

CHAPTER 5

IMPLEMENTATION ISSUES

Introduction

5.1 During the course of the inquiry a number of issues relating to the implementation of the Bill, should it be passed, were raised, including:

- the timing of the introduction of any changes;
- the need to harmonise Commonwealth and state legislation; and
- the potential financial impact of the legislation.

5.2 These issues are discussed below.

Commencement date

5.3 The Committee canvassed the issue of retrospectivity and the commencement date for the proposed legislation. While some witnesses acknowledged that without retrospectivity, some potential beneficiaries would be disadvantaged, no submissions or witnesses expressed support for any retrospective application of the legislation should it be passed. For example, the Association of Superannuation Funds of Australia (ASFA) advised the Committee that there were two situations where retrospectivity might apply. These were:

- (i) a person could claim a lump sum (the insured benefit) or a ‘spouse pension’ if the death of the member occurred before the commencement date of the amending legislation;
- (ii) a primary pension may already be in payment on the date of commencement of the amending legislation and a person may seek payment of a reversionary (pension) when the primary pensioner dies.¹

5.4 ASFA recommended that care should be taken to avoid increased and unplanned cost to other members, the funds insurer, and the employer sponsor through retrospective application of the provisions.² Although it has not been able to quantify these costs, ASFA also advised that ‘unless you put a line in the sand and say, ‘As of tomorrow, these are the rules that are applying,’ you will find that there are in effect retrospective payments of what were people’s claims at that point, which would have quite substantial unplanned financial costs.’³

5.5 The Gay and Lesbian Right Lobby (NSW) advised that it recognised the need for a clear commencement date without retrospectivity:

1 Submission No. 33, pp. 4-5.

2 Submission No. 33, p. 5.

3 Committee Hansard, p. 3.

We certainly think that a lot of people have already suffered injustice and the fairest thing to do would be to give it some retrospective application. However, we understand that that would create a lot of uncertainty for industry bodies. If that compromises support for this Bill then we would be happy for it to apply as it is currently worded so that it has no retrospective effect.⁴

5.6 The Institute of Actuaries of Australia also pointed out that retrospectivity could ‘cause all sorts of complexities.’⁵

5.7 Whilst some witnesses and correspondents to the inquiry regretted that many people would not therefore qualify for benefits, it was felt that trustees and administrators required clear starting dates set in the future. The Institute of Actuaries of Australia suggested that trustees would need about six to nine months prior to the commencement of the legislation to enable adjustments to be made to trust deeds,⁶ while AMP Financial Services advised that it favoured a six to twelve month lead time.⁷

5.8 As far as the timing of the introduction of the proposed legislation, Mr Albanese, MP, indicated that he would like to see the issue completed by the end of the year.⁸

Harmonisation of Commonwealth and state legislation

5.9 The need for consistency of approach in various pieces of Commonwealth and state legislation was raised in evidence to the inquiry by some witnesses, including the Gay and Lesbian Rights Lobby (NSW), AMP Financial Services and the NSW Legislative Council.

5.10 The Gay and Lesbian Rights Lobby (NSW) expressed its view that, as the issue of rights of same sex couples was attracting increasing prominence in state law, reforms to Commonwealth superannuation would bring it into line with the general trend at state level.⁹

5.11 AMP Financial Services drew attention to the need for consistency both within Commonwealth legislation and between Commonwealth and state legislation. The AMP advised the Committee that:

If the parliament believes it is appropriate to put same sex relationships onto the same basis as heterosexual de facto relationships, then they ought to do so consistently. This is one of the problems the parliament has got. If we do this through SIS, then this has potentially a flow-on effect through a whole range of other legislation. It is something the parliament will need to consider because the tax act would have to be amended, the social security acts may need to be reviewed. We are initiating here what is a very substantial social change. Whilst we support social change and doing away with discrimination, this discrimination at the moment exists through a whole series of legislation and by changing it in one act, is only going to cause differentiation with other legislation.

4 Committee Hansard, p. 7.

5 Committee Hansard, p. 12.

6 Committee Hansard, p. 11.

7 Committee Hansard, p. 43.

8 Committee Hansard, p. 15.

9 Submission No. 20, p. 4.

...

It will lead to confusion, but I guess to some extent whilst we have differentiation between federal and state legislation, you are going to get confusion on a whole range of matters.

...

(removing discrimination) is probably best brought about by changes to the discrimination acts themselves which will require cooperation between the federal legislation and the state legislation.¹⁰

5.12 The President of the NSW Legislative Council also drew the Committee's attention to the problems experienced in NSW where there are inconsistencies between Commonwealth and state legislation. The President was concerned that employees of the NSW Parliament and the NSW public service continue to experience discrimination at the hands of their superannuation funds because state government schemes are still required to comply with the Commonwealth's SIS legislation.¹¹

5.13 In support of this view, the NSW Law Reform Commission also advised the Committee that the NSW Government lacks the power to make effective changes to its own superannuation legislation without complementary legislation by the Commonwealth.¹²

Omnibus legislation

5.14 The differential treatment of same sex couples is not limited to the area of superannuation. There exists quite a considerable body of legislation and regulation which discriminates against same sex couples in areas such as property rights, rights upon the death of a partner, health related rights, and access to employment related benefits such as compassionate, carer or bereavement leave, travel packages and participation in health insurance schemes.¹³

5.15 In referring to the need for reform to remove discrimination generally as part of a substantial social change, AMP Financial Services recommended to the Committee that an omnibus approach to changing the legislation would be preferable and noted 'I would think that if this is to be a general social change which is introduced by the parliament then it would be better to look at the broader range of issues rather than just through superannuation.'¹⁴

5.16 In its submission to the inquiry, the NSW Law Reform Commission drew the Committee's attention to the omnibus legislation currently before the Canadian Parliament

10 Committee Hansard, pp. 41- 42.

11 Submission No. 29, p. 1.

12 Submission No. 31, p. 1.

13 Victorian Equal Opportunity Commission, *Same Sex Relationships and the Law*, March 1998, Executive Summary p. 2.

14 Committee Hansard, p. 42.

which aims to ensure that discrimination is ended in all areas of federal law that affect people in same sex relationships in that country.¹⁵

5.17 The Committee noted that the Modernization of Benefits and Obligations Bill (Bill C-23) seeks to amend 68 pieces of Canadian legislation - ranging from Banking and Corporations Acts to Firearms, Criminal Codes, Income Tax, Pension and Public Service Acts. The Bill is designed to extend benefits and obligations to same sex couples on the same basis as common law opposite sex couples.¹⁶

5.18 While some witnesses to the inquiry referred in general terms to the experiences of other countries in dealing with the removal of discrimination against same sex couples, the Australian Society of Certified Practising Accountants supported consideration of the Canadian approach because of the similarities of cultural and political heritage.¹⁷

5.19 The Committee notes that, according to research conducted by the Victorian Equal Opportunity Commission, a number of countries either recognise or are recognising same sex relationships generally. However, this does not necessarily extend to superannuation entitlements. In addition to Canada, these include: Denmark, Greenland, Norway, Sweden, Hungary, Belgium, Iceland, France, Finland, Netherlands, Spain, Portugal, USA, Brazil and South Africa.¹⁸ (see **Appendix 4**)

Potential costs

5.20 Little evidence was received on the potential financial impact of the proposed legislation. Recognising that it would be difficult to estimate, the Institute of Actuaries of Australia noted:

For most superannuation funds, we suggest that this will not be a major problem. It may have a minor increase in benefit payouts for some funds, or fairly negligible. There could be circumstances in a particular fund where we see an increase in the number of death benefits paid that could be quite significant. But that would be a very special case. So, for most funds, we would suggest that it is not going to have a major financial impact.¹⁹

15 Submission No. 31, p. 2.

16 The House of Commons of Canada, Bill C- 23, An Act to modernize the Statutes of Canada in relation to benefits and Obligations, First Reading, February 11, 2000, Summary.

17 Committee Hansard, p. 31.

18 Victorian Equal Opportunity Commission, *Same Sex Relationships and the Law*, pp. 44ff provided in Submission No. 39.

19 Committee Hansard, p. 34.