HUMAN RIGHTS COMMISSION

SUPERANNUATION AND INSURANCE AND THE SEX DISCRIMINATION ACT 1984
PART I - SUPERANNUATION

October 1986

Australian Government Publishing Service

Canberra 1986

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Our Ref:

The Hon. Lionel Bowen, M.P.,
Deputy Prime Minister
and Attorney-General,
Parliament House,
CANBERRA, A.C.T. 2600

Dear Attorney-General,

On 17 September 1984 the then Attorney-General requested the Commission to make a report on the exemptions contained in the Sex Discrimination Act in relation to superannuation and provident funds or schemes (sub-section 41(1) and insurance (sub-section 41(4)). Specifically, pursuant to paragraph 48(1)(g) of the Sex Discrimination Act, the Commission was requested to report on:

(a) whether the Sex Discrimination Act 1984 should be amended in relation to the exemption granted in sub-section 41(1) of that Act regarding the terms or conditions appertaining to a superannuation or provident fund or scheme, and, if so, the form the amendment should take; and

(b) whether the Sex Discrimination Act 1984 should be amended in relation to the exemption granted in sub-section 41(4) of that Act regarding the terms on which an annuity, a life assurance policy, a policy of insurance against accident or any other policy of insurance may be offered or obtained, and, if so, the form the amendment should take.

We present this report to you following the Commission's examination of the exemption granted in sub-section 41(1) of the Act dealing with superannuation and provident funds or schemes.

In view of the Government's decision to let the Human Rights Commission lapse when the legislation expires

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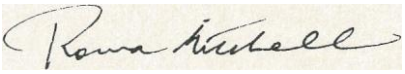
on 9 December 1986, the Commission will be unable to complete its inquiry in relation to the exemption granted in sub-section 41(4) of the Act dealing with annuities, life assurance and insurance generally. Although it is not clear, at this stage, what functions are envisaged for any successor body, it appears that there is an intention to maintain the operation of the Sex Discrimination Act. It is the Commission's view that the arrangements outlined in this report, though formulated when the intention was still to proceed with the insurance part of the inquiry, are capable of standing on their own regardless of any future decisions in relation to sub-section 41(4).

Yours sincerely,



Chairman,
for and on behalf
of the Human Rights Commission

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Sex **Discrimination Commissioner**

Ms P.F. O'Neil

Commissioner for Community Relations

Mr J.P.M. Long

FUNCTIONS OF THE COMMISSION

Section 9 of the Human Rights Commission Act 1981 (Cwlth) reads:

9.(1) The functions of the Commission are -

(a) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments are, or would be, inconsistent with or contrary to any human rights, and to report to the Minister the results of any such examination;

(b) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and -

(i) where the Commission considers it appropriate to do so - endeavour to effect a settlement of the matters that gave rise to the inquiry; and

(ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect a settlement of those matters - to report to the Minister the results of its inquiry and of any endeavours it has made to effect such a settlement;

(c) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights;

(d) when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument;

(e) on its own initiative or when requested by the Minister, to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Covenant, the Declarations or any other relevant international instrument, and to report to the Minister the results of any such examination;

(f) to promote an understanding and acceptance, and the public discussion, of human rights in Australia and the external Territories;

(g) to undertake research and educational programs, and other programs, on behalf of the Commonwealth for the purpose of promoting human rights and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth;

(h) to perform -

(i) any functions conferred on the Commission by any other enactment;

(ii) any functions conferred on the Commission pursuant to any arrangement in force under section 11; and

(iii) any functions conferred on the Commission by any State Act or Northern Territory enactment, being functions that are declared by the Minister, by notice published in the Gazette, to be complementary to other functions of the Commission; and

(j) to do anything incidental or conducive to the performance of any of the preceding functions.

(2) The Commission shall not -

(a) regard an enactment or proposed enactment as being inconsistent with or contrary to any human right for the purposes of paragraph (1)(a) or (b) by reason of a provision of the enactment or proposed enactment that is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons; or

(b) regard an act or practice as being inconsistent with or contrary to any human right for the purposes of paragraph (1)(a) or (b) where the act or practice is done or engaged in solely for the purpose referred to in paragraph (a).

(3) For the purpose of the performance of its functions, the Commission may work with and consult appropriate non-governmental organisations.

Section 48 of the Sex Discrimination Act 1984 (Cwlth) reads in part:

48.(1) In addition to the functions of the Human Rights Commission under the Human Rights Commission Act 1981, the Commission has the following functions:

(a) to inquire into alleged infringements of Part II, and endeavour by conciliation to effect a settlement of the matters to which the alleged infringements relate;

(b) to inquire into, and make determinations on, matters referred to it by the Minister or the Commissioner;

(c) to exercise the powers conferred on it by section 44;

(d) to promote an understanding and acceptance of, and compliance with, this Act;

(e) to undertake research and educational programs, and other programs, on behalf of the Commonwealth for the purpose of promoting the objects of this Act;

(f) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments are, or would be, inconsistent with or contrary to the objects of this Act, and to report to the Minister the results of any such examination;

(g) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to discrimination on the ground of sex, marital status or pregnancy or to discrimination on the ground of sex, marital status or pregnancy or to discrimination involving sexual harassment; and

(h) to do anything incidental or conducive to the performance of any of the preceding functions.

(2) The Commission shall not regard an enactment or proposed enactment as being inconsistent with or contrary to the objects of this Act for the purposes of paragraph (1)(f) by reason of a provision of the enactment or proposed enactment that is included for the purpose referred to in section 33.

GLOSSARY OF TERMS

Extracted from Glossary of Australian Superannuation Terms, issued by The Association of Superannuation Funds of Australia Ltd, Booklet No. 13, March 1985

Annuity

The expression is based on the concept of a series of equal annual payments. Where weekly, fortnightly or monthly payments out of a superannuation fund are involved the expression pension is more commonly used. An annuity is usually purchased from a life insurance company and will probably be payable monthly, quarterly, half-yearly or yearly.

Approved Deposit Fund (ADF)

A fund set up under section 23FA of the Income Tax Assessment Act 1936 (Cwlth) the income of which is not taxable and the purpose of which is to hold lump sum superannuation benefits rolled-over for the purposes of Subdivision AA of Division 2 of Part III of the Act until the taxpayer attains age sixty-five.

Assurance

The term has a similar meaning to insurance and was traditionally used in respect of life insurance as distinct from other types of insurance.

Commutation

In superannuation parlance, surrendering pension or annuity and receiving a lump sum payment in lieu thereof.

Deferred annuity

The commencement of payments under this type of annuity is delayed until after a specified period or to the date of occurrence of a specified event.

Disablement

Each plan will have its own definition. Generally types of disablement are:

Partial - where disablement is not total and it is expected that the disabled person will be able to engage in some form of employment which would not be affected by the partial disability while it lasts. Unless the disability is permanent eventual return to good health would be expected.

Permanent - where disablement is permanent and irreversible.

Temporary - where disablement is temporary and eventual return to normal good health is expected.

Total - where disablement is total. Unless the disability is permanent eventual return to good health would be expected.

TPD/TPI - total and permanent disability/incapacity.

TTD/TTI - total and temporary disability/incapacity.

Early Retirement

Retirement before the normal retirement date. A TRUST DEED or rules may permit voluntary early retirement with benefits generally on a lesser scale than those applicable on involuntary early retirement because of DISABLEMENT, or normal retirement. An in-between benefit would be expected to be payable on management-initiated early retirement because of redundancy or retrenchment.

Earning Rate

Rate of return on moneys invested, usually expressed as a percentage per annum. May include or exclude capital appreciation on equity-type investments and may be either gross or net of taxes and expenses.

Eligibility Conditions

Conditions set out in the TRUST DEED or rules which an employee must fulfil to be eligible to join a plan. Typically, eligibility conditions are based on completed service, minimum age, category of employment, etc.

Endowment Insurance

A contract of insurance for a fixed term under which the full sum insured (and any bonuses attaching) is payable at the end of the fixed term or on the prior death of the .life insured. Premiums may be payable over the full term of the insurance or for a shorter term.

Income Tax Assessment Act 1936 (Cw1thi

Section 23(ja) - relates to a provident, benefit, superannuation or retirement fund established for the benefit of persons, other than employees (ie. self-employed persons). The fund must have at least twenty members and must satisfy the conditions laid down by the Commissioner of Taxation as referred to in section 23(ja)(ii). Limits are imposed on the benefits and contributions which may be paid under the fund. Contributions are deductible under section 82AAT (within limits), with the excess qualifying as a rebatable amount under section 159R (within limits).

Section 23(jaa) - provides for the exemption from income tax of the income of a provident, benefit, superannuation, or retirement fund established either by a Commonwealth or State Act, or an Ordinance of a Territory, or by a municipal corporation, etc. or public authority which is itself constituted under such an Act or Ordinance. The section is applied to funds established by Universities which are constituted under an Act or Ordinance.

Section 23F - provides for the exemption from income tax of the income of certain provident, benefit, superannuation or retirement funds established for the benefit of employees.

Section 23F5 (formerly section 79) - relates to superannuation funds of which persons gainfully occupied (whether employees or self-employed) may be members. With the public section 23FB funds, the contributions are generally paid wholly by the members. An employer may bring a fund for employees within the section although it is usual for an employer's fund to come within section 23F. A series of tests (similar to those under s.23F) must be satisfied if the fund is to come within section 23FB. The income of the fund is not taxable. Insurance policies, which are included in the fund, qualify as tax-exempt business within the life office, in the same way as policies under a section 23F fund. Voluntary withdrawal from a section 23FB fund can only occur between the ages of 55 and 70 on cessation of employment.

Portability

See Preservation.

Preservation

Continuation of the accrued superannuation benefits of a resigned member as rights either in the plan of the late (former) employer (not necessarily with benefits in the same form although this is required by statute in some countries where the member's equity is not transferred to another plan) or by transferring them to another plan (portability or transferability). The former method is often called 'cold storage' and the latter may be achieved either by the conversion of a single cash sum paid to the plan accepting the transfer (a transfer value) into equivalent benefits or simply by allowing it to accumulate for payment as additional benefits when other benefits under the plan become payable.

Roll-over

Means deferring the payment of the tax that would normally apply to an Eligible Termination Payment (ETP) by using the ETP to purchase an annuity or placing it in an ADF or other approved superannuation fund. (An ETP is any lump sum payment (or a payment in instalments, not regarded as income) made in respect of a taxpayer, other than directly to a dependant of a deceased taxpayer, in consequence of termination of the employment or death of the taxpayer (including a payment from a superannuation fund or ADF). An amount paid to a taxpayer or the dependants or estate of a deceased taxpayer or other persons in commutation of an annuity or a superannuation pension or the residual capital value of such an annuity or pension is also an ETP.)

Superannuation Plan (Scheme)

In the private sector, a superannuation plan will normally be evidenced by a TRUST DEED or rules, or both, the former normally being the vehicle for establishment of a superannuation fund. In the public sector an Act or regulations under an Act will be the enabling documentation, which may also result in rules or a trust deed being entered into. A superannuation plan may be managed by a corporate trustee or individual persons appointed as TRUSTEE(S) in accordance with the provisions of the trust deed and otherwise (in areas where the trust deed is silent) under statutes or case law relating to the stewardship of trust moneys.

A superannuation plan usually involves some advance 'funding' of the benefits to be provided under the plan by way of contributions to a superannuation fund. These contributions are usually invested and the benefits payable under the plan financed from a mixture of contributions, investment income and the proceeds of any realisation of the assets.

A superannuation plan may be self-managed in every respect, including self-insurance of the associated risks or it may be run as part of a pool of plans. The simplest superannuation plan would be that based on a policy of insurance issued by a life insurance company.

In some superannuation situations there may be no employee contributions (a non-contributory plan); in some there may be no fund (an unfunded plan).

Defined Benefit Plan - a plan defining the benefits payable, usually in terms of salary near retirement and years of membership. However, they could be defined in dollar amounts.

Defined Contribution Plan - a plan under which the benefits payable in respect of an individual member are based on a defined level of contributions payable by and in respect of that member.

Money Purchase Plan - usually means an accumulation plan. The term can be applied where dollar amounts of benefit are being purchased, as in some government plans.

Unallocated Plan - a plan in which moneys are pooled rather than allocated to individual members. Contributions are paid into the pool and defined benefits and charges are paid out of the pool.

Transfer Value

See Preservation.

Trust Deed

The formal legal document which constitutes a plan and governs the manner of its operation. A 'trust deed' can be entered into unilaterally by an employer but, usually, there are co-signatories and other parties. Commonly, an employer is, or employers are, one party and the TRUSTEE(S) the other. The specific authorities of the Trustee(s) covered by the trust deed will be contained in the deed and in areas where the deed is silent general trust law will apply. A trust deed may be a complex document which covers all manner of matters such as insurance, investment, eligibility for membership, benefits, contributions, reviews, appointment of trustee(s) etc. or it may be a simple document with some or all of the matters above covered by appended 'rules' or 'regulations' or both.

Trustee(s)

A person/persons or body corporate bound by a trust deed or law relating to trusts to carry out the terms of the trust for the benefit of the beneficiaries under the trust document.

Unbundled

Sometimes the services of a superannuation manager may be supplied under an unbundled contract whereby each designated component (administration, investment, insurance, actuarial, legal, etc) is a separately costed item with its own fee structure.

Vesting

Generally a reference to the inclusion in the benefit payable of all or a part of the employer contribution in respect of a member of a superannuation plan, where membership is terminated before entitlement to a retirement benefit. Vesting commonly refers to a cash benefit payable directly to the member but can also refer to a preserved benefit (see PRESERVATION) where payment of the employer component is deferred until a major benefit becomes payable either under the same plan or under another plan. Where all of the employer contribution in respect of a member is included, it is commonly referred to as full vesting. Where only part of the employer contribution in respect of a member is included it is referred to as partial vesting.

Withdrawal

A common expression for ceasing membership of a scheme by resignation from employment.

PART A. THE SCOPE OF THE INQUIRY

CHAPTER I - INTRODUCTION

A. Origins of Inquiry

This report has been prepared in response to a request by the then Attorney-General, Senator the Hon. Gareth Evans, Q.C., under paragraph 48(1)(g) of the Sex Discrimination Act 1984 (Cwlth). Pursuant to that paragraph, on 17 September 1984, the then Attorney-General requested the Commission to report to him as to:

> (a) whether the Sex Discrimination Act should be amended in relation to the exemption granted in sub-section 41(1) of that Act regarding the terms or conditions appertaining to a superannuation or provident fund or scheme, and, if so, the form the amendment should take; and
>
> (b) whether the Sex Discrimination Act should be amended in relation to the exemption granted in sub-section 41(4) of that Act regarding the terms on which an annuity, a life assurance policy, a policy of insurance against accident or any other policy of insurance may be offered or obtained, and, if so, the form the amendment should take.

2. A copy of the then Attorney-General's letter to the Commission is at Appendix 1.

B. Limitation to Superannuation

3. This report deals with the Commission's findings as to the superannuation aspect of the inquiry. The insurance part of the inquiry is under way, and will be the subject of consultation, as has been the case with this part of the inquiry, before a report is prepared.

4. In some areas it is difficult to distinguish between superannuation and insurance. In fact, some forms of superannuation are simply life insurance policies, purchased and contributed to by individuals, which attract certain taxation benefits under special provisions of the Income Tax Assessment Act 1936 (Cwlth), e.g. s.23(ja) (self-employed superannuation) . and s.23FB (personal superannuation). It is the Commission's intention to defer any decision on types of personal superannuation involving insurance until the insurance segment of its inquiry has been dealt with. This report will, therefore, concentrate upon the application of anti-discriminatory provisions to employer-sponsored superannuation. The Commission notes, however, that there are many personal superannuation arrangements which do not use insurance, for example, personal superannuation funds operated by banks. The Commission sees no reason for recommending any special exemption from the provisions of the Sex Discrimination Act for such arrangements and, accordingly, is of the view that the conclusions and recommendations in this repoit should apply to them.

5. It is important to note that significantly more people are covered in employer-sponsored schemes than in insurance-based personal superannuation arrangements. Further, even though many employer-sponsored schemes are underwritten by insurance policies, the employer, who is also contributing to the scheme, may be in a position to negate the differential effects of any insurance.

6. The problems associated with discrimination in superannuation are relatively distinct from those relating to insurance. Discrimination in superannuation has been recognised, not only in Australia, but also in the United States, the United Kingdom, Canada and Europe, as an area in need of attention, and has in fact already been addressed in

these jurisdictions.[1] It has also been addressed by three Australian States and several other countries and the Commission is of the view that the matter should be dealt with forthwith in an Australian context.

7. Discrimination in insurance, on the other hand, is a far more complex area, which has received comparatively little legislative attention to date. It requires further careful investigation before any conclusions can be reached. The Commission has begun its inquiries into insurance and the provision of annuities, but it will be some time before its report on this aspect is ready.

C. Public Involvement

8. The Commission commenced its superannuation and provident fund inquiry in late 1984. Initially, newspaper advertisements were published Australia-wide seeking submissions from interested persons and organisations. Over fifty submissions were received from Commonwealth and State government departments, insurance companies, actuaries, trade unions, employer organisations, women's interest groups and members of the public. The Commission sought comment from various public and private organisations that had not initially made submissions. Of particular assistance has been the ongoing information provided by the South Australian Acting Public Actuary and the Australian Government Actuary. The Commission has had the advantage of being able to refer to the report of the New South Wales Anti-Discrimination Board, Discrimination in superannuation[2] and the report of the Victorian Equal Opportunity Board, Discrimination in superannuation and pension schemes[3].

9. In May 1985 a seminar, attended by representatives of some of the organisations that had made submissions, was held in Sydney. The object of the seminar was to discuss an issues

paper prepared by the Commission which contained preliminary answers to the problems raised in submissions. The seminar was successful in clarifying many of the issues raised, both those that were relatively non-controversial and those that required further consideration.

10. After the seminar in May 1985 the Commission had an opportunity to consult in greater detail with the Australian Government Actuary and his representatives, the Acting Public Actuary of South Australia and representatives of various sections of the superannuation and life insurance industries which are directly concerned with the provision of superannuation and provident funds.[4] Following this, the Commission drafted an outline of material to be included in its final report. This draft outline was forwarded to government, non-government and private sector bodies which had expressed interest in the report. Comments made by these groups composed the agenda for a second consultation held in Sydney by the Commission in October 1985. The meeting clarified a number of points and helped to identify practical solutions to a number of issues.

11. Finally, the Commission held a consultation in Canberra in February 1986 seeking comments on the late stage draft report from a smaller number of government, non-government and private sector bodies. The present report has been subject to revision in the light of comments made at the February 1986 consultation, but is, of course, the responsibility of the Commission itself.

D. Structure of Report

12. In Part A of the report previous inquiries and legislation are reviewed and an outline is given of the meaning of discrimination on grounds of sex and marital status in superannuation. In Part B, the main aspects of superannuation

and provident schemes which are discriminatory on the ground of sex or marital status are discussed. The main areas identified by the Commission as requiring attention are:

conditions of eligibility (Chapter V)
retirement ages (Chapter VI).
death and disablement benefits (Chapter VII)
lump sum benefits and conversion factors (Chapter VIII)
practices involving indirect discrimination (Chapter IX)

13. Part C of the report is concerned with the practical implementation of the conclusions contained in Part B. Suggestions are made for the way in which existing schemes should be modified or superseded; an outline is given of the essential features of non-discriminatory schemes; and alternatives are identified, and a preferred option recommended for the way the Commission's conclusions could be implemented.

14. In Part D, the Commission's conclusions and recommendations are drawn together.

B. Acknowledgements

15. The Commission expresses its appreciation to the many people who have assisted it in its inquiry to date. In particular, it expresses thanks to the Actuaries of the Australian Government and of South Australia, the Life Insurance Commissioner, the Association of Superannuation Funds of Australia Ltd, the Life Insurance Federation of Australia, the Institute of Actuaries of Australia, the National Mutual Life Association of Australasia Ltd and to the Department of Finance, the Treasury, the Attorney-General's Department and the Office of the Status of Women. It also thanks the present and former members of the research team principally concerned with the inquiry - Ms Joan Jardine, Dr Kathy MacDermott, Ms Margaret

Castles and Ms Rosemary Meals. Once again, it thanks from its team of keyboard operators Ms Jan Churcher and Ms Lynne Bliss, and more recently Ms Sally Manwaring, Ms Francis Ashton, Ms Audra Ankers and Ms Karen Garland, for their prompt and effective assistance in production, made more necessary by the fact that the Commission has now moved to photo-reduction as the best method for producing its reports within a reasonable time from completion of the text.

The Commission has sought and given weight to the views of the Sex Discrimination Commissioner upon the matters discussed in this report.

CHAPTER I ENDNOTES

1. See paragraphs 47 to 65 below.

2. New South Wales, Anti-Discrimination Board, Discrimination in superannuation, Sydney, 1978.

3. Victoria, Equal Opportunity Board, Discrimination in superannuation and pension schemes, Melbourne, 1980.

4. In this report the term 'superannuation schemes' is used in a general sense so as to include provident funds.

CHAPTER II - PREVIOUS INQUIRIES AND LEGISLATION

A. The Existing Legal Position in Australia

States other than South Australia

16. At present, in Australia, superannuation is largely unregulated by anti-discrimination legislation. The Commonwealth Sex Discrimination Act and three of the four State anti-discrimination Acts wholly exempt superannuation from the application of their provisions. In each of these cases, however, the exemption was accompanied by a statement of the Government's intention to review superannuation provisions with the object of bringing them into line with the spirit of its Act.

17. The current position is that in New South Wales the Anti-Discrimination Act 1977 (N.S.W.) exempts superannuation from the operation of the Act, although insurance is exempted only insofar as discrimination is based on actuarial or statistical data from a source on which it is reasonable to rely, and where the discrimination is reasonable having regard to that data. The Victorian Equal Opportunity Act 1984 exempts superannuation and pensions from its operations and contains provisions relating to insurance which are the same as those obtaining in New South Wales. The Western Australian Equal Opportunity Act 1984 repeats the insurance exemption in the same form as appears in the legislation of New South Wales and Victoria. Although the Act exempts superannuation, sub-section 34(2) provides, as does the Commonwealth Act, that the exemption may be repealed by regulation at a later date.

18. Neither Tasmania nor Queensland, nor the Northern Territory, has enacted anti-discrimination legislation to date.

Recent South Australian legislation

19. South Australia has had anti-discrimination legislation since 1975, but superannuation was exempted and discrimination was permitted in insurance subject to the same 'reasonable actuarial data' test as subsequently used in other States. Recent South Australian anti-discrimination legislation (the Equal Opportunity Act, 1984) goes somewhat further in that it explicitly covers superannuation schemes. However, while the Act came into operation on 1 March 1986, the sections dealing with discrimination in superannuation schemes on the grounds of 'sex, sexuality, marital status and pregnancy' have not yet been proclaimed.

20. The unproclaimed sections of the Act will, if brought into operation, generally prohibit discrimination in:

(a) all superannuation schemes operating in South Australia which are not employer-subsidised; and

(b) employer-subsidised schemes in which a greater number of employees are resident in South Australia than in any other single State or Territory. (The relevance of this particular approach to employer-subsidised schemes which cover employees in several States is that, if it were adopted by each State, then every scheme in Australia would be subject to the anti-discrimination laws of one and only one State.)

21. There are, however, some exemptions which reflect the fact that the Act still allows insurance policies and annuities to discriminate on the ground of sex on the basis of reasonable actuarial data. The insurance and annuity exemption is carried straight across to schemes which are not employer-subsidised, for such schemes almost without exception use insurance policies where death or disablement risks are involved. More limited exemptions apply to employer-subsidised superannuation schemes:

(a) where a member has an option to convert a pension to a lump sum, and vice versa, discrimination on the ground of sex is permitted so long as it is based on reasonable actuarial data; and

(b) in a defined contribution scheme, where insurance premiums are deducted during the accumulation process, the ultimate accumulation benefit may differ by sex, but only to the extent that the difference results from recognised actuarial or statistical data.

22. The South Australian legislation therefore substantially limits the discriminatory provisions allowable in superannuation schemes, but does not completely remove them, as it was framed to operate against a national background where insurance, including annuities, could still rely on the use of sex-differentiated actuarial data. The confinement of the effects of the use of such data can be greater in employer-sponsored schemes than in other schemes, for in the former schemes the employer can generally insulate employees from any discriminatory results of insurance policies. However, the employer is not required to insulate an employee against sex-based differences where a pension/lump sum switch may be made at the employee's option, or where the employer sets out to provide equal contributions, but different accumulation benefits result from the use of death and/or disablement insurance.

23. The South Australian Act also allows benefits to differ according to marital status, so long as there is no difference in treatment between legal spouses and 'putative spouses', that is, de facto spouses who satisfy certain provisions laid down in the South Australian Family Relationships Act, 1975.

24. Provision is made in the Act for transitional arrangements to be covered by regulations, but these have not yet been promulgated.

25. The Act also prohibits discrimination in superannuation schemes on the ground of race and, further, prohibits discrimination on the ground of physical impairment unless this is based on reasonable actuarial data or, where there is no data, is reasonable having regard to any other relevant factors. The prohibitions on these grounds came into operation on 1 June 1986.

26. A safeguard in the legislation is that, where discrimination is allowed on the ground of reasonable actuarial data, members must be notified that the terms differ and told that they may request a summary of the data.

B. Recent Developments in the Area of Superannuation

27. In the past few years there have been three particularly significant developments in the area of superannuation. The first involved changes to the taxation of lump sum payments which are aimed at, and will increasingly have the effect of, encouraging preservation of superannuation benefits to retirement. Second, there has been a growing coverage of employees in the private sector, rising from 24% in 1974 to 36% in 1984. In some sections of industry, there is now very high coverage, e.g. 81% in mining and 86% in communications (1984 figures). Third, there has been an increased involvement of trade unions in superannuation issues and the establishment of some union-sponsored schemes. Finally, there has been the recent important proposal of the Government and the ACTU that the national productivity case result in an increase of 3% wage equivalent to be paid in the form of new or improved occupational superannuation for all employees. The parties to this agreement are committed to the establishment of real superannuation. The Operational standards for Occupational superannuation funds announced by the Treasurer on 11 June 1986, set out standards in relation to vesting, and preservation and

portability of benefits arising from productivity payments. In an earlier statement, the Government indicated that it was considering the widening of the preservation requirement to superannuation benefits other than those flowing from the productivity award on a phased-in and non-retrospective basis.[2] The High Court, has recently in Re The Manufacturing Grocers' Employees Federation of Australia and the Association of Professional Engineers. Australia, Ex Parte the Australian Chamber of Manufactures and the Victorian Employers Federation (unreported), indicated that at least in the context of the proposals for applying a productivity increase to superannuation, the Arbitration Commission has power to make an appropriate award. This the Commission did, in June 1986, when it indicated that, although it would not arbitrate to provide superannuation as sought by the Commonwealth and the ACTU, it would be prepared to certify agreements or make consent awards providing for employer contributions to approved superannuation schemes.

28. These fundamental shifts clearly have important implications for discrimination in superannuation. First, the shift towards superannuation as an employment condition for all employees highlights the inequity of differentiating on the basis of sex in superannuation conditions and benefits when such airterentiation is unlawful for other employment conditions. Second, consistently with the shift towards superannuation as real retirement income, the Government has introduced policies aimed at encouraging the taking of superannuation in the form of a pension or an annuity rather than as a lump sum. It is in the interest of the community as a whole that both men and women take their superannuation as a pension or an annuity in order to moderate reliance on social security payments, and that the benefits be available on a non-discriminatory basis.

29. Many in the superannuation industry argue against removal of certain instances of discrimination in superannuation, claiming this would have an adverse effect on the community. For example, at the consultation held by the Commission in Sydney in October 1985, it was argued that schemes providing members with an option to convert pensions into lump sum payments should not be required to provide those lump sums on a non-discriminatory basis since such a requirement would distort the market - men would opt for lump sum payments and women for pensions which would increase the cost to the fund.[3] The adverse effects of the removal of discriminatory practices, however, are being judged against a market that is likely to undergo significant changes due to many influences, particularly the outworking of the Government/ACTU superannuation proposal. The consequences of the removal of discrimination from superannuation clearly need to be considered along with the many other significant changes occurring in the superannuation area.

C. Overview of Victorian and New South Wales Reports

30. The present situation, as outlined above, is not static. There have been inquiries by the equal opportunity agencies in New South Wales and Victoria into the possibility of modifying existing legislation to remove the exemption for superannuation. The Anti-Discrimination Board in New South Wales (1978) and the Equal Opportunity Board in Victoria (1980), both reported[4] that, with some qualifications, superannuation should be treated like any other term or benefit associated with employment.

31. In reaching this conclusion, both reports looked briefly at the history of superannuation which began as a voluntary reward on the part of the employer for loyal service on the part of the deserving employee. Conscious or unconscious assumptions associated with these early forms of superannuation are still embedded in superannuation in the form of discrimination in

eligibility requirements and vesting provisions and in the lack of preservation and portability arrangements. Provisions in these areas have traditionally been in favour of men who have been viewed as more likely to prove long-serving and to have dependants and accordingly as being employees needing post-retirement income.

32. Both the New South Wales and the Victorian reports took the view that any superannuation provisions in which members or applicants for membership were treated differently on account of their sex constituted discrimination and should be prohibited. That is to say, both rejected arguments for differentiated contribution or benefit structures based on different mortality rates between men and women. In doing so, both argued that such discrimination on a class basis ran counter to the spirit of the New South Wales Anti-Discrimination Act and the Victorian Equal Opportunity Act respectively.

33. Both also cited arguments that the isolation of risks associated with men and women as groups was taking place in superannuation plans in the absence of possibly equally relevant distinctions between smokers and non-smokers, drinkers and non-drinkers, city and country dwellers, and other groupings.

34. In short then, both the New South Wales and the Victorian reports disapproved of the practice of treating women as a class in superannuation[5], either through scheme requirements based on stereotyped assumptions regarding the pattern of women's working lives, or through increased contributions by or reduced benefits to women based on statistical predictions of women's longevity. Against this general background, recommendations were made in the areas indicated below.

Eligibility requirements

35. Both reports recommended that the same eligibility requirements apply to women and to men. The Victorian report also recommended that, in determining eligibility for retirement benefits, the employer must deem the employee to have completed membership requirements which he or she would have completed but for past discrimination. In addition, the Victorian report took the view that periods of paid or unpaid maternity leave should be counted as service towards qualifying periods for eligibility.

Retirement ages

36. Both reports noted that retirement ages are frequently set in line with the ages of eligibility for the age pension, namely sixty years for women and sixty-five years for men. While noting that this age differential is discriminatory, both reports took the view that the current age differentials are likely to continue in the case of the age pension. Accordingly, both reports recommended that the integration of social security benefits into a superannuation scheme be not unlawful, notwithstanding the discriminatory nature of such benefits, so long as the outcome is the same for all individual members of superannuation schemes. The New South Wales report also recommended that all schemes provide the same normal retirement age for women and men, as well as the same early retirement age and the same conditions of eligibility for early retirement.

Provision for spouses and dependants following retirement

37. Both reports recommended that, so far as the scheme member is concerned, benefits be paid on a non-discriminatory basis. Both also accepted, however, that in the case of the death of the member there are grounds for discrimination in the paying of benefits to spouses and dependants. The basis for

such discrimination is the broad consideration that need is a factor which should be considered in the allocation of funds after a member's death. A problem recognised by both reports is that the specification of bona fide dependency in superannuation schemes themselves is likely to leave out a number of people in genuine positions of dependence, while devising a dependency test which would be fair without being intrusive might pose problems. In the end both reports established a set of options under which discrimination on the ground of marital status should be permitted with respect to the payment of benefits after a scheme member's death.

Death and disablement before retirement

38. Neither report treated disability and disablement at length, though both noted that benefits may vary between women and men and on the ground of marital status and that disablement associated with pregnancy or childbirth may be excluded from cover. Both reports recommended that death and disablement benefits be provided without discrimination on the ground of sex, and that marital status be taken into account only as outlined above.

Lump sum benefits

39. The provision of equal lump sum benefits to male and female members of a scheme with the same period of service and equal contributions, if any, may only defer the problem of discriminatory benefits, as women wishing to convert all or part of their lump sum benefits into pensions may be obliged to do so at sex-differentiated commutation rates stipulated by their own scheme or, on the open market, by insurance companies. The New South Wales report recommended that where a scheme provides for the conversion of a lump sum benefit to a pension, or the conversion of a pension to a lump sum, the factors used in the conversion should be the same for men and women. The Victorian

report argued that it was in fact very rare for conversions of lump sums to pensions and pensions to lump sums to take place as an actual, calculated exchange of values. Normally, scheme members were simply offered a choice between a defined pension and a defined lump sum. In concept, therefore, it distinguished between a member's choice of alternative defined benefits and a genuine commercial exchange for which all relevant factors, for example, health, were taken into account. Accordingly, it recommended that the terms of all options available to members of a scheme should be the same for males and females. It is worth noting in this context that both the New South Wales and the Victorian reports had regard to the preference of Australian scheme members for superannuation benefits in lump sums which attracted an effective tax rate not exceeding 3.05%. The Income Tax Assessment Amendment Act 1984 (Cwlth), which provides for a maximum taxation rate on lump sums of 31% (including the Medicare levy of 1%), is likely to have a noticeable effect on the pattern of choice relating to pensions and lump sums, and may in the future result in the increased popularity of pensions.

Indirect discrimination

40. Both reports drew attention to indirect discrimination in superannuation schemes which results in membership by a substantially larger proportion of men than women.[6] Two broad reasons were identified. First, women tend to occupy part-time positions and positions in the lower categories of employment (for example, as wage earners rather than salary earners), and eligibility for membership is likely to be denied to workers in these positions. Second, women's working lives may be interrupted by child bearing and child raising, and arrangements for portability or vesting of superannuation benefits are based on assumptions about continuous employment being the norm.

41. Both reports stressed the desirability of eliminating the effects of indirect discrimination in superannuation, though neither made a formal recommendation. Desirable reforms mentioned include: the option to continue superannuation contributions during maternity leave or leave without pay; the inclusion of leave time in eligibility calculations; the lowering of vesting periods; improved portability arrangements; and provision for part-time employees to become members of superannuation schemes if they would otherwise qualify for such membership.

42. Indirect discrimination in the treatment of superannuation benefits on separation and divorce was also discussed at length in the Victorian report. Since that time, the Family Law Council[7] and the Institute of Family Studies[8] have also issued reports addressing this matter. In addition, at the present time, the Australian Law Reform Commission has before it a reference on:

> 'whether any changes should be made to the law relating to the rights of the parties to a marriage in respect of property acquired by either or both of them, whether before, during or after their marriage, including their rights during, and upon the dissolution of, the marriage'.

Aspects of the reference, including superannuation, are discussed in the Law Reform Commission's Discussion Paper No. 22, Matrimonial property law[9]. While the division of superannuation benefits on divorce or separation is a matter which is affected by several pieces of legislation, there is agreement that reform in this area is desirable.

Existing ,schemes

43. With the exception of the Victorian recommendation in relation to eligibility for vested benefits, both reports recommended that new provisions not be retrospective. That is, existing discriminatory schemes should be permitted to continue provided that members are given the option of transferring to new non-discriminatory schemes and that there are no new admissions to discriminatory schemes. The problem confronted differently by each report was that of preserving the value of service benefits due to the member on transfer to a new non-discriminatory scheme which might lay down different conditions, for example conditions regarding ages of retirement. The New South Wales report recommended that a Fellow of the Institute of Actuaries of Australia be required to certify new service benefits to be no less than existing service benefits. In order to enable the non-discriminatory basis for future service benefits to be applied to past service benefits but, at the same time, ensure that the value of past service benefits could not be so reduced as to deny members an effective choice as to whether or not to transfer, the Victorian report proposed a more complicated formula. It recommended that the actuarial value of the past service benefits be certified by an actuary to be at least equal to the lesser of:

(a) the value of past service benefits secured under the existing provisions; or

(b) the value of past service benefits determined in accordance with new provisions to apply to future service appropriately adjusted for any difference between actual contributions and those payable under the new provisions.

44. Both reports recommended a transitional period of three years to apply to the alteration of existing superannuation provisions. Additional arrangements relating to the alteration

of trust deeds and the rights and duties of trustees were recommended in order to reduce technical barriers to the implementation of non-discriminatory schemes. In New South Wales, employers with less than six employees would be exempted from compliance, as indeed they are from other provisions of the New South Wales Anti-Discrimination Act.

Uniform legislation

45. There was strong support in both reports for uniform or at least non-conflicting legislation in relation to superannuation, as the operation of multi-State schemes could be severely affected or even prevented by conflicting requirements. Both the Victorian report and the New South Wales report recommended that an employer's superannuation scheme comply with the legislation of whichever State had the largest number of employees at a given date or dates, so long as that State had legislation which made discrimination on the grounds of sex and marital status unlawful in superannuation schemes.

46. No action has as yet been taken on the New South Wales and Victorian reports.[10] Given the strong views expressed in both regarding the desirability of uniform legislation, it is possible that both States might wish to take any federal recommendations into consideration before further steps are taken. The conclusions and recommendations contained in this report accord substantially with the recommendations made in the New South Wales and Victorian reports and in effect, represent a sequel to those reports.

p. The Situation in Other Countries

Introductory summary

47. Broadly speaking, the superannuation arrangements surveyed below reflect a consciousness of sex discrimination issues; but, with some exceptions, they also incorporate provisions for discrimination based on actuarial data. Further, all the countries considered here seem likely to review their legislation to require schemes to treat men and women members alike, as unit members of the scheme, and not separately on account of their sex.

United Kingdom

48. Provisions in the Equal Pay Act 1970 (U.K.) and the Sex Discrimination Act 1975 (U.K.) exclude from the requirement of equality of treatment benefits payable under pension schemes and terms of contracts of employment in relation to retirement. Such differential treatment includes the use of actuarial or other data to calculate differing benefits under a pension plan. This provision was questioned by the important report of the Occupational Pensions Board, entitled Equal status for men and women in occupational pension schemes, which was presented to the United Kingdom Parliament in August 1976. The principal conclusion of the Occupational Pensions Board was:

> (6.29) ... that the test of equal status between men and women should start from the premise of equal benefits, that is identical treatment for men and women in identical circumstances, and not from a comparison of the amount spent by an employer on the 'average' man or woman in his employment or of the financial value of different packages of benefits. We recognise that there may need to be departures in detail from this principle, and we discuss these in later chapters in our report.[11]

This recommendation has yet to be implemented, though it appears, as will be seen, that change is pending.

49. At present, however, a sixty-five year old male or a sixty year old female with the requisite National Insurance contribution record is entitled to receive a Flat Rate Basic Pension and a State Earnings-Related Pension which is, because of differential retirement ages, discriminatory. Earnings-Related State Pensions are based on remuneration and employment since April 1978, the time when the Earnings-Related Scheme came into force. Occupational pension schemes are normally financed by the employer and the employee jointly. Generally, the assets of a scheme will be separated from the employer and held in a trust which is governed by a trust deed and rules.

50. The majority of scheme members in the United Kingdom are covered by defined benefit schemes based on final salary (earnings-related schemes) as opposed to defined contribution (money purchase) schemes.

51. Whether they are 'earnings-related' or 'money purchase', many schemes include a facility for members to pay Additional Voluntary Contributions (AVCs) to supplement their pension entitlement. Under present legislation, this is a particularly tax-efficient medium for personal saving. The AVCs are frequently accumulated up to the date of retirement and part or all of the maturity sum may be used to buy an annuity on the terms offered by the insurance market. This means that supplementary annuities will vary depending on the sex of the annuitant. 12

52. A number of current retirement provisions in the United Kingdom, including those relating to the use of sex-based actuarial data and to sex-differentiated retirement ages are coming under pressure for change as a result of national and, through the European Community, international pressure. A recent Government white paper, Reform of social security,[13] which is intended to be followed by the introduction of legislation in 1986, includes the mandatory use of unisex

annuity tables for pensions intended to replace the State Earnings-Related Pension Scheme (these pensions would include benefits for surviving spouses); and the Government has also committed itself to studying ways of introducing flexibility of retirement ages for both sexes.

53. The European Court of Justice in Luxembourg has recently found that differential compulsory retirement ages for men and women in Britain are in breach of the terms of Directive 76/207 of the EEC on 'Implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions' .14 Its judgement in the test case brought by Ms Helen Marshall against the Southampton and South West Hampshire Health Authority effectively prohibits public sector employers from discriminating in retiring age between men and women.[15] As a result, the Government has announced its intention to introduce legislation to make it unlawful for both private and public sector employers to dismiss a woman on grounds of age when a man of the same age and comparable circumstances would not be dismissed.

The European Economic Community directive

54. Between 1975 and 1978, three directives on equal treatment for men and women were adopted by the Council of the European Community. These are:

> Council Directive of 10 February 1975 on the approximation of the Laws of the Member States relating to the application of the principle of equal pay for men and women. 16
>
> Council Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions)-[7]
>
> Council Directive of 19 December 1978 on the progressive implementation of the principle of equal

> treatment for men and women in matters of social security. 18

Because the subject matter of occupational social security overlaps both equal pay and social security, it was determined that a separate Council Directive should address the topic with the intention of tilling the existing gap in legislation on social security schemes. The 'Directive on the implementation of the principle of equal treatment for men and women in occupational social security schemes' was approved by the Council on 5 June 1986.[19] For its legal basis, the Directive refers to Article 19 of the Treaty establishing the European Economic Community, in which pay is defined to include 'any ... consideration, whether in cash or kind, which the worker receives, directly or indirectly, in respect of his employment from his employer'. The inclusion of occupational superannuation in this category of 'pay' is supported by a judgement of the European Court of Justice of March 1981.[20]

55. Article 6 of the draft Directive of 1983 specified that:

> 1. Provisions contrary to the principle of equal treatment snail include those based on sex, either directly or indirectly, in particular by reference to marital or family status, intended, inter alia, to:
>
> (a) specify those persons who may participate in an occupational scheme,
>
> (b) fix the compulsory or optional nature of participation in an occupational scheme,
>
> (c) lay down different rules as regards the age of entry into the scheme or tne minimum period of employment or affiliation to the scheme required to obtain the benefits thereof,
>
> (d) lay down different rules for the reimbursement of contributions where a worker leaves a scheme without having fulfilled the conditions guaranteeing him a deferred right to long-term benefits,

(e) set different conditions for the grant of benefits or restrict such benefits to workers of one sex only,

(f) fix different retirement ages,

(g) suspend the retention or acquisition of rights during periods of maternity leave or family leave granted by law or collective agreement,

(h) provide for benefits whose level or amount differ and, in particular, set the level of benefits by taking into account different factors of calculation, actuarial or otherwise, with regard to the phenomena of ill health, mortality or life expectancy,

(i) set contributions at different rates, in particular by taking into account the factors of calculation mentioned under (h),

(j) lay down different standards or standards applicable only to workers of a given sex as regards the guarantee or retention of entitlement to deferred benefits where a worker leaves a scheme or as regards the transfer of such entitlement to another scheme.

2. Where the grant of certain subsidiary benefits is left to the discretionary power of a scheme's management bodies, the said bodies must take account of the principle of equal treatment.[21]

In short, the draft Article 6 provided for equality of individual treatment of scheme members in relation to eligibility criteria and retirement ages. It is understood that Article 6 as finally approved allows differentiation on the ground of actuarial data. To this extent, at least, the impact of paragraphs (h) and (i) appears to have been changed. The only available official text at the time of writing is in German, and is reproduced in endnote 22. Active steps are being taken towards ending indirect discrimination in relation to vesting and portability arrangements[23] and in relation to the acquisition or retention of rights during maternity leave.24

United States

56. The use of sex as a factor in determining pension benefits has been under attack in four distinct fora in the United States - the courts, the Congress, State legislatures and Federal regulatory agencies.

57. Most of the court challenges have been based on Title VII of the Civil Rights Act 1964 (U.S.A.)[25] which prohibits sex discrimination in employment. The two main cases relating to sex discrimination in superannuation involved Title VII challenges to calculations of pension payments on retirement which were based on actuarial predictions regarding longevity. In Los Angeles Department of Water & Power v. Manhart,[26] the issue was whether women should be obliged to make higher contributions in order to compensate for higher total pension disbursements as a result of their greater expectation of life. In Arizona Governing Committee v. Norris,[27] the logical counterpart to Manhart was raised. In that case, men and women made equal contributions to a pension fund, but women received smaller monthly benefits on retirement. The combined effect of the judgements was to interpret the Civil Rights Act as prohibiting variations based on sex in either employee contributions or in the dollar amount of benefits payable under any option in connection with any employment-related plan. Life insurance offices and other providers of funding vehicles remained free to use sex-based pricing, but this could affect only the employer's cost, leaving benefits and employee costs sex neutral.

58. While Congress has prohibited the exclusion of pregnancy disability benefits in employer-provided disability and health plans, other legislation has been deferred, particularly proposals directed at requiring all insurance contracts to ignore sex in the determination of premiums and benefits. To date no such proposal has been finalised and the most recent to have been debated has now been amended so as to limit its

application to employment-related plans. This move has caused withdrawal of support by major women's groups, and has effectively shelved the proposals.

59. The main regulatory agency involved with superannuation, the Equal Employment Opportunity Commission (EEOC), has taken the view that civil rights legislation should be regarded as looking at benefits for the individual rather than for a class. The EEOC guideline on sex discrimination in superannuation is as follows:

> It shall not be a defence under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex rather than the other.[28]

60. It appears that to date only one State has enacted legislation along the lines of the various Federal proposals on insurance. However, several States have prohibited differentiation on the ground of sex in the field of motor insurance.

Canada

61. The Canadian social security system is based on four income sources, three federal and one provincial. The first is the federal two-tier anti-poverty program, Old Age Security and the Guaranteed Income Supplement. The second is the contributory social insurance, the Canada/Quebec Pension Plan. The third is composed of private pension and retirement savings plans. The fourth is the provincial residual relief programs. The second and third levels are relevant to this inquiry.

62. The Canada/Quebec Pension Plan, which involves Quebec separately, principally because of the latter's exercise of its constitutional right to independent administration of a pension plan, were introduced in 1966. Under these Pension Plans, every person in the paid labour force who is between eighteen and sixty-five is required to contribute to a public pension.

Contributions are levied on earnings over a minimum and under a maximum sum, presently $C2,300 and $C20,800. Currently workers pay contributions on income between these amounts at 1.8%; and employers match those contributions. Provided that they have contributed to either the Canada Pension Plan or the Quebec Pension Plan for a minimum number of years, workers who retire at sixty-five or who are disabled receive benefits based on an average of their annual earnings up to the yearly maximum pensionable earnings. Workers can continue in paid employment until the age of seventy, and thus improve the average on which their benefits are based. Benefits are, however, payable at age sixty-five on application, regardless of whether the applicant has retired from work. The Canada/Quebec Pension Plan also provides benefits to surviving spouses and children, a death benefit and a pension in cases of severe disability. It is fully portable regardless of the length of any period outside the paid workforce. There is also a child rearing drop-out provision that gives coverage to women who leave the workforce temporarily to take care of their young children.

63. The Canadian Advisory Council on the Status of Women points out that the main gap left by the Canada/Quebec Pension Plan is in its lack of coverage of women whose lives are spent largely outside the paid workforce. The Council identified a number of problems that homemakers have with the present pension system, specifically:

Benefits depend on being linked to a man

- spouseless homemakers who keep house for parents, brothers, sisters or children get nothing from the Canada/Quebec Pension Plan

- women who divorce (40% of marriages now end in divorce) lose all survivors' rights, even if their marriages lasted a very long time

- benefits linked to marital status are too fragile in today's world, as they do not give women the security that the system is supposed to provide.

28 For the married homemaker, there is no personal benefit from the Canada/Quebec Pension Plan

- there is no recognition of the homemaker's personal contribution to the economy

- while proposals to split the Canada/Quebec Pension Plan benefits between the spouses are good, they do not recognize the value of the work done by the homemaker because the couple's total pension is not increased

Widow's pensions are unsatisfactory

- the pensions are related to the husband's income rather than reflecting the value of her own work

- widows' pensions treat homemakers as dependants, not as partners who made a valuable contribution to society

- less than a third of men participate in employer-sponsored pension plans that give pensions to widows

- widowed homemakers may not benefit from their deceased husband's personal savings, registered retirement savings plans, and investments unless these assets are specifically willed to them

Result ... the greater her need, the less she gets.

Even women who do have paid jobs end up with poor pensions since they are based on earnings, and women's wages are only about 62% of those of men.z[9]

64. Canadian private pension plans are affected by federal and often by provincial anti-discrimination legislation. In plans subject to federal jurisdiction the class test of equal financial value has been adopted as the standard test of discrimination. This means that employer contributions, rather than employee benefits, must be equal for each individual. In Ontario, the Report of the Task Force on Employee Benefits under Part X of the Employment Standards Act[30] has recommended that in all but money purchase pension plans, the level of benefits, rather than the cost of benefits, be the criterion of fairness. In general, there are minimum standards for vesting in Canadian pension plans, but pension credits are not required to be portable.

65. In the Throne Speech of 5 November 1984, the Canadian Government committed itself to 'the greater participation of the women of Canada and their rightful claim to equality with men everywhere in our society'. Under this heading the Government committed itself to 'enter discussions with the Provinces aimed at a comprehensive overhaul of the Canadian pension system, including such matters as portability, vesting, survivors' benefits, and pension coverage of women'.[31]

New Zealand

66. In New Zealand, discrimination in relation to superannuation is specified in s.88 of the Human Rights Commission Act 1980 (N.Z.) among provisions applying to terms and conditions of employment and the provision of goods, facilities and services. Section 88(8), however, specifies that:

> Nothing in this Act shall prevent a superannuation scheme from providing -
>
> (a) Different benefits for members of each sex on the basis of the same contributions; or
>
> (b) The same benefits for members of each sex on the basis of different contributions, -
>
> if the differential treatment -
>
> (c) Is based on actuarial or statistical data, upon which it is reasonable to rely, relating to life expectancy, accidents, or sickness; and
>
> (d) Is reasonable having regard to the data and to any other relevant factors.

In effect, this means that superannuation schemes may treat women members either as individuals or as representatives of a class in the calculation of benefits and still comply with the terms of the Act.

67. The New Zealand Human Rights Commission has received complaints referring to s.88(8) of the Act which argue that:

> Men and women should be treated as individuals and not prejudiced on the basis of the life-expectancy characteristics of people of one sex or the other. This is seen to run counter to the principles embodied in equal opportunity legislation.[32]

As a result of these arguments, the Commission is giving consideration to using its power under s.89 of the Act to report to the Minister on what amendments (if any) should be made to s.88 to ensure that preferential treatment based on sex or marital status is eliminated from superannuation schemes. A report has been drafted and consultation is in progress.

CHAPTER II ENDNOTES

1. Statement by the Treasurer the Hon. P.J. Keating, M.P., on Operational standards for occupational superannuation funds, Press Release No. 48, 11 June 1986.

2. Joint Statement by the Treasurer, the Hon. P.J. Keating, M.P., and the Minister for Employment and Industrial Relations, the Hon. Ralph Willis, M.P., 16 December 1985 (Attachment B, Draft operational standards for superannuation schemes, p.1).

3. See Chapter VIII for a more detailed discussion of this issue.

4. New South Wales, Anti-Discrimination Board, Discrimination in superannuation, Sydney, 1978. Victoria, Equal Opportunity Board, Discrimination in superannuation and pension schemes, Melbourne, 1980.

5. See, however, the discussion of options in Chapter VIII below.

6. An Australian Bureau of Statistics Survey conducted from September to November 1982 revealed that only about 30% of female employees who worked twenty hours or more each week in their main job were covered by an employer-sponsored superannuation scheme in 1982 compared to 53% of males. The coverage is lower again for females if those working less than twenty hours a week are included. (ABS Catalogue No. 6319.0, 1984.) A superannuation scheme was defined for the survey as 'any fund, association, scheme or organisation set up for the purpose of providing financial cover for members when they retire from work'. There is an even greater disparity in the numbers of men and women currently retired on superannuation benefits - people who must on average have entered plans twenty-five or more years ago. In a survey report entitled Persons retired from full-time work published by the Australian Bureau of Statistics it emerges that at retirement 92,900 Australian men and 18,500 Australian women in the same age group received superannuation as their main source of income as at September, 1983. (ABS Catalogue No. 6238.0, Canberra, 1984.) The survey included, with certain limited exceptions, all civilians aged forty-five years and over.

7. Family Law Council, Superannuation and family law, Canberra, 1979.

8. McDonald, Peter (ed.), The economic consequences of marriage breakdown, Institute of Family Studies, Melbourne, 1985.

9. Australian Law Reform Commission, Matrimonial property law, Discussion Paper No.22, June 1985.

10. On 19 March 1983 the N.S.W. Opposition announced its intention of introducing equality in superannuation for women if elected in the March 1983 State election.

11. Occupational Pensions Board, Equal status for men and women in occupational pension schemes, Command 6599, HMSO, London, 1976.

12 This account of current retirement provision in the United Kingdom draws substantially on Model of equality: A consulting actuary's report on the methods and costs of equalising the treatment of men and women in occupational pension schemes prepared for the United Kingdom Equal Opportunities Commission by Duncan C. Fraser and Co., Actuaries, March 1985.

13. Department of Health and Social Security, Reform of social security: program for change, V.2 Command 9518, HMSO, London, 1985.

14. Directive 76/207/EEC, 14.2.1976, Implementation of the principle of equal treatment for men and women as regards access to employment vocational training and promotion and working conditions, Official Journal of the European Communities, L39, Vol 19, 1976, p.40.

15. Industrial Relations Services, 'Discriminatory retirement age', (May-June 1986) Equal Opportunity Review, 40-45.

16. Directive 75/117/EEC, 19.2.1975, Official Journal of the European Communities, L45, Vol.18, 1975, p.19.

17. Directive 76/207/EEC, 14.2.1976, Official Journal of the European Communities, L39, Vol. 19, 1976, p.40.

18. Directive 79/7/EEC, 10.1.1979, Official Journal of the European Communities, L6, Vol.22, 1979, p.24.

19. Press Release of the Council of the European Community, 7350 e/86 (Presse 83), 5.VI.86.

20. Susan Jane Worringham and Margaret Humphreys v. Lloyds Bank Limited, Case 69/80 E.C.J.

21. Equal Opportunities Commission, Model of equality : A consulting actuary's report on the methods and costs of equalising the treatment of men and women in occupational Pension schemes, Appendix 1 (Proposal for a Council Directive, Article 6), n.p., March 1985.

22. Richtlinie des Rates, Artikel 6, (Directive on the implementation of the principle of equal treatment for men and women in occupational social security schemes), Amsblatt Der Europ&ischen Gemeinschaften, L225 (12.8.86) pp. 41-2. (Only version available as of going to press.)

(1) Dem Grundsatz der Gleichbehandlung entgegenstehende Bestimmungen sind solche, die sich - insbesondere unter Bezugnahme auf den Ehe- oder Familienstand - unmittelbar oder mittelbar auf das Geschlecht stutzen und folgendes bewirken:

a) Festlegung der Person, die zur Mitgliedschaft in einem betrieblichen System zugelassen sind;

b) Regelung der Zwangsmitgliedschaft oder der freiwilligen Mitgiiedschaft in einem betrieblichen System;

c) Festlegung unterschiedlicher Regeln Ler das Alter fUr den Beitritt zum System oder fir die Mindestdauer der Beschgftigung oder ZugehOrigkeit zum System, um einen Leistungsanspruch zu begranden;

d) Festlegung ausser in den unter den Buchstaben h) und i) genannten FAllen unterschiedlicher Regeln ft7r die Erstattung der Beitrgge, wenn der Arbeitnehmer aus dem System ausscheidet, ohne die Bedingungen erftillt zu haben, die ihm einen aufgeschobenen Anspruch auf die landfristigen Leistungen garantieren;

e) Festlegung unterschiedlicher Bedingungen filr die Gewghrung der Leistungen oder die Beschrgnkung dieser Leistungen auf eines der beiden Geschlechter;

f) Festsetzung unterschiedlicher Altergrenzen filr den Eintritt in den Ruhestand;

g) Unterbrechung der Aufrechterhaltung oder des Erwerbs von AnsprUchen wghrend eines gesetzlich oder tarifvertraglich festgelegten Mutterschaftsurlaub oder Urlaubs aus familigren Grtinden, der vom Arbeitgeber bezahlt wird;

h) Festlegung unterschiedlicher Leistungsniveaus, es sei denn, dass dies notwendig ist, um versicherungstechnischen Berechnungsfaktoren Rechnung zu tragen, die im Falle von Leistungen, die als beitragsbezogen definiert werden, je nach Geschlecht unterschiedlich sind;

i) Festlegung unterschiedlicher 1181¯len fir die Beitegge der Arbeitnehmer;

Festlegung unterschiedlicher HOhen fil[i]r die Beitigge der Arbeitgeber im Falle von als beitragsbezogen definierten Leistungen, es sei denn, es geht darum, die 1.18he dieser Leistungen anzugleichen;

j) Festlegung unterschiedlicher oder nur fur Arbeitnehmer eines der Geschlechter geltender Regelungen - ausser in den unter den Buchstaben h) and i) vorgesehenen Fallen - insichtlich der Garantie oder der Erhaltung des Anspruchs auf spatere Leistungen, wenn der Arbeitnehmer aus dem System ausscheidet.

(2) Steht die Gewghrung von unter diese Richtlinie fallenden Leistungen im Ermessen der fi[1]ar das System zustandigen Verwaltungsstellen, so milssen diese dem Grundsatz der Gleichbehandlung Rechnung tragen.

23. Equal Opportunities Commission, Model of equality: A consulting actuary's report on the methods and costs of equalising the treatment of men and women in occupational pension schemes, Appendix 1 (Proposal for a Council Directive, Paragraph 1(3)), n.p., March 1985.

24. ibid., Paragraph 1(g).

25. Civil Rights Act 1964 (U.S.A.), as amended 42 U.S.C. 2000e-2000e-16 (1982).

26. City of Los Angeles Department of Water and Power v. Manhart 435 U.S. 702 (1978).

27. Arizona Governing Committee v. Norris 103 S.Ct. 3492 (1983)

28. EEOC guidelines on sex discrimination, 29 CFR S1604.9(e).

29. Canadian Advisory Council on the Status of Women 1985, Homemaker Pension, March, 1985, pp.15-17.

30. Task Force on Employee Benefits, Report of the Task Force on Employee Benefits under Part X of the Employment Standards Act, Ontario, 1975, p.50.

31. Canada, Parliament, House of Commons, Debates, Governor-General's Speech from the Throne, 5 November 1984, pp. 5-8.

32. Human Rights Commission and Race Relations Conciliator, Annual Reports for the year ended 31 March 1985, Wellington, 1985, p.29.

CHAPTER III - DISCRIMINATION IN SUPERANNUATION

A. The Relevant Provisions of the Sex Discrimination Act

68. The Commonwealth Sex Discrimination Act was enacted in March 1984. The objects of the Act are:

> to give effect to certain provisions of the International Convention on the Elimination of All Forms of Discrimination Against Women
>
> to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status or pregnancy
>
> to eliminate, so far as is possible, discrimination involving sexual harassment, and
>
> to promote recognition and acceptance within the community of the principle of equality between men and women.

69. Part II of the Act identifies the acts and practices that constitute unlawful discrimination on the ground of sex, marital status or pregnancy. Broadly speaking, the Act seeks to prohibit direct or indirect discrimination on the ground of sex, marital status or pregnancy in all areas of employment except State employment, in education, in the provision of goods, services and facilities and accommodation, in the disposition of land, in clubs and in the administration of Commonwealth programs.

70. Section 5 of the Act defines sex discrimination as follows:

> 5.(1) For the purposes of this Act, a person (in this sub-section referred to as the 'discriminator') discriminates against another person (in this sub-section referred to as the 'aggrieved person') on the ground of the sex of the aggrieved person if, by reason of-
>
> (a) the sex of the aggrieved person;

(b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or

(c) a characteristic that is generally imputed to persons of the sex of the aggrieved person,

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

(2) For the purposes of this Act, a person (in this sub-section referred to as the 'discriminator') discriminates against another person (in this sub-section referred to as the 'aggrieved person') on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition -

(a) with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply;

(b) which is not reasonable having regard to the circumstances of the case; and

(c) with which the aggrieved person does not or is not able to comply.

Section 6 of the Act, which deals with discrimination on the ground of marital status, is similarly phrased.

71. The Act specifies several exemptions to the provisions of Part II, including the exemptions in ss.41(1) and 41(4) relating to superannuation and insurance. Section 41 reads as follows:

41.(1) Nothing in Division 1 or 2 renders it unlawful for a person to discriminate against another person, on the ground of the other person's sex or marital status, in the terms or conditions appertaining to a superannuation or provident fund or scheme.

(2) Sub-section (1) may be repealed by a regulation, and such a regulation shall come into operation -

(a) on a date specified in the regulation, being a date not earlier than 12 months after the making of the regulation; or

(b) at the expiration of the period of 2 years immediately after the commencement of this Act,

whichever is later.

(3) Where a regulation made under sub-section (2) comes into operation, sub-section (1) shall thereupon be deemed for all purposes to have been repealed by an Act other than this Act.

(4) Nothing in Division 1 or 2 renders it unlawful for a person to discriminate against another person, on the ground of the other person's sex, with respect to the terms on which an annuity, a life assurance policy, a policy of insurance against accident or any other policy of insurance is offered to, or may be obtained by, the other person, where the discrimination is -

(a) based upon actuarial or statistical data from a source on which it is reasonable for the first-mentioned person to rely; and

(b) reasonable having regard to the matter of the data and any other relevant factors.

72. The exemption was originally intended to apply for a two year period only, but the many complex issues involved in the area of superannuation led to the exemption being extended indefinitely. The following excerpt from the Second Reading Speech on the Bill' in the Senate in October 1983 explains this, and the reason for the exemption generally:

> As presently drafted the Bill provides an exemption for two years for discrimination on the ground of sex or marital status in the terms or conditions appertaining to a superannuation or provident fund or scheme in operation at the commencement of the legislation. The Government has received a number of representations concerning these provisions, and in view of the difficulties raised and the complexity of the subject matter, has decided to move an amendment to exempt all superannuation funds or schemes, existing or future, for an unlimited time, but to provide that this exemption may be repealed by regulation ... the Government will not make any regulations until an inquiry into the problems raised

> by the life insurance and superannuation industry associations has been held and the industry's major concerns have been examined and met, where appropriate. At the same time, the Government is signalling its intention in principle that the Sex Discrimination Act should - and in due course, will - cover superannuation schemes. (emphasis added)

73. The need for an interim exemption of this nature is clear. Although many superannuation schemes, both public and private, are now non-discriminatory, a number of schemes, particularly in the private sector, contain discriminatory conditions. Some continue to determine contribution and benefit rates and options on the basis of actuarial data using the difference in longevity between men as a class and women as a class.

74. This practice means that a woman, when receiving pension benefits or purchasing an annuity, can expect to receive a smaller periodic benefit for the same purchase price than would a man of equal age. This is because the woman is categorised as belonging to a class of persons that are going to live longer, and thus receive periodic payments over a longer time, than are men. The Commission notes, however, that any differences in benefits as between men and women members of schemes that may thereby arise are, to a large extent, equalised when reversionary benefits, e.g. a pension for a surviving spouse, are taken into account. This is because, if pensions cost more for women (as a class) than for men because of differences in life expectancy, then reversion of superannuation benefits to widowers also costs less, that is, fewer widowers' than widows' pensions are likely to be claimed. On average, the commencement of a widower's pension will be later; and its payment is likely to cease earlier (this is particularly so given that at present a majority of husbands are older than their wives).

B. ——Discrimination in Superannuation

75. In a superannuation scheme or provident fund contributions are made by the employee and by the employer (except in the case of non-contributory funds to which the employee makes no contribution). Many existing large schemes, for example those of the Commonwealth (the Commonwealth Superannuation Scheme as established under the Superannuation Act 1976 (Cwlth)) and large employers, now appear to be non-discriminatory. That is, each employee has the same contribution rights independent of sex, and the pension or lump sum accruing at the point of retirement is also determined independently of sex. In smaller schemes, for example those for smaller employers in which the members may number less than ten rather than be counted in hundreds, the arrangements are normally administered by an insurance company which also provides some form of insurance cover.

76. The Commission notes that there is broad agreement on the elements of a non-discriminatory scheme as evidenced by practice in the Commonwealth Superannuation Scheme and many large company schemes, the reports made as a result of the inquiries conducted by the Anti-Discrimination Board of New South Wales and the Equal Opportunity Board of Victoria[2], the legislation in South Australia and also developing practice in the United Kingdom and North America. Based on this, the Commission Proposes to regard a scheme as non-discriminatory on the ground of sex if the same pension or lump sum is payable to men and women members or potential members of the scheme who retire at the same age and whose periodic contributions, if any. age for age. are the same. A scheme will be non-discriminatory on the ground of marital status if no distinction is made in any of the conditions of the scheme between members or potential members on the basis that they are married, in a de facto relationship. widowed. separated. divorced or single. unless their circumstances are materially different. This means that, for purposes of occupational superannuation and provident schemes,

no distinction may be made between men and women as a class or between spouses (including de facto spouses) or former spouses and single persons. In other words, men and women members of the scheme must be treated alike, as unit members of the scheme, and not separately on account of their sex or marital status.

It follows that pension schemes operated by different employers may have different costs and outcomes, depending upon the existing and estimated ratio of men to women in the scheme. (These differential costs and outcomes are likely to be minimised when reversion of superannuation benefits to spouses is taken into account.) But each scheme will make no distinction between men and women, that is, will have only members and beneficiaries and make no distinction between male and female members and beneficiaries.

77. Three main difficulties are likely to arise from this derinition of a non-discriminatory scheme. The first is that existing schemes may be unable, at existing contribution rates, to give women members the same benefits at retirement as male members, without some form of supplementation, a change in contribution rates or some form of preservation of existing expectations. The problems of existing schemes are considered at some length in Chapter X below.

78. The second or the problems relates to lump sum benefits. The Commission was informed at its third consultation that virtually all superannuation and provident schemes offer a lump sum on retirement as either the only benefit or as an alternative to all or part of a pension. The definition in paragraph 76 provides that a scheme is non-discriminatory on grounds of sex if the monetary amount given to members of the scheme is determined independently of sex. The problem is that, with the continued operation of s.41(4) of the Sex Discrimination Act, if the beneficiary wishes to convert the lump sum to an annuity, the periodic rate of the annuity will be less for women than for men. This is because life insurance is

at present based on an assessment of risk, men and women being treated as separate classes with separately measured actuarial risks. At this stage, therefore, adoption of the recommendations of the Commission in this report will not lead to full non-discriminatory arrangements for retirement provision. This issue is considered further in Chapter VIII.

79. The third main difficulty relates to superannuation where there is life company involvement with death and/or disablement cover or with annuities. In such cases, the life company element may be discriminatory provided it is based on actuarial or other data.[3] The problem arises if members' contributions and/or benefits are directly affected by this life company involvement. These issues are discussed further in Chapter IV.

80. One further issue which has been raised with the Commission relates to the fact that superannuation schemes would not be allowed to use actuarial data in the same way as insurance companies. It is inherent in the Commission's definition of a non-discriminatory scheme that men and women members of a scheme must be treated as members and not as separate classes (male, female, married etc) as defined by the Sex Discrimination Act. If the Commission were to conclude that schemes should be allowed to make use of actuarial data, it would be adopting a position which is contrary to the stated objects of the Sex Discrimination Act. Indeed, there would be little, if any, point in removing the exemption in s.41(1). The Commission cannot endorse such a position, especially given its view, as will become apparent from tne conclusions set down in this report, that eliminating the main discriminatory elements from superannuation schemes will be neither difficult nor costly. It also notes that, as mentioned earlier, many of the larger schemes are now non-discriminatory, or moving to that position. It would not want to see that welcome trend reversed by failure to repeal s. 41(1).

CHAPTER III ENDNOTES

1. Australia, Senate, Debates, 20 October 1983, p. 1893.
2. See Chapter II(C) above.
3. Section 41(4) of the Sex Discrimination Act.

CHAPTER IV - THE EFFECT OF INSURANCE TAKEN OUT BY SCHEMES

81. In Chapter I reference was made to the impact of insurance upon superannuation schemes. The problem, as defined previously, is that the Commission is making its report in respect of superannuation before completing its inquiry into insurance. Thus it needs to suggest a superannuation framework which will interact satisfactorily with insurance irrespective of whether the exemption for insurance remains or is modified or repealed.

82. As the position is at present, if s.41(1) of the Sex Discrimination Act were repealed, s.41(4) would continue to operate to permit actuarially and reasonably based discrimination on the ground of sex in insurance. The continued operation of the insurance exemption thus has implications for superannuation schemes which use insurance policies. For example, in the area of non-employer sponsored superannuation (which encompasses personal superannuation schemes and schemes for the self-employed) there is no employer support and the benefits from such a scheme can relate only to contributions which the individual makes and the results produced by the funding arrangements used by the scheme. To the extent that these schemes use insurance policies as the funding vehicle, s.41(4) would allow differences in these insurance policies to affect contributions and benefits under the schemes.

83. The Commission therefore concludes that it is reasonable to allow contributions and/or benefits under a non-employer sponsored scheme to differ by sex, but only to the extent that the difference arises as a direct consequence of lawful differences in insurance effected by that scheme. To this extent, the difference is directly attributable to life insurance funding, and is therefore exempt under s.41(4) of the Act.

84. In the case of employer-sponsored superannuation, the insurance policies used by such schemes (whose terms vary on the basis of sex) often do not in practice affect the benefits and contributions of members. This is because much of the insurance taken out by schemes merely protects scheme finances against abnormal numbers of deaths and disablements. This insurance does not impact upon members' contributions and benefits and thus these are unaffected by differences in premiums for males and females. Problems arise only where an insurance policy directly affects members' contributions and/or benefits.

85. Insurance policies do not often directly affect members' contribution/benefits in defined-benefit schemes. Where they do, the discriminatory effect can be removed if the employer is willing to vary the employer contribution to equalise benefits for the sex discriminated against. This may require some adjustment of the overall contribution and/or benefit structures of schemes if the employer wishes to avoid increases in costs, but there appears to be no insuperable difficulty in making such adjustments. Since variations in employer contributions are an integral part of defined-benefit schemes, the Commission sees no reason to depart from its definition of a non-discriminatory scheme to take account of employer-sponsored defined-benefit schemes using insurance policies for death/disablement cover or annuities. The Commission notes, however, that s.41(4) of the Act would operate so as to permit any differences arising directly from the lawful use of actuarial data in insurance cover or annuities purchased in respect of individual members to be reflected in the benefits accruing to those members. It would hope such differences were kept to a minimum.

86. The effect of using insurance policies is more difficult to deal with in defined-contribution schemes, for these schemes can be set up with sex-neutrality in all the defined elements (such as employee and employer contributions, death and disablement benefits) but the final benefit which emerges at retirement or resignation can differ by sex. The difference arises if the variable premium charged by the life company for death/disablement cover for each member is debited directly to that member's contributions, although the etfect would be fairly marginal. It would be unreasonable in these cases to require an employer, who set out to have sex-neutral contributions, to vary these contributions so as to produce equal benefits. The Commission sees merit in the approach used in the South Australian legislation for such cases.' It is to accept variations in the results of accumulations so long as the variations arise only from lawful variations in insurance premiums. This would enable employers and/or trustees to underwrite superannuation arrangements solely by insurance policies provided that:

- the plan was established on a defined contribution basis;

- the employer's contributions did not differ by sex or marital status; and

- the death and disability benefits did not differ by sex or marital status,

even if these policies produced different retirement benefits, because of lawful differences in insurance premiums. This situation would be covered by s.41(4) of the Act were the exemption in s.41(1) to be withdrawn, but the Commission expresses the hope that where possible schemes would avoid discriminatory outcomes even if these are allowed by s.41(4).

87. The Commission notes that, in adopting the approaches outlined in the preceding paragraphs (84-86), it does not intend to pre-empt the results of the insurance segment of its inquiry.

88. It can be said in summary that the Commission's conclusion is that employer-sponsored schemes should be non-discriminatory (except to the extent that discrimination cannot be avoided and is permitted by s.41(4)). However, non-employer-sponsored schemes, at least for the time being, may provide for contributions and/or benefits which differ by sex, but only to the extent that the difference arises as a direct result of lawful differences in insurance used by those schemes. Because of the way in which employer and non-employer sponsored superannuation is arranged, simple repeal of s.41(1) should achieve tne desired result in all but a few exceptional cases, where exemptions might be required.

89. Two further points should be made clear. They relate to the distinction between employer-sponsored and non-employer-sponsored schemes. Superannuation for the proprietors of incorporated small business, where the members of a scheme are identical with the employer, could be classed as employer-sponsored and thus should be non-discriminatory in contributions or benefits (except to the extent outlined in paragraph 88). The Commission understands that there would be no real difficulty with this classification, in view of its conclusion, described above, in relation to defined-contribution schemes, and its conclusion regarding the need for transitional arrangements, discussed in Chapter X. On the other hand, the proprietor of an unincorporated small business would come under the self-employed grouping and any superannuation would be within the Commission's proposals for non-employer-sponsored superannuation As such, the superannuation arrangements would be exempt provided they were arranged through a life company.

CHAPTER IV ENDNOTES

1. South Australian Equal Opportunity Act, 1984, Part III, Division VI.

PART B: CURRENT FORMS OF DISCRIMINATION

CHAPTER V - CONDITIONS OF ELIGIBILITY

90. **The** 1982-83 Census of Australian Superannuation Funds' shows that eligibility for membership of superannuation funds may at present be restricted by a number of requirements including the level of earnings,[2] managerial or non-managerial status,[3] sex[4], permanency,[5] full-time status[6] and medical requirements.[7] In addition, a very large number of funds have minimum age requirements[8] and minimum period of service requirements.[9] Finally, membership of schemes may be compulsory, voluntary or by invitation, with an individual's category being determined by one or more of the eligibility requirements set out above.

91. Sex or marital status discrimination in relation to eligibility requirements can be either direct or indirect. A woman may be denied admission to a scheme because she is a woman or because she is a woman of a certain age or because of her marital status. These are cases of direct discrimination. But eligibility requirements may also discriminate indirectly against women, as when they favour groups which are largely male, such as managerial or high salaried workers, or eliminate groups which are largely female, such as part-time and non-permanent workers. Indirect discrimination will be addressed in Chapter IX; what is at issue here is direct discrimination.

92. After review of the circumstances, the Commission has concluded that it is unnecessary to retain the exemption in r:41(1) of the Act in relation to conditions of eligibility which discriminate directly on the ground of sex or marital status. The Commission further concludes that schemes ought to be moving towards eliminating eligibility

conditions which discriminate indirectly on the ground of sex or marital status, although it acknowledges that, in view of possible cost implications, elimination may need to be achieved progressively. To the extent that an exemption might be necessary to cover such arrangements if s.41(1) of the Act were to be repealed, it would consider that appropriate.

93. Although the Commission is of the view that changes to the law affecting superannuation should not take effect retrospectively, [10] it nevertheless concludes, as a matter of principle, that schemes whose qualifying periods of service or minimum ages for admission have discriminated on the grounds of sex or marital status, or whose conditions of eligibility nave in any way had the effect of discriminating directly on those grounds, should wherever practicable, in calculations relating to vesting periods, determine the eligibility of present members as if such past discriminatory provisions had not existed. The Commission acknowledges that there may be practical problems in implementing this proposal. For example, where membership of a scheme is voluntary, a common characteristic of schemes in Australia, it may be almost impossible to determine whether a person now seeking membership had previously declined to join rather than actually being refused admission. For this reason, the Commission concludes that each case would need to be decided on its merits, but with a bias towards allowing the period to count wnerever that can be reasonably established.

94. Such retrospective provision for eligibility is not intended by the Commission to have any effect on the actual contributions credited to the member: only eligibility for vesting (not amounts credited) is being addressed here.

95. It has also been suggested to the Commission[11] that employees admitted to a scheme after the removal of discriminatory eligibility conditions should be entitled to purchase past service. The Commission was advised at its second consultation that some funds enable members entering the scheme late to buy pre-scheme service or make additional employee contributions in order to bring their final superannuation to a reasonable level. Such a facility would allow the purchase of past service units up to the amount to which the employee would have been entitled but for discriminatory provisions.

96. In the view of the Commission this proposal has merit. However, the Commission does not consider that schemes should be required to include the option of purchase of past service. Instead, it commends this option to the managers of funds as they eliminate sex discriminatory rules from their schemes.

CHAPTER V ENDNOTES

1. Australian Bureau of Statistics, Census of superannuation funds. Australia, Catalogue No. 5636, Canberra, 1985. Tables 21, 22, 23 and 25 given as Appendix 3.

2. 208 funds.

3. 817 funds.

4. 34 funds.

5. 942 funds.

6. 1316 funds.

7. 304 funds.

8. 3330 funds.

9. 17,286 funds. 18,222 funds were included in the census. The ABS reports (p.1) that the potential contribution to census aggregates of funds not included would not be significant.

10. See paragraphs 170-171.

11. Submission No. 44, Office of the Status of Women.

CHAPTER VI - RETIREMENT AGES

97. It appears from the Australian Bureau of Statistics survey that the great majority of funds have incorporated the assumption that women will retire at sixty and men at sixty-five.' Thus in 1982-83 the following position applied in relation to private and public sector self-administered superannuation funds:

Private and Public Sector
Self-administered Superannuation Schemes

Retirement Age	No of Schemes	
	Men	Women
60	738	13,462
65	14,898	1,448

Other funds (200) set other ages or ranges of ages for retirement or early retirement, and some (1300) set no age of retirement. The assumption about retirement ages by sex is based substantially on the differential ages of eligibility for retirement benefits set under the Social Security Act 1947 (Cwlth). The trustees of some funds argue that male members cannot be retired before they become eligible for the age pension; and, conversely, that many female members will not want to continue working beyond their eligibility for the age pension.

98. The original differential in the Social Security Act seems to have been based on a concern that women, married or not, were generally earning lower wages than men and, in later age, experiencing more difficulty obtaining work than men.[2] In practice, the differential in retirement ages between men and women has been the basis of a large number of complaints received by the Commission regarding the inequities of requiring men to work longer than women, or preventing women working to maximise their superannuation benefits, particularly in defined benefit schemes.

99. It is the conclusion of the Commission that all superannuation schemes should contain the same retirement age provision for men and women. The Commission acknowledges arguments put by trustees of superannuation schemes regarding the constraints set by existing age provisions of the Social Security Act, and acknowledges also that the Social Security Act is exempt from the provisions of the Sex Discrimination Act. To meet this point, the Commission expresses the view that amendment of the Social Security Act to provide for non-discriminatory ages of retirement is desirable in order to promote the establishment of broadly non-discriminatory superannuation provisions in relation to retirement ages.

100. The Commission is aware that both the Senate Standing Committee on Social Welfare and the Department of Social Security are studying the matter of ages of eligibility for the age pension under the Social Security Act and that there are substantive demographic and other considerations affecting the range of options available. The Commission does not wish to enter this area by nominating a particular age for pension eligibility, or the stages by which a common age of eligibility might be reached, so long as the same age of eligibility is eventually stipulated for men and women.

101. In relation to early retirement, both in occupational superannuation schemes and in eligibility for pension benefits, the Commission, bearing in mind the numerous and weighty considerations involved, concludes that whatever early retirement options are determined should be available irrespective of sex.

102. There will of course be problems associated with any transitional period during which superannuation benefits in excess of those previously stipulated for an anticipated maximum retirement age may accrue. These and other transitional problems are addressed in Chapter X.

CHAPTER VI ENDNOTES

1. Australian Bureau of Statistics, Census of superannuation funds, Australia, 1982-83, (Catalogue No. 5636.0), Canberra, 1985, Table 7.

2. Robert Butterworth & Jennifer Newton, 'The age pension and the retirement age', Social Security Journal, (June 1985), 46-59.

CHAPTER VII - DEATH AND DISABLEMENT BENEFITS

103. It is common practice for the pension/lump sum provisions in superannuation plans to be supplemented by provisions to cover members who may become temporarily or permanently disabled or die before retirement. The risks of paying such death and disability benefits may be absorbed within the operation of a superannuation fund itself, or may be covered in whole or in part by a separate contract between trustees and insurance companies. Absorption is more likely to be the case with very large funds and separate cover with most other funds. A number of the sex and pregnancy related discriminatory provisions described below, particularly those associated with disability coverage, are more likely to arise where there is separate insurance cover.

104. Before looking in detail at death and disability coverage under superannuation plans, it should be noted that superannuation generally has been variously regarded as either a scheme providing benefits answering to the needs of members or as a form of deferred pay. The superannuation industry frequently argues that the two approaches to superannuation are mutually exclusive and that a needs-based approach is preferable. Following this line, it is suggested that for a scheme to be able to provide for the needs of its members there must be a discretion to allocate its limited resources to areas of perceived need among members rather than to have regard only to their employment and contribution history, as required by the deferred pay approach.

105. Out of the deferred pay and needs-based views of superannuation two issues emerge. The first is whether superannuation should address the member's employment and contribution history or his or her social history, including marital status and the existence of dependants.

The second is whether the discretion to address needs should include the discretion to define need according to stereotypes associated with sex and marital status, or whether funds should be obliged to define dependants on a non-discriminatory basis within the terms of the Sex Discrimination Act.

106. In response to numerous submissions and after lengthy discussion at its consultations, the Commission has concluded that needs-based superannuation provision is socially desirable, even though it may mean that a member with surviving dependants will in effect receive greater provision from the fund than a member (or his estate) who has no dependants. In taking this view, the Commission has in mind Articles 23 and 24 of the International Covenant on Civil and Political Rights and Principles 2 and 6 of the Declaration of the Rights of the Child, as well as the historical realities of the development of superannuation. To the extent that an exemption might be necessary to cover such provisions if s.41(1) of the Act were to be repealed, it would consider that appropriate, provided there was no discrimination between dependants on the basis of sex or marital status.

A. Discrimination on the Ground of Sex

107. Benefits paid under death and disability provisions which form part of a broader superannation scheme may vary as a result of the sex of the member.

Death benefits

108. It has been put to the Commission that traditional practice with regard to death benefits in a minority of employer-sponsored funds has tended to more generous lump sum benefits for men than for women.' These discriminatory practices have their basis in assumptions regarding the 'breadwinner' role of men. While the

Commission recognises that death benefits have a part to play in providing on a needs basis for dependants, it is not sympathetic to the classification of scheme members on the grounds of stereotyped assumptions regarding those who are or are not likely to be carrying responsibilities for dependants.

109. The Commission notes that variations by sex in the level of death benefits were previously common in small schemes which used endowment assurance policies to fund the benefits. The traditional endowment assurance policy provided, for a given premium, higher death benefits for a female than a male of the same age. However, the Commission is advised that under modern 'unbundled' insurance policies, it is both feasible and common to provide, for the same premium, the same level of death benefits for both males and females. The Commission therefore concludes that there is no need to provide an exemption in respect of the level of death benefits where new insurance is involved. The transitional arrangements recommended in Chapter X would nevertheless allow continuation of existing arrangements using endowment insurance.

Disability benefits

110. Discriminatory treatment according to sex in the provision of disability coverage, or in the contribution or benefit structure of the scheme, may take one or more of three forms:

(i) married men may receive higher disablement benefits than married women;

(ii) a different actuarially determined contribution or benefit structure may be used for men and women; and/or

(iii)provision of disability benefits may differ on account of sex.

111. The Commission's responses to these forms of discriminatory treatment according to sex are as follows:

(a) There is no justification for allowing distinctions between male and female members of marriages or de facto unions on the ground of sex in disability contribution or benefit structures offered under a superannation scheme. In reaching this conclusion, the Commission recognises that, while superannuation is in part needs based, it is no longer valid (if it ever was) to base presumptions of dependency on the stereotype of men as sole family 'breadwinners'.

(b) Disability contribution or benefit structures offered in conjunction with superannuation differ between men and women not only on stereotyped grounds but also on the grounds of actuarially determined morbidity rates. Following the principle set out in paragraph 76 - that each scheme will have only members and beneficiaries and will make no distinction between male and female members and beneficiaries - the Commission concludes that no distinction on the ground of sex should be permitted in member contributions or benefit structures for disability coverage.

It may be that the trustees of a scheme reinsure disablement benefits with an insurance company and that the insurance involves actuarially based differences in premiums by sex. However, in an employer-sponsored environment, the scheme can be arranged so that these differences have no effect upon member contributions or disablement benefits, and therefore no special dispensation is required. Section 41(4) of the Act will operate to exempt any discriminations arising directly from the use of insurance companies by non-employer sponsored schemes.

(c) It is the Commission's understanding that distinction in the offer of disability benefits on account of sex may have been a practice where insurance was involved - some insurers may have offered disability cover to males and not to females. Such a practice appears to be unlawful as it does not seem to be covered by the exemption in s.41(4).

It is appreciated that the cost of insuring these benefits might differ, but the Commission considers that equality of opportunity is the overriding objective and can see no practical reason why schemes set up to provide disablement benefits should not offer the facility equally for both males and females. The Commission recognises that this may involve the employer/trustee in additional cost in respect of one sex to ensure that the scheme is non-discriminatory; but increases in employer costs could be avoided by appropriate adjustments to the overall structure of contributions and/or benefits.

B. Discrimination on the Ground of Marital Status

112. Discrimination on the ground of marital status, for the purposes of the Sex Discrimination Act, occurs when someone is treated less favourably than a person of a different marital status in circumstances that are the same or not materially different. Benefits paid under death and disability provisions of a superannuation scheme may vary according to the marital status of the member. In such cases, discrimination can occur if a distinction is made between individuals who are married or in de facto relationships and those who are single, and even if the distinction is specifically designed to recognise the element of need in benefit structures.

Death benefits

113. In relation to the payment of death benefits, it is generally, though not universally, accepted that if a member of a scheme dies in service or when retired on a pension, certain benefits should be paid to his or her

dependants. The argument is, however, made that in a scheme where only surviving spouses receive benefits, an unmarried member, or a member whose spouse dies first, will have no such 'dependant' and the actuarial value of benefits provided will be less than for a person who is married and whose spouse survives, other things being equal. For example, assuming average life expectancy, a male employee whose salary after twenty years' service was $25,000 per annum would in actuarial terms be likely to draw a total of $156,406 between retirement and death if he had no spouse, but if he had a spouse the total payout would be $204,258 - 30% more than for a single person.[2] There would be no problem in terms of the Sex Discrimination Act if death benefits (where offered) were provided in respect of all members with dependants. However, it is generally the case that such benefits are only provided in respect of spouses and under-age children (discussed in para.116 below). This is despite the fact that, for example, an unmarried member of a scheme with a sibling may be in circumstances that are the same or not materially different from the circumstances of a member with a spouse, that is, each in a relationship of mutual care and support. To exclude such other dependants from eligibility for death benefits constitutes discrimination on the ground of marital status. Discrimination would occur whether a scheme provided benefits automatically to spouses or only on proof of financial dependency.

114. One possible solution which would allow schemes to adopt a needs-based approach whilst satisfying the requirements of the Sex Discrimination Act would be to require death benefits (where offered) to be provided to all aependants of members on proof of financial dependency. It is, however, argued that objective tests of dependency are difficult to define and the administration of such a test may be time consuming and difficult for trustees and give rise to unpredictable obligations. Apart from

arguments to the contrary expressed by representatives of the Women's Electoral Lobby at the Commission's second consultation, the weight of opinion put to the Commission through its consultations and in submissions favoured the view that schemes ought (as many do at present) to be able to provide benefits to spouses either automatically or on proof of actual financial dependency.

115. Having in mind the requirements of the Act and the conflicting factors noted above, the Commission concludes that an exemption would be appropriate for schemes offering benefits to spouses (including de facto spouses), provided the benefits are given regardless of sex, or on a uniform measure of need. Nevertheless, the Commission notes that needs-based arguments in favour of allowing payment of benefits to spouses are losing some validity as women participate to a greater degree in the work force and as marriage and family patterns change. The Commission would encourage employers and trustees of schemes, especially new schemes, to consider reviewing benefits in this area in the light of these developments.

116. The Commission does not regard provision of death benefits to dependent children as involving discrimination on the ground of sex or marital status so long as all dependent children of all members are covered by the same rules. Accordingly, no exemption would be necessary in relation to dependent children. Similarly, the payment of higher benefits to orphan children than to children with a surviving parent does not involve any discrimination on the ground of sex or marital status and may, in fact, in the light of Principle 2 of the Declaration of the Rights of the Child, be regarded as a desirable form of special protection.

Disability benefits

117. In the case of disability benefits, the Commission concludes that distinctions made between single persons and married persons or persons in de facto relationships of either sex in the payment of disability benefits should not be permitted, as disability benefits are generally related to salary. Any supplementary benefit which is paid on the basis of need should be based on an assessment of actual need rather than on presumptions related to marital status.

Post-retirement marriages

118. A particular matter raised in submissions to the Commission concerned marriages contracted after retirement. It was argued that it is discriminatory on the ground of marital status to require, as do some schemes, including the Commonwealth Superannuation Scheme, a five-year qualifying period where a member was aged 60 or more at the date of retirement and, subsequent to retirement, entered into a marriage or de facto relationship. Many schemes include no provision for post-retirement marriages. While recognising the disadvantage that spouses of post-retirement marriages or relationships may suffer, the Commission is of the view that no discrimination on the basis of marital status is involved in excluding the surviving partner of a post-retirement marriage or de facto relationship from benefit entitlement wholly or for a certain period. The qualification is related to the date of a pensioner's marriage and not to his or her marital status.

119. Two further issues which arise for consideration concern the level of reversionary benefits and the lack of superannuation provision for divorced and separated spouses.

The level of reversionary benefits

120. Several submissions raised the matter of reversionary benefits paid to spouses where the pension payable to the spouse of a deceased former member is at a reduced rate. It was suggested that there is discrimination against the survivor, who may receive say 5/8ths of the amount of the former member's pension, whereas a full pension would continue to be paid to the former member whose spouse had died. The Commission notes that the problem is one which arises in relation to the spouses of both male and female former members but is more likely detrimentally to affect women. The provision is not, in its view, directly discriminatory. To the extent that it may involve indirect discrimination, that will diminish as women participate to a greater extent in the workforce. At present, the Commission sees no need for an exemption in this area.

Divorced and separated spouses

121. In relation to the situation of divorced and separated spouses, the Commission notes arguments put to it concerning the disadvantage suffered by women in two groups. Some have subordinated their careers to those of their husbands and so diminished their own superannuation opportunities; others have contributed to the ability of their husbands to receive superannuation entitlements through their unpaid labour in the home, yet have no separate entitlement to the accrued superannuation benefits. The Commission is of the view that, as with reversionary benefits, problems which relate to discrimination on the ground of sex can be expected to diminish in time.

122. Many complex legal issues arise in relation to entitlement to accrued superannuation benefits when there is divorce or separation, and these can in the present state of the law lead to discrimination on the ground of

marital status. To a considerable degree the issues involved go beyond the scope of this inquiry, and the Commission notes that they are currently under consideration by the Australian Law Reform Commission in the context of its matrimonial property reference. It takes the view that the issues will be more appropriately resolved by the Law Reform Commission in the context of its broader inquiry. That Commission will doubtless have regard to the requirement that there be no concomitant discrimination on the ground of sex.

Discrimination on the ground of pregnancy

123. The Commission notes that the exemption in s.41(1) of the Sex Discrimination Act relates only to discrimination on the ground of sex or marital status. Where discrimination exists on the ground of pregnancy, employers and trustees are already in breach of the Sex Discrimination Act in relation to both superannuation and insurance, and may be subject to the processes provided by the Act. The Commission notes, however, in this context that less favourable treatment on the ground of pregnancy may be lawful where that treatment is reasonable in the circumstances.[3] Nevertheless, the Commission is aware that there may be some continuing discrimination on the ground of pregnancy, usually in the form of excluding pregnancy-related disability or disability arising during the period of a pregnancy from the definition of a disability for which cover is available. The Commission is of the view that disability arising as a result of pregnancy, either during the time the employee is working or during the term of mandatory maternity leave, should be covered in the same way as other disabilities.[4]

124. It has been put to the Commission that insurance for disablement arising out of complications of pregnancy presents difficulties from an underwriting viewpoint because it is at least arguable that there may be a reduced

motivation for a new mother to resume work and because this in turn may be reflected in claim rates. The Commission is of the view that disability arising from complications of pregnancy should be susceptible to the usual medical verifications and safeguards and that accordingly it should not, for presumed reasons of motivation, be regarded as a different kind of disability from other physical disabilities.

CHAPTER VII ENDNOTES

1. Submission No. 33, Life Insurance Federation of Australia, 4.1, p.6.

2. Mary R. Owen superannuation and Women, Paper prepared for the Association of Superannuation Funds of Australia Limited, October, 1984.

3. See s.7(1)(b) of the Act.

4. See also the discussion at paragraphs 148-149.

CHAPTER VIII: LUMP SUM BENEFITS AND CONVERSION FACTORS

125. The Commission has defined a non-discriminatory employer-sponsored scheme as one which involves the payment, for equal contributions, if any, by members, of equal pensions and of equal lump sums to men and women who leave the scheme at the same age. This definition raises problems where the (equal) lump sum is converted to a pension or used to purchase an annuity and the result is unequal periodic pension/annuity payments to men and women. Although not common now, the practice of converting lump sum payments to pensions or annuities is likely to increase following the re-introduction of the means test on assets for the purposes of social security pensions and changes to the method of taxing superannuation payments which make lump sums and pensions or annuities more nearly equal as regards tax. Where the pension or annuity is provided by a life company, the exemption in s.41(4) of the Sex Discrimination Act would allow different periodic payments to men and women for the same lump sum purchase price if sex-differentiated actuarial data was used, whereas the Commission has suggested the same lump sum and periodic payments as being required.

126. In relation to schemes which offer lump sums on retirement as their only form of benefit, the problem is that a given lump sum, if considered as an amount available for purchase of an annuity on the open market, would yield a lower periodic payment under a whole of life annuity for a woman than for a man. It was put to the Commissionl that the payment of equal lump sums to men and women thus discriminates against women because the annuities they are tnen able to purchase are less than men can purchase. Because the life expectancy of men considered as a class is less than that of women, a contract for a specified rate of annuity with a life company, for say $100 a week, will cost a man less than it will cost a woman of the same age.2

Thus converting a sum of $100,000 at age sixty-five to a single life annuity indexed to the Consumer Price Index might result in an annuity (annual payment) of about $8960 for a man but only $7160 for a woman.[3] The Commission recognises this outcome as an anomaly. Although recent amendments to the Income Tax Assessment Act have given more incentive than previously to retired persons to take out annuities, there will be a distinction based on sex so long as annuities are sold with different cost or benefit structures for men and women. The Commission has come to the view that this problem is inextricably tied up with the second stage of its inquiry - on life insurance, annuities and general insurance. It assumes, for the time being, however, that where the member has the option how to apply the lump sum final benefit, the payment of equal lump sums in itself is not discriminatory and will not look beyond this to what the member does with his or her lump sum benefit.

127. The Commission acknowledges, however, that there may be a need for exemptions to be given to some schemes in particular circumstances. For example, there may be some lump sum schemes which will pay out only on the basis that an annuity is purchased, i.e. the member has no option between lump sum and annuity. Since such schemes have the objective of providing annuities to their members, the Commission would see it as reasonable in the present circumstances for unequal cash lump sums to be provided in order to secure equal annuities for male and female members in comparable circumstances. This is because the ultimate benefit provided by the scheme is not a lump sum but a periodic payment or pension. The Commission would consider it reasonable to grant exemptions in such cases (if s.41(4) does not cover the situation), on condition that circumvention was prevented by providing that the annuity purchased could not be commuted for say, five years, except on death. There may be other cases where anomalies arise. Exemptions for such cases could if necessary be considered by the Commission under s.44 of the Sex Discrimination Act.

128. The fact that annuities can differ by sex also impacts upon arrangements where schemes offer the member the option of converting a lump sum to a pension. Take, for instance, the case of a male employee retiring from a lump sum scheme who wishes to receive his benefit as a pension. He could take his lump sum from the scheme and purchase an annuity from an insurance company which will generally provide a higher annuity for males than for females (as permitted under s.41(4) of the Sex Discrimination Act).

Alternatively, he could exercise his option to convert from lump sum to pension within the scheme. If the employer has to provide the conversion option on a basis that does not discriminate by providing a lower pension to women than to men, it is argued that the employer could only afford to allow every member to convert on the least favourable female basis. The reason for this is that, if the scheme offers terms that are not as good as male annuity rates, males are likely to make the conversion outside the scheme using annuities and only females will consider converting within the scheme. Thus, it is argued, the whole point of providing the option within the scheme will be frustrated.

129. A somewhat parallel position applies to options to commute pensions to lump sums, where the scheme provides equal pensions and lump sums. In this case, the problem arises with those males who want their retirement benefits in an income form, but see financial advantage in opting for commutation of their superannuation pension on (to them) a generous uni-sex basis and then purchasing an annuity on the open market at favourable male rates.

130. The reports of the New South Wales Anti-Discrimination Board and the Victorian Equal Opportunity Board both considered this matter. The Anti-Discrimination Board recommended that conversion factors should be the same for men and women while the Equal Opportunity Board recommended that the terms of all options available to members of a scheme should be the same for males and females. The

position adopted in South Australia[4] is that a scheme may offer terms for optional conversions between lump sums and pensions which differ by sex, so long as the differences are based on actuarial or statistical data and members are advised that the terms differ. This exemption was deemed necessary if, as is proposed under that legislation (the relevant part of which has not yet been proclaimed), differentiation on such a basis was to be allowed to continue in respect of annuities. The basis for the exemption is understood to be the view that, so long as annuities can ditfer, 'uni-sex' options must generally either be set at a fairly unattractive level or at a level that will increase employer costs. The net effect could be reduced flexibility, that is no option or an unattractive option.

131. In view of the fact that the Commission has yet to consider whether the current exemption for insurance in the Sex Discrimination Act should continue to apply, it concludes with some regret that the only practicable course is to permit commutation factors to vary on the basis allowed in the South Australian legislation. The Commission notes, however, that if the effect of this were to provide opportunities for circumvention of the Act in other respects, the situation would need to be reviewed. Further, it notes that the original benefit (pension or lump sum) would need to be the same for men and women and that this situation would only apply where the original benefit (pension or lump sum) was convertible according to the terms of the scheme.

CHAPTER VIII ENDNOTES

1. Submission No. 34, National Council of Women of Australia, p.5.

2. See Appendix 2 for a note of differences in mortality between males and females, prepared on behalf of the Institute of Actuaries Risk Classification Committee.

3. Advice provided by the Australian Government Actuary, 16 May 1986.

4. Equal Opportunity Act 1984 (S.A.), Part III, Division VI. (This part of the Act has not yet been proclaimed.)

CHAPTER IX INDIRECT DISCRIMINATION

132. A significant number of submissions to the Commission' have drawn attention to the problem of indirect discrimination in superannuation, and in particular to the manner in which superannuation schemes have developed on the assumption that the traditional pattern of men's working lives provided the norm against which superannuation provisions should be defined. This assumption has not only resulted in an indirectly discriminatory system, it has also determined that 'membership of a superannuation scheme is not generally an economically rational decision for the majority of working women'.[2] Thus women are doubly disadvantaged in relation to superannuation: they may be ineligible for coverage because they work in occupational areas, or at levels, or under conditions (part-time or temporary) in which little or no superannuation provision is made; or they may find that lack of satisfactory preservation arrangements, lack of portability, and low levels of employer vesting, particularly at child-bearing ages, act as deterrents from joining a superannuation scheme for which they may be eligible. As a result, only about 30% of female employees who worked twenty hours or more each week in their main job were covered by a superannuation scheme in 1982 compared with 53% of males,[3] and the coverage is lower again for women if those working fewer than twenty hours a week are included.

133. However accurately superannuation schemes reflect the social and economic circumstances that existed when they were first being developed, it is no longer the case that a significant majority of working lives conform to a single characteristically male pattern. In 1966, for example, just over a quarter of married women between the ages of twenty-five and thirty-four (typically the period of lowest labour force participation) were in the labour force, but by 1982 this had risen to just under a half.[4] Women have

brought to the workforce different patterns of work. Some of these have evolved as a result of choice; some have emerged as the labour market has adapted to exploit women's efforts to balance varying responsibilities. Not only are women more likely to have broken periods of labour force participation, they are also more likely to work part-time or in temporary or casual jobs or - often because of their part-time or temporary status - at lower occupational levels. All of these characteristically female working patterns are associated with restricted or prohibited access to superannuation schemes.

134. The following discussion presents the seven major forms of indirect discrimination brought to the Commission's attention through submissions and consultations.

(i) Non-permanent workers (excluding casual workers)

135. The Commission recognises that, in the case of eligibility criteria which militate against women because of their employment status, discrimination may be argued to originate at the employer rather than the superannuation plan level. However, it regards the failure of plans to provide for staff in categories in which women significantly predominate as giving rise to reasonable concerns about indirect discrimination on the ground of sex. The Commission is particularly concerned about women in temporary categories whose continuous employment with a single employer exceeds one year (the normal qualifying period for many superannuation funds). Figures from the Public Service Board[5], for example, and submissions and consultations, indicate that women clearly predominate in the non-permanent employment categories even before the overall proportion of women to men workers is taken into account. Although figures which would clarify the average term of employment of non-permanent employees are not

available, the Commission is concerned that such workers should not be restricted from joining superannation schemes simply because of their category of employment. Accordingly, the Commission concludes that eligibility for membership of superannuation funds should be extended to non-permanent full-time staff, provided they otherwise meet the eligibility requirements set for permanent employees. Further, the period of eligibility should be the same as that applying generally to permanent employees for membership of the individual fund concerned or one year, whichever period is the longer.

136. It has not been possible to obtain statistics which would allow a costing of the extension of superannuation to full-time non-permanent workers. The Commission was advised at its third consultation, however, that non-permanent workers often do not want to be obliged to take superannuation and that the costs would be significantly reduced if the extension of superannuation coverage to workers in this category were made optional for individual workers. Accordingly, the Commission has concluded that optional rather than mandatory

superannuation cover should be offered to full-time non-permanent workers. If necessary, an exemption could be given to cover such arrangements.

137. At the same time, the Commission recognises that coverage of casual and temporary workers who are in the employment of a single employer for comparatively short periods could constitute a substantial financial and administrative liability for some plans. Accordingly, the Commission welcomed the Government's 'safety net' proposals, designed ultimately to require employers to contribute to privately administered superannuation plans for all employees for whom provision has not already been made. It regards the implementation of the 'safety net' provisions as of importance as a result of the intention to look to superannuation provision as one outcome of

productivity claims. Any awards which might result could otherwise have the effect of discriminating indirectly against those sections of a labour force which are restricted from joining superannuation plans. The Commission does, however, wish to record its concern that the current initiatives make no provision for women whose lives are spent largely outside the paid workforce. Of similar concern is the fact that the restrictions on membership can also prevent disproportionately large numbers of women from deriving benefit from the substantial revenue forgone each year[8] from taxation concessions on superannuation. The Commission notes that the improved preservation and portability conditions, which are also part of the current initiatives, will assist in making membership of superannuation schemes more economically rational for many women.

(ii) Part-time workers - permanent and non-permanent (excluding casual workers)

138. Of 1,084,300 part-time workers in August 1982, 843,300 or 78.3% were women. An average of 36.2% of all women workers employed during that period worked on a part-time basis - including 30.2% of professional and technical women workers, 24.5% of administrative and executive managerial workers, and 27.7% of clerical women workers.[7] Many superannuation funds deny eligibility to part-time workers because they are part-time and without reference to their period of continuous employment for a single employer. The Commission understands that the coverage of part-time workers who are in the employment of single employers for short periods could constitute a substantial financial and administrative liability and notes, in this context, the Government's proposals for the introduction of 'safety net' arrangements for those workers not presently covered by superannuation schemes.[8] Nevertheless, since part-time workers (in the majority) are women, the denial of superannuation to part-time workers without reference to

their continuity or term of employment and in cases in which equivalent full-time staff are eligible for superannuation constitutes indirect discrimination on the ground of sex. The Commission notes in this context similar findings in the Report of the Victorian Equal Opportunity Board.[9] The Commission has also noted advice from the Institute of Actuaries concerning the estimated cost of extending superannuation coverage to part-time workers.[10] In view of the costs involved, the Commission has concluded that, as for non-permanent workers, superannuation for part-time workers who are not casual workers may best be optional rather than mandatory, and that if it is offered the period of eligibility should be the same as that applying generally in the individual fund concerned or one year, whichever is the longer.

(iii) Vesting

139. Figures made available to the Commission from the Commonwealth Superannuation Scheme (see Figure 1) indicate that the rate of withdrawal of female employees is higher than that of male employees, particularly during the high child bearing ages of twenty-five to thirty-four. It understands these figures would be broadly representative of the experience of the larger funds. They show that women bearing and caring for children are likely to leave the workforce for a period of years after between seven and sixteen years of employment. Current vesting practices, on the other hand, tend to presume and reward an 'unbroken career - single-employer' pattern. The Commission was informed by the Institute of Actuaries that many superannuation funds have begun partial vesting by five years; a good proportion are fully vested at fifteen years; and few have not achieved full vesting by twenty-five years. This means that women leaving the workforce at between twenty-five and twenty-nine years of age are likely to be entitled to a low-level vesting at best; and that at present they are unlikely to be able to achieve eligibility

for full vesting in the period between re-entering the workforce and retirement. While it is likely that improved facilities for preservation and portability of benefits would tend to ameliorate the existing situation, increased levels of employer vesting are also part of the pattern of change required to reduce effective indirect discrimination.

FIGURE 1

1981-1984 RATIO OF FEMALE TO MALE WITHDRAWAL RATES FROM THE COMMONWEALTH SUPERANNUATION SCHEME

ATTAINED AGES	DURATION AT TIME OF WITHDRAWAL 0-4	5-9	10-14	15-19	20-24	25-29
15-19	1.21					
20-24	1.50	2.06				
25-29	1.91	3.23	5.38			
30-34	1.90	2.64	3.57	3.79		
35-39	1.56	1.41	2.15	2.48	1.95	
40-44	1.49	1.02	1.71	1.98	2.22	2.32
45-49	1.69	1.34	1.38	1.49		
50-54	2.41	2.34	2.74	2.15		

(Figures provided by the Office of the Australian Government Actuary)

140. In a 1985 survey of senior management in 840 organisations conducted by W.D. Scott & Co., on the subject of 'The Coming Changes in Superannuation' more than four out of five of the 252 respondents believed that there was a trend to vest the employer's superannuation contribution fully in the 'shorter-serving employee (for example, with five years of service) 1.11

141. However, in its Operational standards for superannuation schemes the Government has indicated that:

> Employer-financed benefits arising from implementation of a productivity payment and accruing in whatever fund might be agreed in negotiations between the employer/employers and the union/unions from the commencement date ... will be immediately vested in the member to the extent of 100 per cent. However, as noted in the joint statement of 16 December 1985, there are other alternatives for applying

> the productivity payment such as improved vesting or other benefits in existing funds. Costs of fund management, and
> of any insured benefits, flowing from the productivity payment will be met out of the payment. The level of management fees will be a matter for negotiation between the trustees and fund managers.[12]

142. Given the uncertainty of the existing situation and the clear need for minimum standards of vesting and for shorter vesting periods in order to reduce effective indirect discrimination against women, the Commission has concluded that it would be desirable for it or its successor to review vesting standards and periods after the implementation of any initiatives arising from the proposed employer and union negotiations. Although the Commission suggests that the situation should be reviewed after a period of five years, it nevertheless notes that for present purposes it would regard it as reasonable for the target to be full vesting by all funds after five years membership. The target might be achieved progressively: for schemes already vesting in less than ten years, during a period of three years from the date of repeal of s.41(1) of the Act; for schemes with vesting periods beyond ten years, an additional one year transition period (beyond three years) could be allowed for every five years for which vesting periods exceed ten years, up to a maximum of three additional years. Thus full vesting after five years' membership would be achieved by all funds in six years from repeal of s.41(1).

143. The Commission notes, however, that the Government has not announced any vesting standards in the 11 June 1986 statement, other than with respect to productivity payments. The Commission is advised that the decision was actuated by the concern that, apart from the effects of indexation, increases in employers' labour costs during the two year period July 1986 to July 1988 should not exceed 3 per cent. To the extent that the Commission's proposals in regard to vesting caused any material increase in costs above 3 per cent, the Commission is of the view that it could be appropriate to modify the timetable it has

suggested. This could be achieved through exemptions granted by the Commission under s.44 of the Sex Discrimination Act. Applications for such exemptions would be considered on a case by case basis and depend on the circumstances of the particular scheme.

(iv) Preservation

144. It was put to the Commission in a number of submissions that satisfactory preservation arrangements are central if superannuation is to be seen as a term or condition of employment equally adapted to working patterns of men and of women (preservation allows employers' contributions to be held until retirement for an employee who has resigned). Many women choose or are obliged to absent themselves from the workforce for extended periods during the early years of their children and, where there is no preservation arrangement, the often lengthy period of service preceding the birth of the first child is lost at retirement when calculations of final superannuation benefits and eligibility for vesting are made.

In view of these considerations the Commission is pleased to note that in its Operational standards for superannuation schemes the Government indicates that vested benefits arising from employer contributions flowing from implemenation of a productivity payment would be preserved until genuine retirement from the workforce on or after age fifty-five, with exceptions being permitted in cases such as death or disability. In addition, the Government is examining the matter of all other employer and employee contributions with a view to requiring non-retrospective preservation to age fifty-five on a phased-in basis over a reasonable period of years. Such a requirement, if introduced, would not only be consistent with the objective of moving towards secure and genuine retirement incomes, but would also have significant effects on aspects of existing schemes which indirectly discriminate against women.

146. The Commission strongly supports the Government's initiatives regarding preservation of benefits, and recommends that, to avoid indirect discrimination on grounds of sex, provision for preservation of all employer and employee contributions to age fifty-five on a phased-in basis over a reasonable number of years be developed and implemented. It notes that the Government is developing plans to this effect. It proposes, as it has done in regard to vesting,[13] that it or its successor should review the situation after a period of five years.

147. The continuation of contributions during paid and unpaid maternity and parental leave is a special case of the larger issue of preservation, as it can often involve a comparatively short and fixed term of leave during which a continuity of contributions might theoretically be maintained. The Commission was informed at its consultation in October 1985 that some employers allow employees to pay both their own and their employers' contributions during unpaid or voluntary maternity or parental leave, or at least to continue the life and disability coverage associated with their superannuation schemes.

148. In relation to unpaid maternity or parental leave for both females and males, it has been put to the Commission that employer liability should be the same as for unpaid leave for other purposes. That is, an employer's liability should not automatically accrue during periods when he or she has no salary or financial obligation to an employee. The Commission accepts this argument and its corollary - that during periods of paid leave associated with childbirth or adoption, as in cases of all paid leave, superannuation and disability and life coverage should be continued.[14] The Commission notes, for example that, consistent with its arrangements for all other leave without pay for private purposes, the Commonwealth Superannuation Scheme provides that employer liability does not accrue during periods of unpaid maternity or parental leave in excess of twelve weeks

149. In the light of these points, the Commission has concluded: first, that employers be encouraged but not required to provide facilities for employees on unpaid maternity or parental leave to continue making their superannuation contributions, without such contributions entailing employer liability; second, that it should be regarded as discriminatory if facilities are not provided to enable employees on unpaid maternity or parental leave to continue their death and disability cover, either by payment in anticipation of the leave period or by regular payments made through employers on receipt of due notice, without any employer liability for payment accruing; and third, that it would be discriminatory if, during periods of paid leave, employer liability were to vary on the ground that the leave is for maternity purposes.

150. The Commission notes, however, that in some cases maternity or parental leave may extend for a considerable period - sometimes for a number of years. In such circumstances, employees may find themselves hard pressed to continue making superannuation contributions whilst coping with the added costs that the rearing of children entails. It is of course likely that the improved preservation and portability provisions which the Government has under consideration would, if implemented, mean that if a member were to go on extended leave for a period longer than, say, two years, then the benefits could be taken out of the employer's fund and placed in, say, an approved deposit fund or a 'deferred annuity' and preserved there.

151. At this stage, the improved portability provisions are intended to relate only to benefits flowing from productivity payments. Accordingly, until the implementation of fully improved portability arrangements has been undertaken and completed, the Commission concludes that it would be desirable for employers to be required to provide facilities for 'freezing' the superannuation entitlements of employees on extended maternity or parental leave, that is, an employee should not be required to continue making contributions

throughout the period of his or her leave in order to remain in the scheme nor have his or her past (actual) service disregarded for the purposes of calculating superannuation entitlements after service is resumed.

(v) Portability

152. Associated with the capacity to preserve employee and vested superannuation contributions is the capacity to carry such contributions or their value from employer to employer or from employer to self-employment arrangements, or to preserve contributions through periods outside the paid workforce for transfer on return to the paid workforce. Portability is a form of preservation - but one which requires not only storage arrangements and facilities but also agreements between funds in relation to transfer values and the timing of payments.

153. There is also the issue whether members should be obliged to preserve and transfer all benefits until a certain age (say, fifty-five) rather than having the option of taking a lump sum payment on resignation from employment with a given employer. In the face of these and other matters, it is clear that a number of legislative adjustments would be required to underpin a national portability plan. (See, for example, the Hancock Report.[15])

154. It is the view of the Commission that, like other forms of preservation, portability mechanisms would assist significantly in the broadening of superannuation plans to address women's workforce participation patterns. In this context, too, the Commission welcomes the initiatives set out in the Operational standards for superannuation schemes[16] released by the Government in June 1986. The Commission views the standards applying to portability as constituting a necessary and desirable first step towards the introduction of national portability arrangements. These arrangements would permit an employee to preserve his or her benefit in:

the superannuation scheme which the employee is leaving (where that scheme is prepared to continue to hold those vested benefits);

a superannuation scheme which the employee is joining (where the scheme is prepared to accept a transfer payment and is required under the provisions of its trust deed to preserve those benefits to at least age fifty-five);

a fund eligible for taxation benefits under s.23FB of the Income Tax Assessment Act;

an approved deposit fund; or

a 'deferred annuity'.

155. Given the complexity and as yet unsettled nature of portability provisions the Commission is of the view that the only appropriate course of action for it to take is to endorse the development and implementation of the Government's standards for superannuation relating to portability. It nevertheless concludes that it or its successor should review the situation after a period of five years in order to determine whether the then existing arrangements entrench discrimination.

(vi) Transfer Values

156. A specific aspect of portability which warrants some further discussion concerns transfer values. One possibility when a member leaves a superannuation scheme is that the member will join another scheme which will accept money from the first scheme and as a consequence offer some additional benefits to the member in the new scheme. The Commission is advised that currently this does not occur very often and will do so only when both the member and the new employer want it and the terms are acceptable to both parties. The terms for such transfers may be actuarially based or they may be in favour of the member and really be part of an overall remuneration package.

157. The sum of money paid from one fund to another is called a transfer value. It is a lump sum that is not accessible to the member transferring but is passed directly to the new fund and becomes accessible only when the member ultimately leaves the new scheme and then in the form of benefit prescribed in that scheme.

158. The amount of a transfer value should bear a direct relationship to the individual interest of the employee in the scheme he or she is leaving if other members of the scheme are not to be affected. Where a transfer payment is based solely on the member's own contributions, it is the same for men and women with the same earnings and length of service. But where a transfer payment is based on the capital value of the member's accrued benefits the calculation may at present be made on a basis which is different for men and women. Although this would appear to be discriminatory, it was put to the Commission that if the new employer converts the transfer into benefits in his or her scheme using an actuarial basis as well, the effect of allowing for sex in the calculation of the transfer value passed across would be, to some extent, negated. It has been put to the Commission that in view of the general optionality of transfer arrangements, the lack of accessibility of any transfer value and the rarity of transfers at present, transfer values passed between schemes not covered under the same employer umbrella should be permitted to differ by sex on the grounds of reasonable actuarial data.

159. The Commission is reluctant to support any such general exemption. The approach it has adopted in this report is that neither employee contributions nor benefits should vary on the basis of sex. Similarly, the amount taken from a scheme or received by a scheme on transfer should be the same for all withdrawers/joiners in comparable circumstances, regardless of sex, as the schemes themselves will need to be non-discriminatory. In view of the fact that transfers between schemes are as yet uncommon in Australia, the Commission is of the opinion that further developments should, from the outset,

take place on a non-discriminatory basis.[17] An added reason for adopting this view is that when reversionary benefits are taken into account the difference in value between the benefits accruing to male and female members of a scheme in identical circumstances is minimal. Nevertheless, given the complex and still evolving nature of transfer arrangements the Commission recognises that problems may arise in some instances. Applications for exemptions under s.44 of the Sex Discrimination Act could be considered on a case by case basis.

(vii) Resignation Benefits Before Significant Levels of Vesting

160. The attention of the Commission has been drawn to the fact that many schemes offer very low interest rates on employees' contributions when these are withdrawn on resignation. It also appears from Figure 1 that women are more likely to be adversely affected by low resignation benefits, as they are more likely to resign because of commitments to children or elderly or other relatives. At present employees resigning before employer vesting begins, or before it reaches a significant level, are normally able to take with them their contributions to the superannuation scheme together with a modest interest on their capital, but no employer contribution. To a certain extent, the gap between market rates of interest and resignation benefit interest rates is accounted for by life and disability coverage during the worker's period of employment together with administrative costs of the scheme. It is, however, generally agreed that for many schemes, even discounting for these factors, interest payments on resignation benefits are low by market standards.

161. The Commission takes the view that low rates of interest on resignation benefits are likely adversely to affect women in significantly greater numbers than men. On the other hand, the Commission is informed that in a small number of schemes women qualify for extra benefits on resigning for reasons of marriage, which in the view of the Commission is a direct discrimination against men on the ground of sex. Accordingly the Commission

concludes that for the purposes of determining resignation benefits no extra benefits should be credited on the ground of sex and that interest should be credited at a reasonable rate. A reasonable rate would be one which may discount for the value of life and disability insurance applying during the member's period of employment and for relevant administrative costs, but which otherwise reasonably reflects the actual earning rate of the fund.

CHAPTER IX ENDNOTES

1. Submission No. 34, National Council of Women of Australia
   Submission No. 35, Federation of Australian University Staff Associations
   Submission No. 36, Policy Co-ordination Unit, DSS
   Submission No. 39, Council for Action on Equal Pay
   Submission No. 43, National Mutual Life Association of Australasia Ltd
   Submission No. 44, Office of the Status of Women
   Submission No. 45, Women's Electoral Lobby
   Submission No. 46, Union of Australian Women
   Submission No. 47, Australian Council of Trade Unions

2. Submission No. 36, Policy Co-ordination Unit, DSS, p.2.

3. Australian Bureau of Statistics, Superannuation Australia (Catalogue No. 6319.0), Canberra, 1984.

4. Australian Bureau of Statistics, The Labour Force Australia 1978 (Catalogue No. 6204.0), Canberra, 1980, Table 10 and The Labour Force Australia - July 1982 (Catalogue No. 6203.0, Canberra, 1982, Table 11).

5. Public Service Board, Statistical Yearbook 1984-85, AGPS, Canberra, 1985, pp. 19-21.

6. 'The Report on Tax Expenditures led to the publication in the 1983-84 Budget documents of an estimate of the value of the tax concessions to occupational superannuation of some $2,480 million. This figure has been updated annually since then (see Appendix A). Various private sector organisations and individuals have publicly and privately criticised this costing. Amongst the critics are the Association of Superannuation Funds of Australia (ASFA, 1984), the Committee for Economic Development of Australia (CEDA, 1984), and two major life insurance companies (National Mutual, 1984 and Scottish Amicable, 1984).' Daryl Dixon, 'Costs and Benefits of Occupational Superannuation Tax Concessions', Economic Papers. December 1985, 38.

7. See Australian Bureau of Statistics, The Labour Force Australia - July 1982 (Catalogue No. 6203.0), Canberra, 1982, Table 25.

8. Joint Statement by the Treasurer and the Minister for Employment and Industrial Relations, Canberra, 16 December, 1985.

9. Victoria, Equal Opportunity Board, Discrimination in superannuation and pension schemes, Melbourne, 1980, p.66 (7.35).

10. See Appendix 4.

11. W.D. Scott & Company Pty Ltd, The coming changes in superannuation, 1985.

12. Joint statement by the Treasurer and the Minister for Employment and Industrial Relations, Attachment B, Draft operational standards for superannuation schemes, Canberra, 16 December, 1985.

13. See paragraph 142.

14. See paragraphs 123 & 124 for a discussion of discrimination on the ground of pregnancy.

15. National Superannuation Committee of Inquiry. Occupational superannuation in Australia: final report (Chairman: K.J. Hancock), AGPS, Canberra, 1977.

16. Statement by the Treasurer the Hon. P.J. Keating, M.P. Attachment I, Operational standards for superannuation schemes, Canberra, 11 June 1986.

17. The Commission notes that even under present practice in the United Kingdom a high proportion of schemes use different methods of calculation 'for incoming and outgoing transfers and adopt varying degrees of generosity. This in itself frequently gives rise to inequities. The problems of transfers overall would not necessarily be much worse with the use of a common table for men and women than they are at present.' Equal Opportunities Commission, Model of equality: a consulting actuary's report on the methods and costs of equalising the treatment of men and women in occupational pension schemes, London March 1985, p.21.

PART C - IMPLEMENTATION

CHAPTER X - EXISTING SCHEMES

A transition period

162. The Commission recognises that, if the exemption in s.41(1) of the Act is repealed, some transitional period will be needed during which schemes prepare the variations to their trust deeds and effect the changes in practice that will be necessary to bring them into line with the Sex Discrimination Act. The length of the transition period should depend on the warning period given. The Commission recommends that the transition period should be three years, provided that arrangements are made to remove the exemption within twelve months of delivery of this report. If arrangements to remove the exemption take more than twelve months, the transition period should be reduced to two years from the date of operation of such arrangements. Section 41(2) now in effect allows any date not less than one year after the regulation is made to be the date of repeal of s.41(1).

163. The Commission has also considered the position of new schemes which are not part of transition arrangements for existing schemes but are planned to commence during the period before repeal of s.41(1). In order to avoid disrupting such schemes in the period immediately preceding their commencement, the Commission recognizes the need for a transition period during which relevant provisions in such schemes can be reconsidered in order to ensure compliance with the Sex Discrimination Act. Accordingly, the Commission recommends that in the case of schemes about to commence there should be a transitional period of six months from the date of removal of the exemption.

164. The Commission recognises the possibility that some schemes, despite appropriate efforts during the transitional period, will require exemptions beyond the date on which repeal of s.41(1) becomes effective if they are not to be put to unreasonable expense, or their members to unreasonable inconvenience, while changing their arrangements so as to conform with the Act. Applications for such exemptions could be considered by the Commission under s.44 of the Act.

Expectations of existing members.

165. Members of existing schemes have expectations as to the benefits they will receive from those schemes. These expectations would not be met if benefits yet to accrue were required to be provided on a non-discriminatory basis and thus, for example, some males experienced a reduction in expected benefits or some women were required to work beyond a present retirement age of sixty in order to obtain the same benefits. Accordingly, and in order to meet legitimate existing expectations, the Commission has concluded that existing discriminatory schemes (or discriminatory sections of schemes) should be allowed to continue indefinitely beyond the end of the transition period in respect of existing members only, subject to one major condition. The condition is that existing members must be given an option at some stage before the end of the transition period (or must have been given an option at some previous time) to transfer, for both past service and future service benefits, to the non-discriminatory scheme (or section of the scheme) applicable to new employees in the same employment category.

166. There would of course be little reason for an employee to take up such an option if none of the terms in the discriminatory section were less favourable than those in the non-discriminatory section.

167. It is to be hoped that improvements and/or options could be built into discriminatory schemes (or may already have been built into existing schemes) to obviate the need for employees to consider transferring to new non-discriminatory schemes or sections of schemes. The Commission is advised that in many instances discrimination is so limited as to make modification of existing schemes the most practical solution. Take, for example, a common final benefit scheme with retirement ages of sixty-five for males and sixty for females and death benefits based on service to those ages. If a retiring age of sixty-five is used for future female members, then the simplest (but not the only) solution would be to grant existing female members death benefits based on service to age sixty-five and give them a choice, when they attain age sixty, of retiring or remaining in service until age sixty-five. There would then be no reason for considering establishing a new scheme with options to transfer to it.

168. The Commission is advised that, given the large number of schemes which are already non-discriminatory and the use of simple changes such as that illustrated, only a small minority of scheme members will be faced with difficult decisions during the transition period.

Past service benefits

169. The previous section dealt with options to transfer to new schemes (or sections of schemes) offering non-discriminatory terms. The Commission shares the concern of the Victorian Equal Opportunity Board' that members should not be denied an etfective choice about transferring by being offered poor recompense for past service benefits. Accordingly, it concludes that transfer arrangements should be negotiated between employers and employees and should be subject to the provision of an actuarial certificate that the arrangements are fair in respect of accrued benefits.

Retrospectivity

170. Although, in general, no benefit is payable to a member of a superannuation scheme until that member leaves the service of his or her employer, it is normally considered that benefits accrue year by year over membership.[2] In general, this accrual concept corresponds broadly with the spreading by the employer of the cost of each member's benefits over the period of membership. The Commission recognises that the financial impact would be considerable should employers be required to correct discrimination in benefits already accrued. Accordingly, it is of the view that in general removal of the exemption in s.41(1) of the Act should not have any retrospective effect.

171. The Commission does, however, share the concern of the Victorian Equal Opportunity Board[3] that employees should not be deprived of any future service benefit to which they would be entitled, but for past discrimination. The example given in the Board's report relates to the application of past service to the determination of eligibility for vesting of the employer's contribution. This matter is considered at paragraph 93.

Health evidence

172. The Commission has received submissions from women employed for several years in the one employment who have only recently become eligible to join superannuation schemes or who have recently been granted access to benefits previously granted only to males (for example, spouses' benefits). These women have been required to undergo a medical examination in order to gain such benefits. They argue that this requirement is discriminatory since, although in good health when they commenced employment, some employees may now be in poor health and so be unable to benefit from the new non-discriminatory provisions. Women who become eligible for supplementary benefits argue that the

results of the medical examination which they underwent when they first entered the scheme should be used to determine eligibility. While the Commission notes that the requirement for evidence of current good health may cause substantial disadvantage to some employees, it recognises that the financial impact could be considerable if employers were required to accept persons for cover, notwithstanding their poor health. In addition, the Commission, as noted above, is of the view that its conclusions should not have retrospective effect. Nevertheless the Commission endorses the comment made by the Victorian Equal Opportunity Board in its report that those schemes which do not rely on life assurance to provide death and other benefits should be encouraged to waive their health evidence requirements with respect to the benefit improvements resulting from the introduction of non-discriminatory eligibility provisions for future service benefits. This waiver would of course be subject to the employee establishing that he/she was in good health at the time when, but for his/her sex or marital status, he/she would have first been eligible to join the scheme.[4]

The transition process

173. The Commission recognises that the transition to non-discriminatory schemes may in some cases be complex. To assist in this, the Commission recommends that a small temporary advisory service be established to assist schemes during the changeover. The service could either be a small temporary unit attached to the Commission or its successor (or the Treasury or the new Occupational Superannuation Commissioner).

Alternatively, the service could be provided by a committee comprising representatives from the Treasury, other relevant bodies (including the new Occupational Superannuation Commissioner) and possibly the Commission, with professional advice provided by the Australian Government Actuary's Office. The Commission envisages that any such service would be available to advise employers and trustees of schemes on general non-discriminatory principles not necessarily canvassed in this

report. Guidelines on the new non-discriminatory requirements should also be produced to assist schemes and be promoted through a public awareness program.

174. The Commission notes that difficulties may arise in making the alterations necessary to bring trust deeds into line with the provisions of the Sex Discrimination Act. For example, trust deeds may not empower the trustees to amend their provisions or perhaps may require that an amendment be made only with the consent of a stipulated proportion of members. In addition, alterations to trust deeds can attract significant stamp duties, and taxation concessions as presently available rest on calculations which incorporate actuarial data on male and female life expectancies. In order to overcome these difficulties and to assist in defraying the costs of the changeover, the Commission recommends that:

approaches be made to the States to legislate to permit trustees to settle the terms of the new arrangements and that, similarly, the Commonwealth confer such discretion in areas of its jurisdiction;

approaches be made to the States to ensure that the necessary alterations to trust deeds be exempt from stamp duty and that, similarly, exemptions from any Commonwealth stamp duty should be made;

- appropriate changes be made to taxation rulings to ensure their compliance with the Sex Discrimination Act; and
- the costs of transition be allowable for tax purposes.

CHAPTER X ENDNOTES

1. Victoria, Equal Opportunity Board, Discrimination in superannuation and pension schemes, Melbourne, 1980, pp. 43-44.

2. ibid, p.41.

3. ibid. p.45.

4. ibid. p.47.

CHAPTER XI GUIDELINES FOR NON-DISCRIMINATORY SCHEMES

175. Following from the Commission's conclusions in relation to sex and marital status discrimination in superannuation outlined in the previous chapters of this report, essential features of non-discriminatory employer-sponsored schemes will be as follows:

In general, a scheme will be regarded as non-discriminatory on the ground of sex if the same pension or lump sum is payable to men and women members or potential members of the scheme who leave the scheme at the same age and their periodic contributions, if any, are the same, age for age. This means that, for purposes of superannuation and provident schemes, no distinction may be made between men and women as a class. Each scheme will have only members and beneficiaries and will make no distinction between male and female members and males and females in the same class of beneficiary (paragraph 76).

Similarly, a scheme will be non-discriminatory on the ground of marital status if no distinction is made in any of the conditions of the scheme between members or potential members on the basis that they are married, in a de facto relationship, widowed, separated, divorced or single, unless their circumstances are materially different (paragraph 76).

Conditions of eligibility should not discriminate directly on the ground of sex or marital status (paragraph 92). As to indirect discrimination, the schemes would need only to adjust arrangements as set out in Chapter IX, with the main areas being related to eligibility of part-time and temporary employees, vesting and preservation/portability (these issues are noted below and also are discussed at paragraphs 135-155). However, schemes ought to be moving

towards eliminating other eligibility conditions which discriminate indirectly on the ground of sex or marital status (paragraph 92).

The same retirement age provision should apply for men and women (paragraph 99). Whatever early retirement options are determined should be available to both sexes (paragraph 101). (The Commission also expresses the view that the Social Security Act should be amended to eliminate the age ditferential for eligibility for the age pension.)

Eligibility for and the level of death and disability benefits should not vary on the basis of sex (paragraphs 108-111).

Schemes may offer death benefits to spouses (including de facto spouses) if the benefits are given regardless of sex, or on a uniform measure of need. (If this requires an exemption under the Sex Discrimination Act, the Commission considers it should be given.) (Paragraph 115.).

In relation to the provision of death benefits to dependent children, all dependent children of all members should be covered by the same rules (paragraph 116).

No distinctions should be made between single persons and married persons or persons in de facto relationships of either sex in the payment of disability benefits (paragraph 117).

Disability arising as a result of pregnancy, either during the time the employee is working or during the term of mandatory maternity leave, should be covered in the same way as other disabilities (paragraph 123).

- Membership of schemes should be open to:

  – non-permanent full-time staff

  – part-time staff who are not casual workers

  and the period of eligibility should be the same as that applying generally to full-time permanent workers or a period of one year, whichever is the longer.

  Superannuation cover for such workers should be optional rather than mandatory (paragraphs 135-138).

  The target for full vesting for all funds should be five years. The target should be achieved by the end of three years from the date of repeal of s.41(1) of the Sex Discrimination Act except for schemes which, at that date, did not provide full vesting for employees with less than ten years' membership. These schemes could have an additional one year transition period (beyond three years) for every five years by which full vesting periods exceed ten years, up to a maximum of three additional years (paragraph 142).

  In relation to preservation, the Commission endorses the stated objective of the Government, which it understands is to secure, on a phased-in basis over a reasonable number of years, preservation of all employer and employee contributions to age fifty-five, and the consequential action which will be expected of funds (paragraphs 145-6).

  Facilities should be provided for an employee on unpaid maternity or parental leave to continue

  Employer liability should not vary on the ground that paid leave is for maternity purposes (paragraph 149).
  death and disability cover (paragraph 149). If a charge is made for this cover, then one payment option given to the employee should involve regular payments during the leave period.

Facilities should if practicable be provided for 'freezing' the superannuation entitlements of an employee on extended maternity or parental leave, that is, an employee should not be required to continue making contributions throughout the period of his or her leave in order to remain in the scheme nor should his or her past (actual) service be disregarded for the purposes of calculating superannuation entitlements after service is resumed (paragraph 151).

. Transfer values should not vary on the basis of sex (paragraphs 156-159).

In determining resignation benefits, no extra benefits should be credited on the ground of sex, and interest on contributions paid should be credited at a reasonable rate, that is, a rate which may discount for the value of death and disability insurance applying during the member's period of employment and for relevant administrative costs, but would otherwise reasonably reflect the earning rate of the fund (paragraph 161).

Any differences arising directly from the lawful use of actuarial data in insurance cover or annuities purchased in respect of individual members of a defined-benefit scheme may be reflected in the benefits accruing to those members to the extent permitted by s.41(4) of the Act. The Commission would hope that such differences were kept to a minimum (paragraph 85).

A defined-contribution employer-sponsored scheme may produce accumulation benefits that differ by sex so long as the difference relates only to lawful differences in insurance costs deducted during the accumulation process (paragraph 86).

176. In relation to non-employer-sponsored schemes:

The contributions and/or benefits under a non-employer-sponsored scheme that uses insurance policies may differ by sex, but only to the extent that they reflect lawful differences by sex in the insurance policies (paragraph 83).

CHAPTER XII METHODS OF IMPLEMENTATION

177. In the preceding chapters of this report the Commission has concluded that the exemption in respect of superannuation in s.41(1) of the Sex Discrimination Act should be removed subject to time being given for transitional arrangements and the issue of a small number of exemptions by the Commission or its successor. Some of the exemptions should apply to the industry generally, some to specific schemes.

178. In this chapter, the alternative means of implementing the Commission's conclusions are discussed bearing in mind the initiatives being taken by the Government in the area of superannuation and the need to minimise administrative and other costs both to the industry and the Government.

179. Although the Commission originally envisaged a need for legislation apart from simple repeal of s.41(1) to implement the change from the existing situation to a non-discriminatory pattern, it has concluded that there is no need for this. The concept of simple repeal contained in the Act is, in other words, viable. It would be quick, clear and inexpensive. As will be shown in this chapter and the next, the exemptions needed, i.e. the extent to which the Commission would be involved in regulating the transition process, would not be large, unexpected or continuing and in many cases would simply confirm existing practice. Accordingly, the Commission has in most cases not felt a need to make recommendations as to legislation, but rather has indicated in its conclusions the ways in which the Act, once s.41(1) has been repealed, would apply to superannuation and provident funds and schemes.

Simple repeal of s.41(1) and use of existing administrative machinery

180. Implicit in the provision in s.41(2) of the Act that sub-section (1) may be repealed by regulation is the view that the Sex Discrimination Act applies in its terms to superannuation and provident funds or schemes. Implicit also is the view that it should not be overly difficult for the superannuation industry to conform with the requirements of the Act.

181. The findings of the Commission in this report essentially confirm these assumptions as many existing large schemes appear already to operate on non-discriminatory lines. The Commission accordingly recommends as the preferred course simple repeal of sub-section (1) of s.41. The existing exemption power given to the Commission in s.44 of the Act would allow the Commission to give exemptions in relation to matters involving the industry generally or where particular schemes were for good reason unable to comply, at least for the time being, with the requirements of the Act. The exemption power is already contained in the Act and has been used where the anti-discrimination provisions, if applied in their terms, would have produced anomalies or unreasonable results. The position for employers and superannuation funds who provide superannuation would be no different under the Act than for other employers or service providers if the general exemption in s.41(1) were to be repealed as forecast by the then Attorney-General.

182. The general exemptions that appear likely to be needed are expectable, will be limited in scope, uncontroversial and, as indicated in previous chapters, be to:

> allow a period beyond the transition period provided in the repeal regulation during which schemes could if necessary have further time to make the variations to their trust

deeds and effect the changes in practice that will be necessary to bring them into line with the Sex Discrimination Act;

allow the payment of dependants' benefits to spouses and those in de facto relationships if the benefits are given regardless of sex, or on a uniform measure of need;

allow the use of actuarial data in respect of options to convert pensions to lump sums or vice versa; and

allow existing discriminatory schemes (or sections of schemes) to continue to serve present members who elect to remain in them rather than having their benefits determined in accordance with new non-discriminatory provisions.

183. Exemptions (or further exemptions) made by the Commission, which may have effect, as appropriate, for up to five years would provide a quick, economical and effective means of dealing not only with the problems of transition but also with the more substantive issue of dependants' benefits, which may require re-examination from time to time to take account of continuing developments in the superannuation area. The need for further legislation would be avoided, and the Act would be given rational application in particular, and probably currently unforeseeable, circumstances. In relation to present members of existing schemes, the need for schemes to apply for exemptions on a regular basis might provide a valuable safeguard against any diminution in entitlements.

184. Turning to the four areas mentioned above in which exemptions may be necessary, there will be cases where, despite appropriate efforts during the transition, a scheme will require an exemption beyond the date on which repeal of s.41(1) becomes effective if it is not to be put to unreasonable expense, or its members to unreasonable inconvenience, while changing its arrangements so that they will not infringe the Act. Such exemptions could be expected to be few and limited to particular

funds. No problems should be experienced by the Commission in considering and, where appropriate, granting exemptions in such cases. Taking the second point, there will be schemes that provide reversionary benefits to spouses only. In such cases, the Commission would see it as appropriate that an exemption be granted provided the benefits are given to spouses or de facto spouses regardless of sex, or on a uniform measure of need. As regards the third point, given the continued operation of s.41(4) of the Act, the Commission would see it as appropriate for an exemption to be given to allow the use of actuarial data in respect of options to convert pensions to lump sums or vice versa. Such an exemption is already provided for (but not yet proclaimed) in South Australian legislation. On the fourth point, where the trustees of a scheme wish to maintain guaranteed benefits for existing contributors, specific cases could be brought forward by either a member or trustee of a scheme. In either event, there should be no difficulty in determining whether or not an exemption should be given and, if given, for how long.

185. In the event that sub-section 41(1) of the Sex Discrimination Act is repealed, the question arises as to whether superannuation schemes would then be regarded under the Act as 'a term or condition of employment' or a 'benefit associated with employment' (s.14) or as a service (s.22). Because this report addresses both employer-sponsored superannuation and personal superannuation arrangements which do not use insurance, the question of whether superannuation can be classed as a service has an important bearing on the matter of coverage under the Act.[1]

186. In the Sex Discrimination Act, as in State anti-discrimination legislation, the term 'service' is not defined; instead, interpretative provisions in the legislation set out what may be included in the meaning of the term, and it is left to the appropriate authorities to determine what is included in specific cases. No such determinations have been made by the Australian High Court. There are, however,

international precedents for the interpretation of 'service'. Briefly, such interpretations have been very broad. 'Service' has been taken to include 'any act performed for the benefit of another under some arrangement or agreement' (U.S.), or a '"help" or "benefit" or "advantage" conferred' (Canada).[2] If both employer-sponsored and personal superannuation arrangements are regarded as conferring benefits, then they would appear to fall into the category of a service.

187. There is now authority for saying that s.14 also applies to superannuation. This follows the recent decision of the High Court in Re Manufacturing Grocers' Employees Federation of Australia: Ex parte Australian Chamber of Manufactures.[3] It appears from the judgement that, at least in the context of the current proposals for use of some of the productivity increase for superannuation, the provision of superannuation is now regarded as being part of the terms and conditions of employment.

188. If, as the Commission recommends, s.41(1) of the Sex Discrimination Act is repealed, then employer-sponsored superannuation in the private sector would be covered by s.22 and s.14. Schemes in the private sector would thus be required to conform to the guidelines for non-discriminatory schemes outlined in Chapter XI unless covered by any exemptions.

189. The application of the Sex Discrimination Act to schemes operated by Governments of the States and the Northern Territory is more difficult. Section 14 does not apply to the States or the Territory and s.13(1) excludes the application of s.14 in respect of State instrumentalities. Further, the Commission has been advised by the Attorney-General's Department that:

> The Commonwealth does not have any specific heads of legislative power that would enable it to legislate in

> relation to all employment matters (including superannuation) in the States.. .Various heads of legislative power available to the Commonwealth have been relied on to apply the Act in particular circumstances (see s.9). For the Commonwealth to legislate in relation to employment by the States it would need to do so in terms of those heads of power. A perusal of the powers referred to in s.9 suggests that only sub-section 9(10) would, within its limits, empower the Commonwealth to enact legislation impinging upon State employment. It provides, in effect, that certain provisions of Division 1 and 2, including sections 14 and 22, have effect in relation to discrimination against women to the extent that the provisions give effect to the Convention on the Elimination of All Forms of Discrimination Against Women. Section 9(10) does not support the application of s.14 in relation to discrimination against men. I can therefore confirm that the legislative power of the Commonwealth extends to making the prohibition on discrimination in employment in s.14 apply to all States' Government employers but only so far as the section prohibits discrimination against women.[4]

190. The Commission notes that even though s.14 is not expressed as applying to the States, other prohibition provisions in the Act which do apply to the States, most notably s.22 dealing with goods, services and facilities, might be invoked in order to bring State superannuation schemes within the scope of the Act, but again probably only in relation to discrimination against women.

191. The Commission has concluded that it may not be necessary to cover State superannuation schemes, at least initially. The preferable course would be for the States and their authorities to take appropriate action to eliminate any discriminatory aspects from their schemes, leaving any problems for subsequent negotiation with the Commonwealth Government or the Commission. The Commission recommends that the Government take up the issues with the Governments of all States and the Northern Territory with the object of ensuring that all superannuation schemes operated by them and their authorities avoid discrimination on grounds of sex, marital status and pregnancy, and along the lines set out in this report.

192. The role of the Commission in the implementation phase would be to consider applications for exemptions in accordance with the interpretation of the requirements of the Act as set out in this report. On the assumption that any arrangements will be consistent with the provisions of the Sex Discrimination Act, and that this report will provide an understood basis for implementing it, the Commission or its successor should have no difficulty in granting exemptions on that basis as it has done in relation to other matters covered by the Act.

Administration

193. The Commission has had discussions with representatives of the Office of the Commissioner of Taxation and the Department of the Treasury about administrative measures which could be adopted to ensure that superannuation schemes operate in a non-discriminatory way. The Commission is anxious to avoid adding substantial new burdens of paperwork and reporting to superannuation schemes as a by-product of compliance with the Act. Equally, it is anxious that administration of the new arrangements should be effected by the Commonwealth as economically and expeditiously as possible.

194. With these factors in mind, the Commission proposes that until the statutory position of Occupational Superannuation Commissioner (OSC) is created and is authorised to undertake the task, the Office of the Commissioner of Taxation should add a small number of questions - probably about a dozen - to the questionnaire already addressed to new superannuation funds seeking exemption from income tax under the Income Tax Assessment Act. These questions should also be asked of trustees of existing funds when they file their periodic

returns. The Commission recommends that questions along the lines of those set out in Appendix 5 be approved by the Government for this purpose. The questions would be included in the material already circulated to trustees of superannuation funds by the Commissioner of Taxation.

195. At the time of preparation of this report, the °SC was operating as an interim cell for the purpose of performing preliminary functions connected with the operational standards. While the OSC interim cell builds up its capacity to handle the full range of functions, the responsibility for supervising superannuation funds with respect to their operations during 1986-87 will be shared to some extent between the Taxation Office and the OSC interim cell. Once the statutory position of OSC is created, and assuming it would be authorised to discharge the functions envisaged by the Commission, their discharge should not represent a material addition to the new organisation's functions.

196. Under this arrangement any scheme which, through its answer or failure to answer one of the questions relating to compliance with the Sex Discrimination Act, indicated or implied that it was not in compliance would be referred to the Human Rights Commission. The Commission would then review the issue and either indicate to the trustees of the scheme that the scheme must comply or issue an exemption which would define the terms and conditions and period of the exemption. In addition, failure of the scheme to comply may result in a complaint, which could then be the subject of inquiry by the Commission and of an appropriate determination under s.81 of the Sex Discrimination Act. The arrangement would not imply that the Income Tax Assessment Act was being used to enforce requirements of the Sex Discrimination Act, nor would withdrawal of the income tax concessions be a necessary consequence of failure of a scheme to comply with the Sex Discrimination Act. But schemes could be expected, after consultation with the Commission, to bring themselves into line with the Act or would be given an exemption

to allow them time to comply.

197. At the same time, the Commission would hope that taxation or OSC officers, when investigating schemes, would draw to the attention of the trustees of such schemes the need to approach the Commission in any instances where they believed that the Sex Discrimination Act may not be complied with. For this purpose, the Commission would draw up, in consultation with the Commissioner of Taxation, suitable guidelines to assist taxation or OSC officers. Section 26 of the Sex Discrimination Act provides that:

> It is unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program, or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person, on the ground of the other person's sex, marital status or pregnancy, in the performance of that function, the exercise of that power or the fulfilment of that responsibility.

198. Regardless of whether the Commissioner of Taxation would, as a matter of strict law, be required by s.26 to ensure that superannuation funds complied with the Sex Discrimination Act, it would certainly be expected that he and his officers would do what they could so that the administration of the Income Tax Assessment Act did not, in the longer term, make taxation concessions available to schemes which did not comply with the provisions of the Sex Discrimination Act.

Repeal of Section 41(1) accompanied by substantive amendment

199. If the Government were to prefer not to follow the course of simple repeal of s.41(1) by regulation as already provided for in the Sex Discrimination Act as outlined above, it would be necessary to amend the Sex Discrimination Act to provide both for the transition from the present stage of exemption as provided by s.41(1) to the required degree of non-discriminatory operation, and for the arrangements to cover new and continuing schemes (outlined in paragraph 182 above).

200. As indicated above, the Commission sees no need for more than simple repeal by regulation of s.41(1), and notes that in any case some exemptions would still need to be given by the Commission, as is the case with the other matters covered by the Act. Thus in the end the Commission will, under either alternative, need to have and exercise its powers of exemption. If the Commission's recommendation for simple repeal is not accepted, there would inevitably be a time lag while the amending legislation was prepared; the amending legislation would be complicated if it were to attempt to cover the transition phase in any detail; and there is a risk that the amending legislation might define the exemptions too broadly in order to cover the schemes less close to complying.

Conclusion

201. Taking into account the arrangements implied in s.41 of the Sex Discrimination Act, the extent to which superannuation schemes and provident funds are already complying with the Act, the problems associated with amending legislation and the administrative and other cost advantages associated with the simple repeal option (paragraph 181), the Commission recommends that this first option be adopted. To make it fully effective there would need to be discussions with the States to ensure that they will bring their schemes into line. The Commission believes that the problems should not be insuperable and that any issues that arise are capable of being sorted out satisfactorily with the superannuation industry and any members involved, because its recommendations have been arrived at after extensive consultation with representatives of relevant funds and life offices, and with actuaries as well as with other interest groups. The Commission believes that there is a large measure of agreement on the outcome. It also believes that its proposals have the advantages of economy in administration, maximum achievement of the goals of the Act and speed in implementation.

CHAPTER XII ENDNOTES

1. The two major cases concerning sex discrimination in superannuation brought under U.S. anti-discrimination legislation involved employer-sponsored superannuation. Accordingly, superannuation was treated as a "'privilege' of employment and 'fringe benefit'" and as falling under "compensation, terms, conditions or privileges of employment". (Arizona Governing Committee v. Norris (U.S. Sup. Ct. 1983) 671 F2d 330; City of Los Angeles, Department of Water and Power v. Nanhart (U.S. Sup. Ct. 1978) 435 U.S. 702.)

2. Creameries of America Inc. v. Industrial Commission 102 P.2d 300 (1940); and Rex v. Levine (1939) 4 D.L.R. 368.

3. 15 May 1986, decision unreported.

4. Advice provided by the Attorney-General's Department, 11 July 1986.

CHAPTER XIII - SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

202. This report focuses upon the application of anti-discrimination provisions to employer-sponsored superannuation.

203. The Commission has concluded that, taking into account in particular the arrangements implied in s.41(2) of the Sex Discrimination Act and the extent to which superannuation schemes are already, in the main, non-discriminatory, simple repeal of s.41(1) would be the most appropriate course of action. It would be quick, economical and effective. Accordingly, it recommends that action be taken to repeal s.41(1) by regulation made under s.41(2) of the Act (paragraph 181).

204. Following repeal of s.41(1), superannuation schemes would be required to comply with the provisions of the Sex Discrimination Act. The essential features of non-discriminatory schemes are outlined in Chapter XI of this report. It is recognised that this would mean that schemes presently using actuarial data would not be allowed to use it in the same way as insurance companies. However, to allow such use (other than in respect of options) would be contrary to the stated objects of the Sex Discrimination Act.

205. A transitional period will be needed during which schemes prepare the variations to their trust deeds and effect the changes in practice that will be necessary to bring them into line with the Sex Discrimination Act. The Commission recommends that the transition period should be three years, provided that arrangements are made to remove the exemption within twelve months of delivery of this report. If arrangements to remove the exemption take more than twelve months, the transition period should be reduced to two years from the date of operation

of such arrangements (paragraph 162). In the case of schemes about to commence, the Commission recommends that there should be a transitional period of six months from the date of removal of the exemption (paragraph 163).

206. The Commission recognises that exemptions may be necessary to allow a further transition period beyond that provided in the repeal regulation (paragraph 164); in relation to the payment of dependants' benefits to spouses or de facto spouses (paragraph 115); to allow conversion options between lump sums and pensions to be based on actuarial data (paragraph 131); and in relation to present members of existing schemes (paragraph 165). The Commission should consider such exemptions in relation to the industry generally. In addition, it should consider exemptions on a case by case basis for schemes which might face difficulties in complying with the Act. The Commission envisages that the need for such exemptions would be limited and would relate to particular matters such as transfer values (paragraph 159).

207. The Commission has concluded that all superannuation schemes should contain the same retirement age provision for men and women. In order to assist in overcoming the constraints set by existing age provisions of the Social Security Act (which is exempt from the provisions of the Sex Discrimination Act) the Commission expresses the view that amendment of the Social Security Act to provide for non-discriminatory ages of retirement is desirable in order to promote the establishment of broadly non-discriminatory superannuation provisions in relation to retirement ages (paragraph 99).

208. The Commission has concluded that personal superannuation not involving insurance should also conform to the requirements for non-discriminatory schemes contained in this report (paragraph 4). While it has deferred any decision on personal superannuation involving insurance until the insurance segment of its inquiry has been dealt with, it notes that such personal superannuation would nevertheless be subject to the provisions

of s.41(4) of the Sex Discrimination Act, which permits only actuarially and reasonably based discrimination in insurance on the ground of sex, not marital status or pregnancy.

209. The Commission has concluded that, in view of the complexity and unsettled nature of some aspects of superannuation which may result in indirect discrimination, it would be desirable for it or its successor to review them after a period of five years. These aspects are:

vesting standards and periods, following implementation of any initiatives arising from the proposed employer and union negotiations (paragraph 142);

preservation arrangements (paragraph 146); and

portability arrangements (paragraph 155).

210. If s.41(1) of the Act were repealed, complaints could be brought to the Commission about schemes which did not comply with the Act. The Commission has nevertheless concluded that, in view of the large number of schemes in existence and the complexity of issues in this area, it would be appropriate to provide some other mechanism to ensure that schemes which do not comply with the Act are brought to notice. Accordingly, it recommends that questions along the lines set out in Appendix 5 be included in the questionnaire sent out to new superannuation schemes by the Commissioner of Taxation or the new Occupational Superannuation Commissioner. The questions should also be asked of existing schemes (paragraph 194).

211. The Commission notes that the main effect of its recommendations would be on private sector schemes and schemes run by the Commonwealth. In order to promote uniformity of approach, the Commission recommends that the Commonwealth Government seek action by the Governments of all States and the Northern Territory that will ensure that all superannuation schemes operated by them and their authorities avoid

discrimination on the grounds of sex, marital status and pregnancy (paragraph 191). The Commission understands that the matter has already been discussed by the Standing Committee of Attorneys-General and that this might provide an appropriate forum in which to formulate a co-ordinated approach. In this respect the Commission notes that the proposals contained in this report accord substantially with the recommendations made by the New South Wales Anti-Discrimination Board and the Victorian Equal Opportunity Board in their reports and with the as yet unproclaimed provisions of the South Australian Equal Opportunity Act 1984. The Commission's proposals are also very much in line with developments in North America and the European Economic Community.

212. Further, to overcome difficulties and to help to defray the costs of changeover to non-discriminatory schemes relating to the emendation of trust deeds, the Commission recommends that (paragraph 174):

approaches be made to the States to legislate to permit trustees to settle the terms of the new arrangements and

that, similarly, the Commonwealth confer such discretion in areas of its jurisdiction;

approaches be made to the States to ensure that the necessary alterations to trust deeds are exempt from stamp duty and that, similarly, exemptions from any Commonwealth stamp duty should be made;

appropriate changes be made to taxation rulings to ensure their compliance with the Sex Discrimination Act; and

the costs of transition be allowable for tax purposes.

213. In order to assist in the transition to non-discriminatory schemes, the Commission recommends that a small temporary advisory service of two to three persons be established in the office of the Commission or its successor during the transition

period to provide advice on non-discriminatory requirements and to assist with the preparation of appropriate exemptions (paragraph 173).

214. The Commission notes that even if limited exemptions were enacted, it would still be necessary for the Commission to give exemptions either on a class or case by case basis in relation to such matters as optional rather than mandatory cover for non-permanent full-time workers and part-time workers (paragraphs 136 and 138 respectively) and vesting (paragraph 142). Thus, even if this course were followed, it would still be necessary to supplement the resources of the Commission to assist the transition process.

215. The Commission is of the view that, if the Government does not simply repeal s.41(1), leaving the Commission to consider exemptions as appropriate, then the Sex Discrimination Act should be amended to substitute for s.41(1), the following more limited exemptions to:

allow a period beyond the transition period provided in the repeal regulation during which schemes could, if necessary, be allowed further time to make the variations to their trust deeds and effect the changes in practice that will be necessary to bring them into line with the Sex Discrimination Act;

allow the payment of dependant's benefits to spouses and those in de facto relationships, provided the benefits are given regardless of sex, or on a uniform measure of need;

allow the use of actuarial data in respect of options to convert pensions to lump sums or vice versa; and

allow existing discriminatory schemes (or sections of schemes) to continue to serve present members who elect to remain in them rather than having their benefits determined in accordance with new non-discriminatory provisions.

The Commission is of the view that it would be desirable, in the interests of progress towards full compliance with the Act, if power could be given to repeal by regulation any of those exemption categories as experience proved that to be desirable.

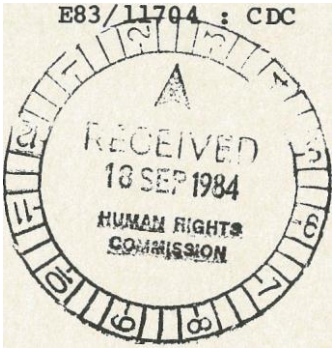
APPENDIX 1

SENATOR THE HON. GAREth EVANS O.C.

ATTORNEY-GENERAL

PARLIAMENT HOUSE

CANBERRA A.C.T. 2600



17 SEP 1S3:1

The Hon. Dame Roma Mitchell, D.B.E.
Chairman
Human Rights Commission
A.M.P. Building
Hobart Place
CANBERRA CITY A.C.T. 2600

Dear Dame Roma

Pursuant to paragraph 48(1) (g) of the Sex Discrimination Act 1984, I request the Human Rights Commission to report to me:

(a) whether the Sex Discrimination Act 1984 should be amended in relation to the exemption granted in sub-section 41(1) of that Act regarding the terms or conditions appertaining to a superannuation or provident fund or scheme, and, if so, the form the amendment should take; and

(b) whether the Sex Discrimination Act 1984 should be amended in relation to the exemption granted in sub- section 41(4) of that Act regarding the terms on which an annuity, a life assurance policy, a policy of insurance against accident or any other policy of insurance may be offered or obtained, and, if so, the form the amendment should take.

In requesting this report, I note that both the Governments of New South Wales and Victoria have had reports prepared on discrimination in superannuation while the Government of South Australia has had research undertaken on the question. I would be grateful if any proposals recommended by the Commission could take account of any relevant State proposals and the Government's policy that, as far as possible, there should be consistency between State and Commonwealth legislation.

Yours j.cerely

GARETH EVANS

NOTE OF DIFFERENCES IN MORTALITY BETWEEN MALES AND FEMALES

Prepared by J L Crocker on Behalf of the Institute of Actuaries Risk Classification Committee

Actuarial studies over very many years and in many countries have demonstrated that there are observable differences in male and female mortality. In general females live longer than males of the same age. The following table sets out the ratio of female to male mortality in the UK and Australia at a comparable time.

Ratio of Female to Male Mortality

Age	England & Wales 1975-78	Australia 1975-77
20-24	.40	.29
30-34	.70	.50
40-44	.67	.61
50-54	.58	.53
60-64	.51	.49

NOTE: The ratio compares the chance of a male and female of the same age dying in a year.

From a superannuation point of view the important mortality statistic is the expectation of life at retirement. This gives a guide to the length of time a pension might be expected to be paid to a retiree. The latest Australian life table indicates that an Australian male aged 65 can expect to live a further 13.1 years. The corresponding female figure is 17.5 years. The figure at age 60 are 17.2 for males and 22.0 for female.

However in many cases a spouses pension is included. The fact that the pension for a female member is payable for a longer period than a male member is balanced to some extent by the surviving spouses pension being payable for a shorter period.

For example using population mortality the cost of providing pensions to members aged 65 with a two-thirds pension being payable to the surviving spouse is virtually the same for male and female members if it assumed that on average husbands are three years older than their wives. Thus if spouses benefits are prbvided on a non-disriminatory basis for those superannuation funds providing such benefits differences in male and female mortality are unlikely to be of major financial significance. For those funds which do not provide spouses pensions the difference in mortality is of major financial significance.

ABS Survey of superannuation funds (Catalogue No. 5636) pp.20-21.

SECTION III: ELIGIBILITY.

TABLE 21. PRIVATE SECTOR EMPLOYEES FUNDS AND PUBLIC SECTOR SELF-ADMINISTERED FUNDS: NUMBER OF FUNDS AND MEMBERS BY MINIMUM AGE REQUIREMENT, 1982-83.

	Private sector employees' funds		Public sector self-administered funds		Total	
Minimum age requirement	Number of funds	Number of members	Number of funds	Number of members	Number of funds	Number of members
None	15560	418985	61	665070	15621	1084055
Males - 21 or over	1027	111305	7	2372	1034	113677
- less than 21	618	198221	13	81687	631	279908
Females - 21 or over	1025	111205	7	2372	1032	113577
- less than 21	620	198321	13	81687	633	280008

TABLE 22. PRIVATE SECTOR EMPLOYEES' FUNDS AND PUBLIC SECTOR SELF-ADMINISTERED FUNDS: NUMBER OF FUNDS AND MEMBERS BY PERIOD OF SERVICE REQUIREMENT, 1982-83.

	Private sector employees' funds		Public sector self-administered funds		Total	
Period of service requirement	Number of funds	Number of members	Number of funds	Number of members	Number of funds	Number of members
None	12665	373535	54	586143	12719	959678
Less than one year	1985	136598	10	6565	1995	143163
One year	1278	149103	11	144417	1289	293520
Over one year	1277	69275	6	12004	1283	81279
Total	17205	728511	81	749129	17286	1477640

TABLE 23. PRIVATE SECTOR EMPLOYEES'FUNDS AND PUBLIC SECTOR SELF-ADMINISTERED FUNDS: NUMBER OF FUNDS AND MEMBERS BY OTHER ELIGIBILITY REQUIREMENTS, 1982-83.

	Private sector employees' funds		Public sector self-administered funds		Total	
Other eligibility requirements	Number of funds	Number of members	Number of funds	Number of members	Number of funds	Number of members
Earnings	207	1064	1	933	208	1997
Managerial or non-managerial status	816	71717	1	108	817	71825
Sem	33	6536	1	1953	34	8489
Permanency	910	165998	32	435834	942	601832
Full time employment	1285	193790	31	508060	1316	701850
Medical requirements	275	95402	29	230109	304	325511
Other	635	94179	11	93790	646	187969

TABLE 24. PRIVATE SECTOR EMPLOYEES FUNDS AND PUBLIC SECTOR SELF-ADMINISTERED FUNDS: NUMBER OF FUNDS AND MEMBERS BY NATURE OF EMPLOYEE MEMBERSHIP, 1982-83.

Nature of employee membership		Private sector employees' funds		Public sector self-administered funds		Total	
		Number of funds	Number of members	Number of funds	Number of members	Number of funds	Number of members
Compulsory		2366	251566	52	611735	2418	863301
Voluntary	- less than 502	762	101723	13	65751	775	167474
	- 502 to 742	524	107283	6	70235	530	177518
	- 752 to 992	615	97744	3	261	618	98005
	- 100%	1877	14680	3	148	1880	14828
By invitation	- less than 502	2966	21531			2966	21531
	- 502 to 742	1362	60502			1362	60502
	- 752 to 997.	1514	51761	1	79	1515	51840
	- 100%	5219	21721	3	920	5222	22641
Total		17205	728511	81	749129	17286	1477640

TABLE 25. PRIVATE SECTOR EMPLOYEES' FUNDS: NUMBER OF FUNDS AND MEMBERS BY EMPLOYMENT STATUS OF FUND BY NATURE OF EMPLOYEE MEMBERSHIP, 1982-83.

Nature of employee membership		Employment status of fund							
		Managerial		Non-managerial					
				Salaried		Wages		Mixed (a)	
		Number of funds	Number of members	Number of funds	Number of members	Number of funds	Number of members	Number of funds	Number of members
Compulsory		260	3552	38	23345	880	43358	1170	181296
Voluntary	- less than 502	450	2623	40	3963	28	13541	223	81596
	- 502 to 742	185	512	40	16833	22	27193	266	62665
	- 752 to 99%	160	1514	31	2262	37	27211	375	66757
	- 100%	1251	3829	124	567	39	3847	378	6399
By invitation	- less than 502	1852	4257	104	275	51	127	870	16872
	- 502 to 74%	651	1565	40	1154	30	3159	612	54624
	- 752 to 99%	438	2910	147	1642	34	2795	873	44414
	- 1002	3487	7538	329	648	114	1140	1167	12398
Total		8734	28380	893	50689	1235	122421	5934	527021

a) A mixed fund is a fund which cannot be classified solely as Managerial or Non-managerial (Salaried or Wages) as it comprises members of more than one of those classifications.

NOTE ON POSSIBLE COST OF EXTENDING
SUPERANNUATION-COVERAGE TO PART-TIME EMPLOYEES[1]

It is difficult to get any real measure of cost. The figures set out below are very rough and cover part-time employees only.

1. Number of Part-Time Employees and Hours Worked (Source Labour Force December 1985 ABS CAT 6203.0)

	Number of Part-Time Employed Persons	Average Hours Worked per week	
	$	Part-Time	Full-Time
		$	$
Males	247.0	16.2	42.8
Females	988.9	16.0	38.9

2. Average Weekly Earnings Full-Time Adults - Weekly Total Earnings Source Average Weekly Earnings September Quarter 1985 ABS CAT 6301)

Males	441.6
Females	346.8

3. Estimate of Part-Time Total Annual Salary Bill

(a) Assume part-time rate of pay 75% of full-time rate - i.e. allow for part-time to generally be amongst lower paid jobs

Males

$$.75 \times \frac{16.2}{42.8} \times 441.6 \times 247{,}900 \times 52$$

Number of PT Males | Average PT Hours / Average FT Hours | AWE

i.e. $1,616 million

1. Prepared by J L Crocker on behalf of the Institute of Actuaries Risk Classification Committee.

Female

(a) Superannuation Coverage of Work-Force is 40% - use this penetration for part-timers.

(b) Average employer cost

of 8% of salary

i.e. 40% X 8% x

7,117 million =

230 million

However,

(a) some part-time workers already have superannution coverage

(b) It would be _expected that a higher proportion of
part-time workers would not elect to join superannuation plan even if available_

If a further factor of 50% is used to reflect this features then the likely maximum cost is $115 million per annum.

APPENDIX 5

QUESTIONS TO DETERMINE COMPLIANCE OF EMPLOYER-SPONSORED SUPERANNUATION SCHEMES WITH THE PROVISIONS OF THE SEX DISCRIMINATION ACT

1. Does the scheme pay the same pension or lump sum to men and women members of the scheme who leave the scheme at the same age and whose periodic contributions, if any, are the same, age for age?

2. Does the scheme make no distinction in any of its conditions between members or potential members on the basis that they are married, in a de facto relationship, widowed, separated, divorced or single, unless their circumstances are materially different?

3. Does the scheme have the same conditions of eligibility for men and women whether they are married, in a de facto relationship, widowed, separated, divorced or single?

4. Does the scheme extend membership to non-permanent full-time workers and part-time workers? Is the period of eligibility the same as that applying generally in the individual fund concerned or a period of one year, whichever is the longer?

5. Are the scheme's retirement age provisions the same for men and women? Are any early retirement options equally available to both sexes?

6. Are eligibility for, and the level of, death and disability benefits determined independently of sex and marital status?

$$.75 \times 988{,}900 \times \frac{16.0}{38.9} \times 346.8 \times 52$$

i.e. $5,501 million

or Total annual salary bill of $7,117 million

Estimate of Cost of Extending Superannuation

7. Where the scheme provides disability benefits, are pregnancy related disabilities and disabilities arising during the period of a pregnancy included within the definition of a disability for which cover is available?

8. Is employer liability the same irrespective of whether paid leave is for maternity or other purposes?

9. Are facilities provided for employees on unpaid maternity or parental leave to continue their death and disability cover? If a charge is made for this cover, does one payment option available to the employee allow regular payments during the leave period?

10. Are facilities provided for 'freezing' the superannuation entitlements of employees on extended maternity or parental leave?

11. Will the scheme provide for vesting to take effect after five years' membership at a maximum of three years from 'X' (i.e., the date of repeal of s.41(1) of the Sex Discrimination Act)? (If not, but the scheme has a vesting period beyond ten years, will the scheme achieve full vesting within an additional one year transition period (beyond three years) for every five years for which the vesting period exceeds ten years, up to a maximum of three additional years?)

12. Are transfer values calculated independently of sex?

13. In determining resignation benefits does the scheme credit interest at a reasonable rate, that is, a rate which may discount for the value of life and disability insurance applying during the member's period of employment and for relevant administrative costs, but which otherwise reasonably reflects the overall earning rate of the fund?