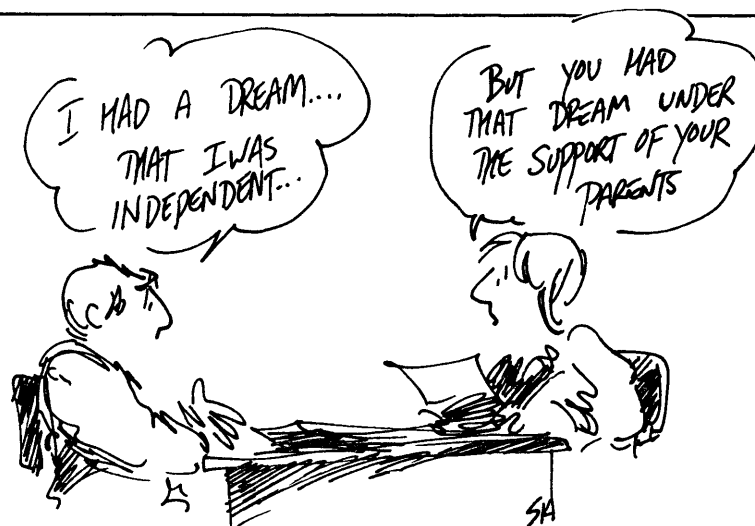


Security Act': Reasons, para.21.

Because of the purpose of special benefit and the financial support provided by and available from his parents during the period in question, the AAT decided, as a matter of discretion, that a special benefit should not be granted to Robson for the period during July and December 1984.

#### Formal decision

The AAT affirmed the decision under review



## Cohabitation: age of consent

### KENNISON and SECRETARY TO DSS

(No.S85/42)

**Decided:** 25 November 1985 by J.A.Kiosoglous, F.A.Pascoe and B.C.Lock

Thomas Kennison had been granted unemployment benefit in July 1982. In December 1982, he was granted additional benefit on the basis that he was living with a woman, C (who was then 16 years old), and should be treated as a 'married person' when calculating the rate of benefit payable to him. In June 1983, the DSS decided to pay Kennison the single rate of unemployment benefit because C was under the age of 17 years, the legal age of consent to sexual intercourse in South Australia.

Kennison asked the AAT to review that decision.

#### The legislation

At the time of the DSS decision, s.112(2) of the *Social Security Act* provided that additional unemployment benefit should be paid to a 'married person' who had a dependent spouse.

Section 106(1) defined 'married person' as including a man with whom a woman was living 'as his wife on a *bona fide* domestic basis although not legally married to him.'

The South Australian *Criminal Law Consolidation Act 1935* provided in s.49 that it was an offence for a person to have sexual intercourse with a person under the age of 17 years, unless that other person was at least 16 years and the accused 'believed on reasonable grounds' that the other person was at least 17 years old.

#### The evidence

Kennison and C told the Tribunal that, during the period from December 1982 to August 1983, they had lived together in what they described as a

*de facto* relationship. They said that they were financially and socially interdependent during that period. But there was no direct evidence before the Tribunal of a sexual relationship between Kennison and C.

#### The DSS argument

The DSS relied on 2 written opinions given by the Commonwealth Attorney-General's Department. Between them, these opinions argued that the DSS could not accept that a woman was living with a man as his wife where the woman was below the legal age of consent in the relevant state. This was, the opinions said, because the DSS could not administer the social security system so as to allow any person to benefit from the commission of a criminal offence and because the word 'woman' in s.106(1) should be read as referring to 'an adult female human being'.

#### The AAT's view

The AAT said that the question whether 2 people were living as man and wife within the *Social Security Act* depended on all aspects of their inter-personal relationship. A number of factors had to be considered; and the existence or not of a sexual relationship was only one of those aspects.

In the present case, there was no evidence of a sexual relationship between Kennison and C and neither the DSS nor the AAT was obliged to investigate the existence of any such relationship. Although it might be proper for the DSS to refuse to pay a benefit to a person who was otherwise entitled when that person's entitlement rested upon facts which amounted to a criminal offence under State law, where there was no evidence of the commission of such an offence. Neither the DSS nor the AAT was the appropriate body to pursue that evidence.

The AAT rejected the narrow reading given by the Commonwealth Attorney-General's Department to the word 'woman' in s.106(1). The Tribunal noted that, under the *Marriage Act 1976* (Cth), a female person (subject to some restrictions) had the capacity to marry and become a wife from the age of 14 years. It followed, the AAT said, that -

'a female person has the capacity and may become a "dependent female" and may live together with a male person as his wife (i.e. as if she was his wife), although not legally married to him, from the age of 14 years. The legal impediments do not prevent the existence of a *de facto* relationship, or of a *bona fide* domestic relationship" of unmarried husband and wife, because those impediments are related simply to consent to marry and to the ceremony of marriage. Therefore, because a female person has the capacity (marriageability) to become a legally married wife or spouse of a male person from the age of 14 years, she also has the capacity to become a dependent female "as his wife".'

(Reasons, para.17)

In the present case, the AAT said, there was sufficient evidence (in the financial and personal interdependence of Kennison and C) to establish that Kennison and C were living together in a *bona fide* domestic relationship as unmarried husband and wife at the relevant times.

#### Formal decision

The AAT set aside the decision under review and substituted a decision that Kennison was a 'married person' as the husband of a 'dependent female' between December 1982 and August 1983.