

## CHAPTER 6

### CONCLUSIONS AND RECOMMENDATIONS

#### Conclusions

6.1 This Committee concludes that discrimination against same sex couples can no longer be tolerated.

6.2 The main intention of the Bill examined by the Committee is to end the current discrimination against same sex couples in respect of superannuation benefits.

6.3 Discrimination occurs because the laws do not allow superannuation fund trustees to automatically consider same sex partners as dependent.

6.4 Despite the relatively short time period, the Committee received a total of 41 submissions from various organisations. The Committee also received over 1100 items of correspondence and e-mails, of which only five were opposed to the Bill.

6.5 It is clear from the overwhelming support for the intention of this Bill that the Senate should not unnecessarily delay its passage any further. It is incumbent on the Government to ensure that this Bill is passed.

6.6 This Bill was originally introduced into the House of Representatives in June 1998 as a private member's bill by Anthony Albanese MP. Mr Albanese stated to the Committee that it was because a House of Representatives private member's bill cannot have a negative impact on government revenue, that his Bill exempted Commonwealth public sector and defence force superannuation schemes established under the *Superannuation Act 1976*, the *Superannuation Act 1990*, and the *Military Superannuation and Benefits Act 1991*. The Committee notes however that the issue of discrimination in Commonwealth superannuation funds needs to be addressed.

6.7 The Committee also notes the previous work of Senator Spindler, of the Australian Democrats, who introduced a private senator's bill into the Senate. The Sexuality Discrimination Bill 1995 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.

6.8 Evidence to the Committee highlighted the current problems for same sex couples in respect to superannuation benefits. The current definitions of 'dependant' and 'spouse' in the *Superannuation Industry (Supervision) Act 1993* (SIS Act) 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.

6.9 The SIS Act currently defines a dependant 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 dependant of the deceased and does not have to demonstrate financial dependency.

6.10 The Committee received evidence that trustees and fund administrators view the term spouse as being gender specific, effectively excluding a partner of the same sex. Under the current legislation, trustees of a superannuation fund risked their fund's compliance under the SIS Act and hence, concessional tax status should they pay a death benefit to a same sex partner.

6.11 A number of funds 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. However evidence from the Gay and Lesbian Rights Lobby (NSW) pointed out that, in its experience, superannuation funds are reluctant to follow this course of action as it may leave them subject to legal challenges.

6.12 The Committee received considerable evidence surrounding the definition of dependant. The Tasmanian Gay and Lesbian Rights Group expressed its concern that the definition of what constitutes a relationship may exclude significant other personal relationships.

6.13 Submissions to the Committee and witnesses at the hearings raised a number of concerns about potential unintended consequences of the proposed legislation, including:

- removing the definition of 'spouse' from the SIS Act; and
- the words designed 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.

6.14 ASFA expressed concern that it was hard to define the words 'social origin'.

6.15 AMP Financial Services and the Institute of Actuaries of Australia raised concerns that the word 'sex' would have unintended impacts on premiums and benefits as the premiums for annuities and insurance policies can be gender based.

6.16 The Institute of Actuaries noted that removing discrimination on the basis of 'family responsibilities' may impact on benefits payable to larger families as currently some funds pay higher benefits according to the number of dependent children.

6.17 The Committee concludes that resolution of these issues is possible through negotiations with the stakeholders and that these issues should not unnecessarily hinder the passage of this Bill.

6.18 A number of submissions to the Committee highlighted that this Bill will not end discrimination in respect to social security and taxation for same sex couples. In particular superannuation 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.

6.19 Noting these issues, the Gay and Lesbian Rights Lobby (NSW) stated in its submission that they recommend that the Senate support the Bill on the basis that 'something

is better than nothing' for surviving same sex partners. According to the group, receiving a heavily taxed death benefit payment is a substantial improvement on the current situation, where many receive nothing at all. A commonly expressed view was that incremental change was better than no change.

6.20 The Institute of Actuaries of Australia estimated that the implementation of the Bill would cost the superannuation industry less than one per cent of the present value of current pensions in payment.

6.21 The Australian Taxation Office confirmed that there are no tax revenue implications in the legislation stating that 'changes in the Bill before us just amend the Superannuation Industry (Supervision) Act. ... So "dependant" under the tax act will continue to have its existing meaning and there will be no change there.'<sup>1</sup>

6.22 The Committee received evidence from the Human Rights and Equal Opportunity Commission (HREOC) that the current discrimination against same sex couples breached Australia's international obligations.

6.23 No submissions or witnesses expressed support for any retrospective application of the legislation.

### **Recommendations**

6.24 The majority of the Committee recommends that:

- A maximum period of one month be given for advice to be sought from stakeholders, including the superannuation industry, on how best to draft appropriate amendments to the Bill to avoid the possibility of unintended consequences and that the Bill then be passed;
- The Bill should not apply retrospectively;
- The Government establish a Commonwealth Inter-Departmental Committee, coordinated by the Attorney-General's Department, to examine the full range of Commonwealth legislation with respect to discrimination on the basis of same sex relationships.

**Senator Stephen Conroy**

**Senator John Hogg**

**Senator the Hon Nick Sherry**

**Senator Lyn Allison**

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1 Committee Hansard, p. 47.

