at a future point in time, will not be financially dependent. So you have to determine the financial dependence at the time of the death of the individual.¹⁸

4.23 This addition may or may not alleviate a concern raised during the inquiry in relation to other family relationships such as sisters and brothers who have cohabited for substantial lengths of time and become dependant upon each other.

4.24 The Tasmanian Gay and Lesbian Rights Group (TGLRG) expressed its support for the thrust of the Bill, indicating that the definitions proposed in the Bill would permit superannuation contributors to nominate anyone of their choice as their beneficiary. The TGLRG submitted that:

Obviously, this would allow a whole range of significant personal relationships to be legally recognised, and not simply the domestic sexual relationships which commonly come with the definition of 'spouse' or 'de facto partner'. As well as same sex relationships such significant personal relationships would include relationships between older companions, relationships between carers and the people they care for, and relationships between people in extended ethnic or aboriginal kinship groups.¹⁹

15 Submission No. 20, p. 2.

16 Committee Hansard, p. 42.

17 Committee Hansard, p. 40.

18 Committee Hansard, p. 45.

19 Submission No. 16, p. 1.

4.25 However, the Group expressed its concern that the definitions of what constitutes a relationship may exclude some of these significant personal relationships.²⁰

4.26 The Australian Retirement Fund also expressed its support for the Bill, submitting that current legislation is deficient because it fails to give recognition to same sex partners as dependants.²¹

4.27 The Committee is also aware of instances where some have experienced difficulty in proving their claims to benefits. For example, when speaking in the House of Representatives, Dr Brendan Nelson, MP, Member for Bradfield noted:

I support this bill not because I see it as an issue of homosexual rights, nor do I in any way wish to give further legitimacy to gay marriages, but because I see it as a human and economic justice issue.

The worst case that I have in my electorate is of two women-neither are homosexuals, they are sisters. They lived and worked through a period where women were paid less than they are today and less than men. They worked through a period where women, once they married, were forced effectively to leave the work force. Each reached the zenith of their employment and professional careers, and now they are treated as lesser human beings than others, and certainly had they chosen to marry.²²

4.28 The Institute of Chartered Accountants in Australia pointed out that it was essential for the definition of 'dependant' to be clear in the legislation, so that trust deeds can be amended and trustees can actually implement the legislation 'from a moving forward position.'²³

4.29 Witnesses like the Gay and Lesbian Rights Lobby (NSW) argued that the term 'dependant' should apply in the same way as it applies to heterosexual and de facto couples.²⁴

Unintended consequences

4.30 A number of potential unintended consequences of the proposed legislation were also brought to the Committee's attention during the course of the inquiry, particularly with respect to the proposed changes in definitions.

4.31 The Australian Society of Certified Practising Accountants (CPAs) noted a number of concerns in its submission and in giving evidence to the Committee, particularly with reference to the removal of the definition of 'spouse' and the addition of the general obligation under 52 (2) not to discriminate in relation to a beneficiary. The CPAs advised that:

... it is technically problematic to remove a definition for 'spouse' from the SIS Act. The definition for 'dependant' still refers to 'spouse', and we would note

20 Submission No. 16, p. 1.

21 Submission No. 30, pp. 1-2.

22 House of Representatives, Hansard, 7 June 1999, p. 6147.

23 Committee Hansard, p. 10.

24 Committee Hansard, p. 7.

below that spouse makes more appearances with the SIS Act, especially as a result of recent legislative reforms.²⁵

4.32 In its submission, the CPAs went on to recommend that the definition of 'spouse' be retained, noting that recent changes to the SIS Act under *Superannuation Legislation Amendment Act No 3 1999* and *Superannuation Legislation Amendment Act No 4 1999* have extended the use of 'spouse' under that Act.²⁶

4.33 The representative from the Association of Superannuation Funds of Australia (ASFA) indicated the Association's support for the applying the same approach to same-sex couples as is applied to de facto relationships.²⁷

4.34 Other submissions to the inquiry noted that the definition/word 'spouse' is used throughout a substantial amount of Commonwealth and State/Territory legislation and this may lead to further concerns.

4.35 The provision in the Bill which would amend subsection 52 (2) of the SIS Act emerged as potentially able to raise a considerable number of important problems and unintended consequences for fund administrators and members alike. The provision seeks to prevent discrimination in relation to a beneficiary:

on the basis of race, colour, sex, sexual preference, transgender status, marital status, family responsibilities, religion, political opinion or social origin.²⁸

4.36 ASFA expressed its concern about the inclusion of the words 'social origin' in this provision,²⁹ recommending that the term be removed as it was very broad and open to interpretation and confusion.³⁰ Mr Albanese, MP, Member for Grayndler, explained at the hearing that the words were intended to prevent discrimination on the basis of class structures.³¹ However, Mr Albanese also pointed out that he would not object if those words were deleted.³²

4.37 In that same section of the bill, AMP Financial Services and the Institute of Actuaries of Australia also drew attention to quite significant unintended consequences of the inclusion of the words 'sex' and 'family responsibilities'. They drew attention to the current allowable discrimination in favour of certain persons based on statistical data.

4.38 AMP advised the Committee that:

(it) believes that this condition goes further than the original intentions and is likely to cause difficulties for trustees and at times to put them in an untenable position.

25 Submission No. 19, p. 3.

26 Submission No. 19, p. 3.

27 Committee Hansard, p. 5.

28 Superannuation (Entitlements of same sex couples) Bill 2000, p. 5.

29 Committee Hansard, pp. 2,5.

30 Submission No. 33, p. 5.

31 Committee Hansard, p. 14.

32 Committee Hansard, p. 14.

Discrimination on the basis described is abhorrent and the federal and state legislation has been enacted to make it unlawful. However, the vast majority of this legislation allows some exceptions where the discrimination is based on statistical or actuarial data.

It is a fact of life that life expectancy and mortality experience is different for males and females and life insurance providers receive exemption to enable them to differentiate where the differences are substantiated.

Trustees generally insure members' death and disability benefits and they may also effect annuity contracts in order to pay an income stream to a member or their dependant. In providing and paying benefits, trustees are bound by SIS whereas life insurance providers are not bound by its provisions. Therefore a life provider is able to discriminate under certain approved circumstances and if the draft amendments were to be enacted the trustees would be in breach of SIS if they paid benefits in accordance with the insurance contract.

AMP believes that such provisions are best left to anti-discrimination legislation and all parties to superannuation be brought under those same rules.³³

4.39 The Institute of Actuaries of Australia pointed to the same concerns and gave examples of how the inclusion of these words could cause problems in the areas of annuities and insurance premiums:

For instance, let us say that somebody retires with a lump sum of \$100,000 just for the sake of argument. The trustee says that we can convert that into an annuity, or a pension, at option. So the person can choose that option of the level of the pension according to their age and gender. The trustee may guarantee that pension by buying an annuity from a life insurance company that is gender based. If that opportunity for the trustee not to distinguish by gender is not there, the trustee could just remove the option and say, 'I am sorry, we are not going to make that opportunity available to you because we no longer have the exact risk matched with our life office annuity.'

And

Another example could be on the insurance side. ... In many group life insurance schemes for a superannuation plan, there is a unisex rate quoted by the insurer, but in some cases, perhaps where there is an all-female fund, or predominantly female fund, the premium rates are cheaper because of the female's lower probability of dying. If it is an all-male fund, or predominantly male, the premium rates will be higher. That discrimination is based on gender, and the insurance charges follow. If the insurance charges cannot be determined by gender, we will end up with a unisex rate with no ability to price according to gender.³⁴

4.40 The Australian Society of CPAs noted a slightly different concern in relation to the interdependence of the SIS Act and the Income Tax Assessment Act.

Anti-discrimination on the basis of age should be very carefully applied to superannuation fund trustees, as superannuation is intended for retirement income,

33 Committee Hansard, pp. 40-41.

34 Committee Hansard, pp. 34,35.

both the SIS Act and the Income Tax Assessment Act set down important age-based restrictions that are there for sound policy reasons.³⁵

4.41 With respect to the words 'family responsibilities' the Institute of Actuaries noted that the proposed changes may have an impact on benefits payable to larger families.

With regard to family responsibilities, the way it currently reads is that you are not allowed to discriminate in relation to a beneficiary on the grounds of family responsibilities - in other words, everybody receives the same benefits irrespective of the number of children they may have or not have.

...

Currently, in some funds a higher benefit is paid out where there are dependent children.³⁶

4.42 The Institute went on to provide an example of how this might impact on families:

You might have an example where there is a spouse pension which is 30 per cent of the final average salary of the member and there are dependent children's pensions with, say, 10 per cent for each child. There would be a question of whether the inclusion of family responsibilities put that benefit structure in doubt. The other thing that I would draw your attention to is where a trustee is deciding the distribution of a death benefit. Conceivably you could have a situation where there is a spouse and a de facto spouse, and one of them may be responsible for dependent children. There would be a question of whether, in deciding the distribution of that death benefit, the trustee could take into account that one of the spouses - if I could put it in those terms - is responsible for the dependent children and therefore has greater need. So that would be another question mark that we would put over the implications of the family responsibilities inclusion in there.³⁷

4.43 Witnesses to the inquiry, such as the Institute of Actuaries and AMP Financial Services, were unsure whether or not it was even necessary to have the proposed amendment to subsection 52 (2) as subsection 10 (1) - which replaces the definition of dependant covers the intent of the bill.³⁸

4.44 In its submission the Investment and Financial Services Association (IFSA) also pointed out that its main concern with the Bill related to the 'unintended consequences' of item 4. The Association submitted that 'careful consideration must be given to the potential impact of this proposed provision on legitimate and acceptable superannuation arrangements to ensure an efficient, transparent and certain retirement incomes system is maintained.'³⁹

35 Submission No. 19, p. 3.

36 Committee Hansard, p. 35.

37 Committee Hansard, p. 35.

38 Committee Hansard, pp. 36 and 41.

39 Submission No. 28, p. 3.

Inequitable taxation treatment

4.45 Under Section 59(1A) of the SIS Act and Regulation 6.17A of the SIS regulations, the governing rules of a superannuation fund may now permit a member of the fund to make a binding nomination for the payment of a benefit after the member's death. However, Regulation 6.17A(4) still requires that the nominated beneficiary be either 'the legal personal representative or a dependant of the member'. The entitlement of same sex couples is unclear under this provision with the existing SIS Act definitions of 'dependant' and 'spouse'.

4.46 In addition, benefits paid to a same sex partner classed as a 'financial dependant' or as a beneficiary under the member's will are treated differently for taxation purposes. Under the provisions of the *Income Tax Assessment Act 1936*, there is a concession for payments made to heterosexual partners but not to same sex partners.

4.47 In addition, all death benefits made on or after 1 July 1994 are subject to pension and lump sum Reasonable Benefit Limits (RBLs). The lump sum RBL is currently \$485,692 and the pension RBL is \$971,382.

4.48 Under the Tax Act, death benefit lump sum payments made directly to the dependants of a deceased member are exempt from tax up to the deceased person's RBL. Any amount above that is treated as an excessive component and taxed at the highest marginal rate. When paid to a person other than a dependant (and this is where the same sex couples are discriminated against because of the current definitions) death benefit payments become Eligible Termination Payments (ETPs). The post June 1983 death benefit ETP is taxed at 15 per cent if paid from a taxed source and 30 per cent if paid from an untaxed source.⁴⁰

4.49 Several submissions and correspondence commented that the Superannuation (Entitlements of same sex couples) Bill 2000 does not, as it stands, address the taxation issues mentioned above where death benefits are paid to a person who does not meet the current definitions of spouse or dependant.⁴¹ The elimination of this discrimination would require amendments to the Tax Act similar to the amendments to the SIS Act this Bill proposes.

4.50 It appears that a small number of people from same sex relationships have been able to access death benefits, but that these benefits were subject to a discriminatory rate of taxation. However, the Gay and Lesbian Rights Lobby (NSW) noted in its submission:

We ...urge the Committee to recommend that the Senate support the Bill on the basis that 'something is better than nothing' for surviving same sex partners. Receiving a heavily taxed death benefit payment is a substantial improvement on the current situation, where many receive nothing at all.⁴²

4.51 Others who commented on the issue recognised the concern about the inequality of taxation treatment, but felt that it should not prevent the passage of the bill.

40 Superannuation Ready Reckoner: Taxation and Preservation Rules for 1999-2000, Department of the Parliamentary Library, Information and Research Services, Current Issues Brief No. 2 1999-2000, p 6.

41 For example, see Submission No. 9, Submission No. 8, and Submission No. 33.

42 Submission No. 20, p. 3.

4.52 Many witnesses, such as the ACTU, commented that the Bill was only one step in the incremental steps being taken to remove discrimination.⁴³ Some, like ASFA and the Institute of Chartered Accountants, recognised that further amendments would be needed to the taxation legislation.⁴⁴ Others, like the CPAs indicated that it would not be mandatory for taxation and social security legislation to be amended to ensure that the same sex couples Bill functions.⁴⁵ Still others, like the Institute of Actuaries of Australia advised that it was better to wait until a holistic approach has been taken. The Institute called for a broader, more comprehensive review of the policy in this area that not only looks at superannuation but looks at social security and taxation issues across the Board.⁴⁶

Inequitable social security treatment

4.53 The Department of Family and Community Services outlined the current treatment of same sex couples under the *Social Security Act 1991* in its submission to the Committee:

Eligibility and entitlement - general

Whether or not a person is defined as being a "member of a couple" can affect their eligibility and rate of payment. Section 4 (2) of the *Social Security Act 1991* defines someone as a "member of a couple" if:

- (a) The person is legally married to another person and is not living separately and apart from the other person on a permanent or indefinite basis; or
- (b) All of the following condition are met:
 - 1) the person has a relationship **with a person of the opposite sex (the partner)**;
 - 2) the person is not legally married to the partner;
 - 3) the relationship between the person and the partner is a marriage-like relationship;
 - 4) both the person and the partner are over the age of consent applicable in the State or Territory in which they live;
 - 5) the person and the partner are not within a prohibited relationship for the purposes of section 23B of the *Marriage Act 1961* (ie. With an ancestor, descendant, or a whole or part-blood brother or sister of the person).

Relationships between one person and another person of the same sex do not therefore, result in either party being defined as a member of a couple. Either or both parties to the relationship would be treated as a single person.

43 Committee Hansard, p. 27.

44 Committee Hansard, p. 2 and Submission No. 13, p. 1.

45 Committee Hansard, p. 30.

46 Committee Hansard, pp. 10-11.

Entitlement to Rent Assistance

Rent assistance is paid to eligible recipients of certain pensions and allowances. A same sex couple (or any single person/s sharing accommodation), with at least one person receiving the appropriate pension or allowance, who are sharing accommodation may have their entitlement to maximum rate Rent Assistance reduced under the sharers provisions. Under the provisions, a person is to be treated as a single person sharing accommodation if the person is not a member of a couple (defined above), has no dependant children, and has, in common with one or more other people, the right to use at least one or more major area of accommodation. A same sex couple sharing accommodation would be considered to be two single sharers. Single sharers receive a reduced rate of Rent Assistance. Disability Support Pensioners and those in receipt of Carer Payment are exempt from the sharers provisions.

Effect of a reversionary income stream on entitlement

Under the *Superannuation Industry (Supervision) Act 1993* a reversionary benefit may be paid to a same sex partner on the death of a fund member only after the trustees are satisfied that there are no dependants or a legal personal representative of the member. For social security purposes, this income would be assessed under the normal assessment provisions relating to income streams; the sex and previous relationship of the reversionary beneficiary is irrelevant.⁴⁷

4.54 Current social security legislation does not recognise a same sex de facto spouse as a partner for determining benefits. Same sex couples are treated as individuals and this may lead to a reduction in benefits because the assets test provisions do not enable joint asset consideration.

4.55 As with the taxation issue described above, a number of submissions to the inquiry noted the inequitable treatment of persons of the same sex in relation to social security payment eligibility, and that the Bill does not propose changes to remove these inequities.

Breach of international treaties

4.56 Australia's commitment to a number of international covenants was raised as an issue during the course of the inquiry, with a number of submissions and correspondence referring to concerns about alleged breaches of international treaties in relation to human rights.

4.57 As mentioned in Chapter 3, the Human Rights and Equal Opportunity Commission 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. The Commission considers that 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.

47 Submission No. 37, p. 2.

4.58 In her submission, the Sex Discrimination Commissioner, on behalf of the Human Rights and Equal Opportunity Commission (HREOC) noted that

Australia is a signatory to several important international conventions which enshrine human rights to include civil, social, cultural, political and economic rights. These international instruments aim to promote the equality of women and men through eliminating discrimination to promote equality of opportunity and equality before the law.

Equality of opportunity and treatment in employment is a fundamental human right which Australia has ratified through the *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act). International conventions supporting this right include the International Covenant on civil and Political Rights (ICCPR) and the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO 111).

While these international instruments do not specifically mention sexuality, people with a sexual orientation other than heterosexuality are covered by provision in the ICCPR and by the HREOC Act.⁴⁸

4.59 The Bill was supported by many correspondents on the grounds that it would eliminate breaches of international treaties.

Exemption of public sector funds

4.60 As described in Chapter 2, the Bill exempts public sector superannuation schemes established under the *Superannuation Act 1976*, the *Superannuation Act 1990*, and the *Military Superannuation and Benefits Act 1991*. Mr Albanese, MP, explained that these exemptions were necessitated by the conventions in the House of Representatives covering private member's bills which cannot have a negative impact on government revenue.⁴⁹

4.61 Public sector funds are, in the main, covered by specific legislation. Few have opted to be subject to the provisions of the SIS Act. Many of these funds are particularly large funds. The exemption of the Commonwealth public sector and defence force schemes from the Bill attracted considerable comment during the inquiry, as concern was expressed about the continued inequitable treatment of same sex couples who may belong to public sector schemes.

4.62 A J Hosken & Co, Barristers and Solicitors, noted a particular case study in its submission to the inquiry:

I have also had the experience of acting for a person whose partner was employed by the Commonwealth.

The partner was infected with HIV and he in turn infected his partner.

The employee of the Commonwealth later died leaving his partner destitute. Because the surviving partner was dying and destitute we wrote to the minister in

48 Submission No. 26, p. 1.

49 Committee Hansard, p. 15.

charge of Superannuation asking for an ex-gratia payment in order to relieve his suffering.

The minister wrote back reciting the law and how spouse was defined at heterosexual and not same sex.

We find that the circumstance that currently prevails from the Commonwealth to be inhumane and also is out of touch with the rest of the community.⁵⁰

4.63 The Women's Electoral Lobby (Australia) was similarly dissatisfied with the continuation of discrimination under the proposed legislation, submitting that the exemption was 'unreasonable and unnecessary':

This Bill, if passed, will continue this progress but add further unevenness due to the proposed exclusion from justice of public sector employees and superannuants.

We strongly oppose clause 5 of the Bill which excludes public sector superannuation schemes established under the *Superannuation Act 1976*, the *Superannuation Act 1990*, and the *Military Superannuation and Benefits Act 1991*.

4.64 In expressing its opposition to the exclusion from the Bill of the Commonwealth public sector and defence force schemes, the Women's Electoral Lobby (Australia), in its submission, pointed out that, the exemption was unnecessary because of the small numbers involved:

While there are no firm estimates of the number of gay couples in society, the general consensus is that gay couples form a very small proportion of all couples. We recollect a book written some years ago called *One in Twenty*. Because of these small numbers the cost of providing them with fair and just entitlements would be small.

The pensions provided under most public sector schemes are not generous. For example, the average Commonwealth Superannuation CSS pension is \$20,557 pa. The average PSS pension is \$14,003 pa.⁵¹

4.65 Other groups which expressed opposition to the exemption of these schemes from the proposed Bill included the Tasmanian Gay and Lesbian Rights Group and the Australian Council for Lesbian and Gay Rights. These groups urged the Committee to recommend that these pieces of legislation be amended to ensure that lesbian and gay Commonwealth government employees and members of the Australian Defence Force have the same rights as other employees.⁵²

4.66 ASFA also indicated that it found it difficult to welcome legislation which would remove discrimination for those employed in the private sector while permitting that discrimination to continue for those employed in the public sector. ASFA indicated that this could be a further area of reform.⁵³

50 Submission No. 2, p. 1.

51 Submission No. 11, p. 3.

52 Submission No. 16 and Submission No. 19.

53 Submission No. 33, p. 5 and Committee Hansard, p. 2.

4.67 Unlike the other gay and lesbian groups which provided evidence to the inquiry, the Gay and Lesbian Rights Lobby (NSW), expressed its view that even though this sector would be discriminated against, at least some discrimination would be removed with the passage of the Bill. The Lobby advised the Committee:

... while drawing attention of the Committee to the fact that it does not cover (public servants)... that does not compromise my support for this Bill. We understand the limitations of the bill that arise from the rules of parliament. That does not stop our wanting to do our best to fix the situation for as many people as possible at this stage.⁵⁴

4.68 In response to a question taken on notice about the likely cost for the Commonwealth superannuation schemes if this amendment was also applied to the public sector plans, the Institute of Actuaries of Australia pointed out that it is very difficult to get an accurate figure. However, the Institute advised the following:

Firstly let us consider the current pensioners. The present value of the current pensions payments is about \$22 billion. This includes pensions for past employees who are both single and married. The value for reversionary pensions is about \$2.2 billion. Depending on your assumptions it may be reasonable to suggest that the extra cost for pensions payable to same sex couples may be in the region of \$150-\$200 million which is less than 1% of the present value of current pensions in payment.

An additional cost would be borne for death cover in respect of current employees. It may be estimated that the present value of the extra benefits provided to current employees would be of the same order as to pensioners, ie. about \$150-\$200 million.

Based on these very broad estimates, the total cost of extending death benefits to same sex couples in the Commonwealth plans would be about \$300 - \$400 million in present value terms. It should be stressed that this extra cost is not for a single year but is a cost in respect of current members and pensioners for all future benefits associated with this extended definition.⁵⁵

Dissenting views

4.69 There were only five submissions which opposed this Bill. Two groups appeared before this Committee, however their evidence did not so much address the substance of the Bill, but rather their moral judgement of homosexuality. Their views can be summarised as follows:

4.70 The submission from the Festival of Light (SA) considered that 'there are good sociological, psychological and health reasons for governments to continue to discriminate in favour of those men and women who take the trouble to make a lasting, legally binding commitment to each other and their children through marriage.'⁵⁶ Both the Festival of Light

54 Committee Hansard, p. 8.

55 Submission No. 40.

56 Submission No. 35, p. 2.

and the Australian Family Association hold the view that positive discrimination in favour of traditional heterosexual families was to the benefit of society.

4.71 The Australian Family Association also stated at the hearing in Canberra that it considered that the Bill presented the wrong messages to society about what it values in terms of appropriate relationships and family structures. In its submission, the Association noted:

Our Association firmly opposes any recognition of same sex couples as equivalent to marriage.⁵⁷

4.72 At the hearing in Canberra, the representative from the Festival of Light claimed that very few people would benefit from the legislation because of the small numbers of declared gay and lesbian couples. The Festival of Light claimed that same sex relationships are, in its opinion, not usually exclusive or long lasting and therefore it would be inappropriate to give them the same recognition as those of opposite sex marriage.

4.73 In giving evidence to the Committee, the representative from the Festival of Light stated that without a clear indication from a democratic plebiscite, the Government could not assure itself of the support of the Australian people.

57 Submission No. 38, p. 1.