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SENATE

SENATE SELECT COMMITTEE ON SUPERANNUATION AND
FINANCIAL SERVICES

**Reference: Provisions of the Superannuation (Entitlements of Same Sex Couples)
Bill 2000**

FRIDAY, 3 MARCH 2000

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SENATE

SELECT COMMITTEE ON SUPERANNUATION AND FINANCIAL SERVICES

Friday, 3 March 2000Friday, 3 March 2000

Members: Senator Watson (*Chair*), Senator Sherry (*Deputy Chair*), Senators Allison, Chapman, Conroy, Hogg and Lightfoot

Senators in attendance: Senators Allison, Hogg and Watson

Terms of reference for the inquiry:

Superannuation (Entitlements of same sex couples) Bill 2000.

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Committee met at 9.00 a.m.**SMITH, Ms Philippa Judith, Chief Executive Officer, Association of Superannuation Funds of Australia**

CHAIR—I declare open the proceedings of this Senate Select Committee on Superannuation and Financial Services. The committee's terms of reference require it to inquire into, and report on, the provisions of the Superannuation (Entitlements of same sex couples) Bill 2000. The aim of today's hearing is to provide the committee with an opportunity to identify, with the assistance of key individuals and organisations, the issues raised by this bill. The committee would like to focus on the changes proposed in the bill and its potential consequent impact on the rights and obligations of members and the rights and obligations of fund administrators.

All of the witnesses who appear before the committee are protected by parliamentary privilege with respect to the evidence given before the committee. This means that they are given broad protection from action arising from what they say, and the Senate has power to protect them from any action which disadvantages them on account of the evidence given before the committee. The committee prefers to conduct its hearings in public. However, if there are any matters which you wish to discuss with the committee in private, the committee will consider your request.

I welcome Ms Philippa Smith. I thank you for your presence today and for the association's continuing interest in matters raised by the committee. We also value the input that you make. It gives, I believe, a great deal of credibility to our reports. We would like you to pass those messages of support back to your executive. We would like you to speak to your submission.

Ms Smith—Thank you. I certainly will pass back those messages to our research team. ASFA welcomes this review. Our position is that we support the end of discrimination in terms of the superannuation payments for death benefits and pensions for same sex couples. The SIS legislation requires trustees to treat both opposite sex and same sex couples very differently. We think the time has passed, if it ever was there, for this to occur.

As the committee would probably be aware, in opposite sex partner arrangements, the surviving partner is automatically deemed to be the dependant and can be freely paid any superannuation death benefit. In same sex partner arrangements, it cannot be paid directly, unless that surviving sex partner can demonstrate a financial dependency on the deceased. This hurdle can be very difficult to determine and prove, and it creates a high level of uncertainty for trustees. For example, if regular mortgage payments are shared by those partners, it may be provable, but in quite a large number of other situations, that proof of financial dependency can be very difficult. Really the only other way that it can flow to the same sex partner is where the death benefit was paid to a deceased member's estate and the same sex partner was named in that will, but there can be long delays in that. With superannuation being often quite the substantive asset that it is, those delays really are not tolerable in this sort of situation.

Where there are no dependants or legal representatives, the trustee has the discretion to pay the same sex partner directly. But that is not really clear-cut and I do not think that can be relied upon as a method because, again, it is not a clear and transparent process. There may be a range of other non-dependants, such as the parents of the deceased or previous partners, and the same sex partner or the current sex partner would be disadvantaged in those situations. What we are saying is that, really, same sex partners should be treated in the same way as opposite sex partners. If they are in a relationship like opposite sex partners, married or de facto, whether they are same sex or opposite sex would be the scenario we would like to see going in. That would, we believe, provide trustees with much more certainty in terms of being able to apply the rules fairly and quickly and make fair decisions.

So we would like the committee to support those changes. Our submission highlights that, in our view, that takes one very important step in terms of removing the current discrimination and anomalies. We do, however, point out that the taxation issues remain in terms of some of the same features of discrimination against same sex partners as opposed to married or de facto couples in opposite sex arrangements. Again, the Income Tax Assessment Act requires that a higher financial dependency test of that and, as we detail in our submission, the implications in terms of financial substance can be very great for the individuals indeed.

Going back to the SIS arrangements, we also perhaps suggest that perhaps the bill could be enhanced by ensuring that the wording explicitly states that it applies to benefits payable following a pensioner's death and retirement, were a reversionary benefit is available, as well as when a member dies while still in employment. I guess that is us just trying to predict any areas of greyness. It was probably the intent of the bill—and I might be assuming this—but we wanted to make sure that it was explicitly covered in the bill.

In terms of transition issues we highlight and tease out two particular issues of what, in effect, would be retrospective entitlements that might arise. Firstly, there may be a situation where a person could claim a lump sum or a spouse pension if the death of the person occurs before the commencement date of this legislation. As

we indicated, there may be some implications there in terms of costs for funds, their insurers and employer sponsors in those defined benefit arrangements, but maybe you could tease out to what extent that might be if you have actuaries before you. We, unfortunately, have not had the opportunity to work out how substantive an issue it is. As I said, these are not to argue against the introduction of the bill; they are just some of the teasing out issues. Secondly, there may be a situation where a primary pension may already be in payment on the date of commencement of the amending legislation and a person may seek payment of the reversionary pension when the primary pensioner dies. Again, it may be worth teasing out how great an issue that is. We are just looking at what might, in effect, become the financial retrospective implications of the bill.

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In looking at the bill, we were a bit concerned about the words ‘social origin’, primarily because we did not know what it meant. In not being sure about what it meant, we were concerned that it might be open to confusion in terms of interpretation and potential legal difficulties for trustees and courts if required to interpret this term. We were not sure of what it meant and what it added. Therefore, because of that, we suggest that it be removed. Without it, the thrust of what we are trying to get at is there.

I mentioned the tax arrangements before. We see those as being a consequential next step issue that should be dealt with. Equally, we would like to see the Military Superannuation and Benefits Act and the government pension arrangements addressed as soon as possible on the basis of equity legislation, which would remove discrimination for those employed in the private sector while permitting discrimination to continue for those employed in the public sector—it seems a little bit incongruous. That is a slightly difficult one in that we do not want to halt. This has had a long and sorry history of stop-start improvement in this area. We do not want to halt the removal of discrimination in the private schemes, but we do point to this area as needing to be addressed also.

In conclusion, we support the inclusion of the same sex partners with SIS, amending the definitions. We recommend the removal of that undefined term ‘social origin’. We recommend the inclusion of words explicitly stating that ‘reversionary benefits are payable where available under scheme rules following death in retirement’. We suggest some teasing out in terms of the transition steps and the retrospective possible increased costs that will be there for schemes. We call on the government to remove the remaining discrimination in relation to public sector superannuation schemes and the taxation systems.

CHAIR—Thank you for your presentation. Is superannuation the appropriate vehicle to be leading this reform or should it come from other areas such as tax or social security? Are we specialised enough to provide the required guidance in terms of making quite a significant change?

Ms Smith—It is recognising the change that is there. Trustees would welcome recognition of it because it would give them more certainly in terms of the payment. Because of the compulsory nature of superannuation and the fact that the quantum of superannuation and its importance now is growing for people’s retirement income, we really should not ignore it any more. As we pointed out, the tax issues need to be amended too. In so far as superannuation is concerned, we are very conscious of the anomalies that are there and the difficulties that have been imposed because of those anomalies.

CHAIR—What about the messages it might send in terms of the traditional form of marriage—do you think it will undermine that in any way?

Ms Smith—I personally do not think it does. What we are trying to do here is acknowledge long-term, lasting relationships, whether they are marriage or de facto. Already, the SIS acknowledges de facto relationships in that way.

CHAIR—You do not think that will put an onerous responsibility on trustees to determine what is a long-term relationship? Three years, four years—where are trustees going to draw the line? Don’t you think they need some guidelines?

Ms Smith—From my perspective, the guidelines are already there for de facto relationships.

CHAIR—So use those same guidelines?

Ms Smith—I would, because what we are trying to get to here is a parity, in terms of the treatment of SIS, between same sex and opposing sex. So it should be whatever applies to the de facto—well, it applies to married and de facto, but the de facto arrangements should be what apply to the same sex relationships.

CHAIR—I would like to give the other members of the committee an opportunity to ask questions. Senator Hogg.

Senator HOGG—Ms Smith, the issue of retrospectivity interests me, in the sense that you do define a situation there in terms of looking forward. What about an existing couple who may have split some time ago, who have had a long relationship and who, until now, have had no claim on part of that superannuation

because of the different treatment—do you see those people now becoming eligible to make a claim on part of their former partner's superannuation as a result of the passage of this legislation, because it may well be one of the unintended consequences in terms of some people's lives.

Ms Smith—That is why we raise it. The situation we would like to see it moved to is, again, like the de facto relationship, that the rights for the de facto partner are if they are in a de facto relationship at the time of the death. We do have concerns if retrospective financial rights are allowed. I do not think we can suddenly do a catch-up of all the anomalies that have been there in the past.

Senator HOGG—I accept that, but would you see a line being drawn in the sand saying, in effect, that this begins as of, let us say, today, regardless of whatever has taken place previously, even though it may have been a meaningful relationship where one of the partners made a significant contribution to the major superannuant and might otherwise, even in a de facto or a heterosexual relationship, have a legitimate claim on part of that superannuation? Are you saying: draw a line in the sand; otherwise it is going to be too confusing?

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Ms Smith—Yes. Unfortunately, that—

Senator HOGG—You see, you get to the issue of making people equal—and I have no problem with that, if that is what the desire is—but then you have to know where you are stretching equality to and how equality is going to apply.

Ms Smith—Our view being put there is that, in essence, unless you put a line in the sand and say, 'As of tomorrow, these are the rules that are applying,' you will find that there are in effect retrospective payments of what were people's claims at that point, which would have quite substantial unplanned financial costs.

Senator HOGG—It might not only be a former partner; it might well also be, if they were in a heterosexual relationship prior to their gay or lesbian relationship, that there are other dependants as well.

Ms Smith—Yes. It becomes a very difficult situation for the fund and there would probably be quite substantive costs attached to that. If you allowed retrospectivity, if you allowed people to go back in the books so that they could say whether or not they were in a relationship at that time and that, if only the laws had allowed that claim at that time, they would have been eligible. What we are saying is that really you have to draw a line in the sand and say, 'From tomorrow'—or from whenever—'these claims and entitlements are allowed.'

Senator HOGG—All right. Not being a lawyer, which I think is one of my positive traits, I do not necessarily know, and I think the committee will need to seek some legal advice on that aspect. I would imagine that there are heterosexual couples who have now started to use that part of the law when they split. For instance, one partner has been the significant superannuant and the other, having played a supportive role, has now lodged claims to part of the major superannuant's funds. I am just wondering whether or not there was retrospectivity there. I do not know whether it was through a passage of the law or whether one day someone pursued it through the courts and there was a legitimate ruling and thereby other people got caught up. This is the sort of legal entanglement I do not want us to get into.

Ms Smith—Yes. It may be worth getting more advice. We purposely raised these issues. When we sat down and thought about it, they were some of the more convoluted parts of dealing with the situation. My understanding though is that the superannuation entitlements generally deal with the partner at that point in time. If you are dealing with rules of the state—for example, divorce laws et cetera—you are getting into the area where superannuation has not been regarded as an asset in those sorts of planning estate situations. So it has been treated more like a retirement income to the individual and the dependant at that point in time.

Senator HOGG—Do you have any legal advice in this area that you can furnish the committee with?

Ms Smith—No, we have not.

Senator HOGG—Thank you.

Senator ALLISON—I just wanted to pursue that comment about unplanned fund cost for funds, their insurers and employers' sponsors in a retrospective situation. Obviously, that would be very difficult to quantify, but what advantage has there been to the funds over time in the absence of legislation to deal with same sex benefits?

Ms Smith—I have not been able to quantify this, but I suppose what would have happened is the actuaries would have made an assessment in terms of the total payouts that were going to be due to them. That is why I was indicating before that it might be interesting to get some teasing out of this. Certainly from the perspective of the trustee, it is more a decision as to who exactly should be entitled.

Senator ALLISON—So it is not a question of this money not being withheld or not having to be handed over at all by the funds. It is rather a case of going to individual—

Ms Smith—There would be some situations where there would not be a dependant found in the arrangement. Unfortunately, I cannot answer exactly how many situations have been involved.

Senator ALLISON—Can you just explain a little more reversionary payments; this is not something that I have come across: what does it mean?

Ms Smith—The reversionary payments are basically terms of defined benefits, like a pension stream, I think.

Senator ALLISON—ASFA is supportive of the legislation being passed, obviously?

Ms Smith—Yes, so those details about the transition section should not be interpreted as putting up insurmountable obstacles in that regard.

Senator ALLISON—Yes. Do you have a view as to how the parliament should handle this? Should we get our whole house in order and deal with the tax question before this legislation, or is it in your view okay to put it through at this point?

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Ms Smith—I think there will have to an assessment for the committee as to how quickly the tax issues might be able to be brought into line, and indeed the government pensions, so it would be a whole policy going forward. If the implications of trying to do that just delay this segment of it for a long period, our preference would be to move ahead on this segment rather than potentially allowing years of delay and further debate.

CHAIR—But it would highlight the discrimination against, say, Commonwealth employees much more significantly than the present situation, wouldn't it?

Ms Smith—Yes, that may be the consequence, but not to move on one area of discrimination when it has been identified and the parties agree to move forward, I do not think is a reasonable way either.

Senator ALLISON—Pursuing that same point, we have another bill before the Senate introduced by my forebear, former Senator Sid Spindler which is much fuller, I suppose, in its approach to discrimination against same sex couples. Are you aware of that bill?

Ms Smith—No. I am sorry, I am not aware of that bill.

Senator ALLISON—You may not wish to answer this question, but the only submissions really that the committee has received against this legislation are those claiming that this bill will further damage the family structure as we know it. Could you comment on those sorts of moral arguments? Do you think there is any place for that anymore?

Ms Smith—I guess I am coming from the trustee's perspective of the management of the funds. They have had members who have saved money through both compulsory and voluntary arrangements. There can be a substantive amount of money in those funds. So the trustee, to the best of their ability, is trying to ensure that the money goes to the right person, obviously within the parameters of the legislation that they are provided. The legislation, as it currently sits, prohibits payment in situations where the trustees have seen that there have been long-term partnerships and it would seem the clear intent of the member of the fund. So they are aware of those anomalies and it has created uncertainty from their perspective in terms of the application of financial dependency and differences between that and de facto situations.

Senator ALLISON—To put the question another way, do your trustees receive a lot of complaints from opposite sex couples who are their members at the prospect of same sex couples receiving equal treatment? What is the feel out there amongst those people who receive benefits? Obviously, the funds benefit by not having to pay out in certain circumstances, so there is a financial benefit to maintaining the status quo for most members. Can you give the committee some sort of feel for opinion?

Ms Smith—In most situations I think funds find someone to pay it to. I am not aware of this being controversial, of there being many claims from previous partners. I think that gets back to the divorce law situation more than this. What we are trying to deal with here, in terms of the death benefit, is finding who is the partner and dependant, the de facto dependant but key dependant, at that point in time. That is what the intent of the SIS legislation and the role of the trustees should be about.

Senator ALLISON—Thank you.

CHAIR—The term 'superannuation' has particular connotations in Australia, but overseas it is referred to generally as retirement incomes. What developments are taking place in other countries—Britain, the United States, across Europe—in terms of recognition of same sex couples with regard to retirement incomes?

Ms Smith—I am not sure if I am fully equipped to answer that question.

CHAIR—Where should we be looking to make inquiries in that area?

Ms Smith—We perhaps can do some.

CHAIR—Can you?

Ms Smith—I am happy to see if we have got any—

CHAIR—We have got some information about Canada.

Ms Smith—We will do a quick search and see what we can find for you.

CHAIR—That would be helpful. You favour an incremental approach?

Ms Smith—Only if the other is slow in coming, I guess.

CHAIR—Do you think, for example, we should be recommending in the case of insured death benefits that they be paid across for gays using the definition of de facto relationships? Is that an area where it is fairly clear?

Ms Smith—Yes, I believe it is.

CHAIR—Do you think we should be going that far at the moment, or is that too small an incremental step? Technically that is still a problem, isn't it, because there is a higher hurdle for the gays, even in insured death benefits, than for others?

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Ms Smith—That is right.

CHAIR—So should we be moving in that area as one step? Where do we start?

Ms Smith—I believe the SIS area would be an important area to start in terms of the payment of death benefits and other pensions.

CHAIR—Is that an easy area to begin with as far as administration is concerned, providing you use the status of de facto relationships to determine an equivalent?

Ms Smith—I believe it is as easy as anywhere else, yes. As you have raised, it highlights the anomalies that are still left in the government schemes and the taxation areas. But I do not believe that we should use that as a reason for not moving on the SIS legislation where we can identify reforms that would be useful.

CHAIR—Are there any other comments that you might like to conclude with?

Ms Smith—No. I am happy to give any follow-up information.

Senator HOGG—The only other issue I want to raise with you is the question you raised about the undefined term 'social origin'. Do you know if there is any other comparable legislation, from when you were looking overseas, that uses a similar term?

Ms Smith—I have not looked overseas, but we looked in the legislation in Australia, in terms of various discrimination acts, and we could not find the terminology anywhere.

Senator HOGG—All right. When you are looking to the overseas situations, can you see if you can address that issue as well?

Ms Smith—Yes, I will try to; whether we get down to that detail—

Senator HOGG—It may well be that someone has come across it somewhere in their travels overseas and it might have some specific application overseas.

Ms Smith—If I can uncover that, I will. I doubt whether we will be able to get to that detail. I would still warn you that it is not a term being used in Australia. Unless there is a very real reason for having those words there—we were not sure what the term meant or what it added—it potentially raises a confusion or legal argument as to what that might mean, and we were trying to avoid that.

CHAIR—Thank you very much, Ms Smith. We look forward to your further submission or correspondence.

Ms Smith—Thank you.

Proceedings suspended from 9.35 a.m. to 9.46 a.m.

KIRKLAND, Mr Alan John, Superannuation Spokesperson, Australian Council for Lesbian and Gay Rights; and Co-Convenor, Gay and Lesbian Rights Lobby

CHAIR—Welcome to the committee and thank you for your submission and for appearing before us today. You are protected by parliamentary privilege and we welcome your participation.

Mr Kirkland—Would you like me to introduce our submission?

CHAIR—We would like you to introduce and highlight the significant points that you make and your concerns about areas of discrimination. In particular, we would like your views as to how the discrimination is best overcome.

Mr Kirkland—I will not speak for long because I believe the issues are relatively simple and I am sure senators are familiar with them, or certainly will be by the end of the day. The problems for people in same sex relationships under current Commonwealth superannuation legislation arise mostly in relation to payment of death benefits where a person who is a party to a relationship dies. There are problems with the surviving partner accessing those benefits. There are several aspects to that problem.

The problem starts with the sole purpose test in the Superannuation Industry (Supervision) Act and the requirement to pay death benefits to either dependants or to the legal personal representative of the deceased. The definition of dependant in the act states that it includes a spouse or child of the fund member. It is not an exclusive definition, but what superannuation funds and industry bodies tell us when we have spoken to them about the problems is that they are reluctant to consider payment to a surviving same sex partner because they believe it leaves them in an extremely precarious legal situation. There are a small number of funds that are prepared to consider paying to a surviving same sex partner where that person is able to establish financial dependence on the deceased and where there is no dependant as legally defined. However, that is a very small number of funds and it is a difficult test to meet. In general, we understand that funds try to avoid doing that and certainly do not publicise the fact that they may consider that because it is a difficult legal situation for them.

In some cases, surviving same sex partners are able to access benefits where death benefits are paid to the legal personal representative. By that I mean in most cases the executor of the will. That can only occur if indeed the deceased had a will and had updated it and had named the partner as a beneficiary. In most states, same sex partners do not have full rights to inherit if a person dies intestate, so if there is no will the surviving same sex partner will generally not be able to access benefits.

In the small number of cases where a surviving same sex partner is able to access benefits, a problem arises with taxation in that the Income Assessment Act allows a concession for heterosexual couples where a surviving partner receives death benefits, but that concession is not available to same sex partners. There are small numbers of cases where payments are made and a high level of taxation is incurred. The bill before the committee today will not address the taxation problem—we recognise that. We recognise that it is not possible as a private senator's bill because of the implications for Commonwealth expenditure. However, we believe that it is important to at least ensure that those people who are missing out on any sort of death benefits at the moment have access to some payments. That is why we support this bill, and I speak on behalf of the national gay and lesbian rights movement in saying that. We believe that for the legislation it will be necessary at some stage to address the problems in relation to taxation and, also, in relation to Commonwealth super funds which for the same reasons, in relation to a private senator's bill, are not covered by this bill.

There are a few other things I would add. I ask that this bill be consistent with a growing trend in state law to recognise same sex relationships particularly in relation to financial affairs and inheritance. That has happened fully in New South Wales; it has happened partially in Victoria and the ACT, and some changes towards legal recognition of same sex relationships have begun in Queensland. For people living in those states, particularly in New South Wales, there is a lot of confusion that arises from the fact that people can inherit when a partner dies intestate but they will not receive death benefits which are, in most cases, the most significant financial investment that any person has accumulated through their working life.

There is one further issue I would like to address and that is some of the changes that went through last year in one of the superannuation legislation amendment bills to allow superannuation funds to change their rules to accept binding death benefit nominations. We understand that it is the view of some members of the government that that has fixed the problem and there is no longer a problem for people in same sex relationships. Unfortunately that is not the case for several reasons. Firstly, a very small number of superannuation funds, if any, have actually taken advantage of that opportunity and changed their rules. I am sure some of the industry bodies will be able to elaborate on that a little further.

Secondly, the sole purpose test remains in relation to payment of death benefits to dependants as defined in the act. Superannuation funds tell us that they believe the law is ambiguous and they do not feel that there is

enough certainty for them to feel confident in paying benefits to same sex partners if they were to change their rules so as to accept binding death benefit nominations. Those were the issues I wanted to highlight for the committee, but I am happy to take any questions, of course.

CHAIR—Could you give us the developments that are occurring overseas? You outlined the Australian state developments: what is happening overseas?

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Mr Kirkland—I can certainly provide a list on notice of countries where relationships are recognised, though in countries—

CHAIR—In terms of retirement income?

Mr Kirkland—I am actually not sure of the situation in relation to retirement income. I understand that in the States, increasingly, same sex partners are able to access benefits upon the death of a fund member. There have been quite sweeping changes to recognise same sex relationships on a par with heterosexual relationships in countries like France and, most recently, Canada, which would apply across the board to retirement income in the same way as they apply to all other areas of the law. South Africa is another example.

CHAIR—ASFA have undertaken to give us some more information but I thought that maybe, given your focus, you might have the information readily to hand or able to access it?

Mr Kirkland—I can certainly take that on notice and provide some more information.

CHAIR—Thank you very much.

Senator ALLISON—I have just a couple of questions that arise out of ASFA's submission. They have suggested that the bill could be enhanced by ensuring that the wording explicitly states that it applies to benefits payable following a pensioner's death in retirement where a reversionary benefit is available as well as when a member dies whilst still in employment. Would you support that as an amendment?

Mr Kirkland—We would support that change. Anything to clarify the application of the bill would be supported.

Senator ALLISON—The other was the comment about a term, 'social origin', and a question about whether that was an appropriate term or what it meant and a suggestion that it be removed. Do you know what that means in this context?

Mr Kirkland—I think that is an attempt to address some issues of ethnicity and religion that are not always most easily described on those grounds and to insert a generally applicable discrimination clause into the bill. I understand that some bodies have concerns about that. We would certainly support the existing anti-discrimination clause in the bill.

Senator HOGG—I will ask the same question I asked of the first witness in respect of retrospectivity. ASFA made it clear to us that they believe that any outcome from this bill should not operate retrospectively at all. Do you share that view?

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

Senator HOGG—The other issue I raised was the fact that it gets down to the definition of 'dependant'. How does one deal, under this piece of legislation, with a same sex couple who have split? The major superannuant has a claim on them as a result of the split, because the lesser partner—if I can put it in that sense—of the relationship has been with them over a long period of time. They now find themselves in the position that, having split, the person has taken up with another partner. Does the previous partner have a claim on the person's superannuation in the same way as do heterosexual and de facto couples?

Mr Kirkland—We would argue that it should apply in the same way as it applies to heterosexual and de facto couples. This bill does not seek to give people in same sex relationships any special treatment. It is merely about applying the rights that exist for people in heterosexual relationships.

Senator HOGG—I understand that, but there may well be a definitional problem. That is what I am alluding to. Do you foresee any problems definitionally in that happening?

Mr Kirkland—I do not, because the bill merely seeks to expand the definition of 'dependant' to make it apply equally to people in same sex relationships. I cannot see any problem there.

Senator HOGG—That is all right. It is not a trick question. It is better to have these things discovered now rather than for someone to come back later.

Mr Kirkland—Certainly.

CHAIR—There are a number of difficulties with this bill. There are definitional problems and there are questions of scope. How would your members feel about being left out if they were, for example, in the military or in the Commonwealth Public Service?

Mr Kirkland—I know from correspondence that a number of Commonwealth public servants have made submissions in favour of this bill, while drawing the attention of the committee to the fact that it does not cover them. Indeed, I have funds in ComSuper from being a Commonwealth public servant, and that does not compromise my support for the bill. We understand the limitations of the bill that arise from the rules of parliament. That does not stop our wanting to do our best to fix the situation for as many people as possible at this stage.

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Senator ALLISON—I want to go back to what you said about trustees being reluctant to act on awarding benefits to same sex couples. You said that they were in a precarious legal position. Have any of their decisions in respect of this been challenged in the past; are there some examples you might give the committee?

Mr Kirkland—I am not aware of any challenges under the current legislation. Before the Superannuation Industry (Supervision) Act there was some case law about what financial dependence meant and about same sex couples sometimes being able to access benefits on those grounds. One of the greatest problems with that test that I have not already addressed is that it really does create problems for the most disadvantaged people in our society. The people who are most able to argue a case before a superannuation fund and take it through the courts are people who have access to legal advice, the necessary funds and an understanding of our system of government and law necessary to do that. The more disadvantaged people who do not have all of those resources at hand are the ones who are going to lose out the most under the current legislation.

Senator ALLISON—Does that suggest that this is a bit of a smokescreen that the trustees are using?

Mr Kirkland—I think I understand the situation of trustees in that they feel there is a great deal of uncertainty. I think they could be exposing themselves to significant costs and further uncertainty if they take a course of action that is open to legal challenge.

CHAIR—Wouldn't it be true to say, though, that in reading the decisions—and there is only a limited number from the tribunal—the tribunal members have tended to uphold the decisions made by the trustees in nearly all cases?

Mr Kirkland—In relation to payment to same sex partners?

CHAIR—Yes.

Mr Kirkland—That may well be the case. But those decisions are cases where somebody has had the resources at hand to appeal against the decision, and the fact remains that the law simply does not treat people in same sex relationships equally. Our argument is simply an equal rights argument in relation to how people organise and allocate the most significant financial investment they will ever have in their lives.

Senator HOGG—Could I just go back to the point you made about the changes made by the Commonwealth government in 1999 on the binding death benefit nominations? You have said that there has been a reluctance on the part of many funds to make changes. Without nominating them here, can you give us some indication of how many funds, if any, have made significant changes?

Mr Kirkland—I am not aware of any that have. It is information that is difficult for us to obtain.

Senator HOGG—I thought the experience of some of the people in your organisation may well lead you to know just how many have run into difficulties in having that applied.

Mr Kirkland—We tend to advise people to write to their superannuation funds. For people who want to know the status of their benefits should they die, we advise them to write to the fund and ask for clarification on the fund's position and whether they have changed their rules. I am not aware of any instances where a fund has replied and said that they have changed their rules. We generally rely on the advice of industry groups on that issue, and they tell us that few, if any, have changed their rules.

Senator HOGG—In the wake of the changes that took place in 1999, did your organisation actively lobby various superannuation funds to accept the binding death benefit nominations from funds, or did you leave that to individual members of your organisation?

Mr Kirkland—Rather than doing that at a state or a national level, we have encouraged individual members to do it with their own funds. We thought that our resources as a voluntary organisation were more effectively allocated to trying to fix the bigger problem, given that we did not think that having funds change their rules would necessarily fix the problem.

Senator HOGG—Just one last question: can you give the committee some indication of the scope of the problem that this bill is meant to overcome? Is there one couple affected, or are there two, 50, 100 or 1,000 a year? Have you got any idea of the number of people affected currently?

Mr Kirkland—It is difficult to ascertain but certainly it is perceived by people in our communities to be an enormous problem. It is probably one of the most common issues that we are approached about by people wanting advice or advocacy. Two weeks ago we had the Sydney Gay and Lesbian Mardi Gras fair day, which was attended by around 70,000 people. We had two stalls at that event and it was the most common issue raised by people who approached our stalls on their way around the event.

Senator HOGG—Thank you.

CHAIR—Thank you very much, Mr Kirkland.

[10.05 a.m.]

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COOGAN, Mr David Nicholas, Chairperson, Superannuation Task Force, Institute of Chartered Accountants in Australia

CHAIR—Mr Coogan, would you state the capacity in which you appear before the committee today, and then you may talk to your submission.

Mr Coogan—I am representing the Superannuation Task Force of the Institute of Chartered Accountants in Australia. We have members that cover quite a broad spectrum of superannuation funds across government, public sector, corporate and industry fund type environments. That is by way of background. In terms of our submission, we were supportive of the proposed legislation but raised a couple of issues. From what you have already talked about this morning it sounds as though there are some issues in terms of consistency within other parts of the legislation and identifying what some of the practical issues may be.

One of the issues that we raised in our submission was that we feel that there needs to be a comprehensive review of the policy in this area that not only looks at superannuation but looks at social security and taxation issues across the board. Another of the issues that we have specifically raised which is consistent with that issue—and I think you have already touched on this to some extent—is the definition of ‘dependants’ in trust deeds. In most trust deeds it is fairly hard coded and this legislation will require, in most instances, if not all, trust deed amendments before trustees can actually implement the legislation from a moving forward position. So timewise that raises some issues in terms of the effective dates and giving trustees enough time to make sure they update their trust deeds.

The other issue that we raised in our submission was in the area of taxation. We have not looked at it extensively, but with respect to the non-dependants that are taxed up to the deceased pension RBL using the ETP lump sum tax rules, we feel that in order that these provisions do not discriminate between same sex dependants the tax law will need to be reviewed for consistency. We are a little concerned in that area. This, I guess, leads on to the whole area of the social security legislation that does not recognise the same sex de facto spouse as a partner for determining benefits. This may lead to a reduction in benefits as a result of the asset test provisions that may not arise where joint asset provisions are considered.

Based on the time that we had in getting to our members, they were a couple of areas that we have brought to your attention. Just to summarise, we are comfortable with what is being proposed but we feel that obviously the devil is in the detail and we need to make sure that there is a review of consistency across other parts of the legislation and that, from a tax and social security point of view, all the detailed issues have been considered in terms of their impacts. I will leave it at that.

CHAIR—If I am judging you correctly, Mr Coogan, you are in favour of a holistic approach, looking at the tax, social security and superannuation issues as one, rather than an incremental approach?

Mr Coogan—Yes, because we are concerned that there may be inconsistencies in different legislation that is already out there that will cause complications for trustees, and I guess also government and the tax office. It is a matter of whether those have all been identified.

CHAIR—You mentioned that it would be necessary to change a number of trust deeds if the legislation is changed. What is the approximate cost of changing a trust deed to pick up the sorts of things that would be necessary to provide the equality and remove the discrimination?

Mr Coogan—That would vary depending upon the type and scale of fund and the complexity of the fund design. I would say, as a rough rule of thumb, it would be between a couple of hundred dollars for a self-managed fund up to, say, \$2,000 or \$3,000—hopefully no more than that—for some of the larger funds. I am not too sure to what extent it would be. There were some exemptions in terms of some of the public sector funds, but there are a lot of other state based public sector funds where that would require, potentially, changes to government acts.

CHAIR—Before I ask my other colleagues for questions, I would like to thank the institute for the consistent way in which it makes presentations to the committee. We value your participation and your input because you represent a wide sector of the Australian community and have technical expertise. I would like you to pass that back to the committees on which you serve, because the public does appreciate your input.

Senator HOGG—I just want to take up that last point that the chairman made in respect of the practicalities of the change. If it is going to cost \$200 for a self-managed fund and \$2,000 to \$3,000 for a major fund to change, is there some default mechanism that can be put in place which will overcome the need to change that? The reason I ask is this: firstly, there is the question of the money involved; and, secondly, there is the question of the elapsing of time. Obviously the far more preferable point would be for each trustee to be individually amended. I am not sure of the legal implications. Maybe there is some assistance you could give us there.

Mr Coogan—It depends on the trust deed. When SIS was enacted, there was a section that allowed for SIS to apply even though a trust deed had not been amended for particular sections of SIS. From what I understand, that has caused some problems for trustees. A lot of lawyers have suggested that, even though that section is there, as trustees it would be prudent to make sure that your deed has changed to reflect whatever the situation is like, like what we are talking about today. I really cannot answer your question definitively. It would be worth talking to someone on the superannuation legal side about that.

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Senator HOGG—In your experience, what then would be the amount of time that would be required for funds to make the appropriate changes? I would presume that each fund, whilst it might seem a pro-forma change in some way, would want to seek legal advice because they are all structured differently. What sort of lead time, from the passing of the legislation to the actual need to have it implemented, would there need to be—12 months, two years?

Mr Coogan—I would have thought, given the number of funds that are out there, that six to 12 months would be practical. It is possible it could be done sooner than that. It really gets down to the volume of funds. Trustees need scheduling of time into the trustee meetings, particularly in the larger funds, to review the changes to the deed and approve them. If trustees in Australia were aware of it through their advisers, you could shorten that period to three to six months, but I would say six months is probably realistic.

Senator HOGG—My experience generally is that for people to find out information takes longer than one thinks so one would be better to err on the side of putting it out rather than having people come at the end to claim some sort of exemption.

Mr Coogan—Yes.

Senator HOGG—The other issue I want to raise comes out of the submission that was put in by your organisation. In paragraph 3 you say:

Although the Bill appears to make minor changes to the SIS legislation the consequences of these changes are potentially much greater than anticipated.

I must put that in its correct context because I did not read the sentence before. This submission was put together by you in the light of the short time available for submissions to be made and so I understand that you have not elaborated. What are the potential consequences that might not be anticipated by legislators or by the wider community at large? While some people embrace the changes as being necessary, as being good changes, as being changes that they would like to see operating quickly, are there unintended consequences in terms of the practical application of these clauses that the committee might not be aware of, that people such as you would be aware of, that you might not have addressed in your submission?

Mr Coogan—Other than what we have outlined in the submission, the only thing that comes to mind now is the whole issue of effective date in terms of when these beneficiaries actually make a claim. So I guess the cut-off date between the old legislation and the new legislation, in terms of some of the definitions behind that, some of the effective dates, could be an issue but I think trustees generally are pretty well equipped to already handle that.

Senator HOGG—Do you see any need for any transitional arrangements in this bill?

Mr Coogan—I do not see any need for transitional arrangements. I think our view, as we have outlined, is to make sure that there is consistency with other legislation such as the tax legislation and social security side of things. We would have thought that making an effective date of six months out would be an optimistic date. Somewhere between six and nine months is probably realistic, and that would be our suggestion.

Senator HOGG—All right. Given that this is just a single piece of legislation and you have mentioned two other areas—social security and tax where there is not even a bill on the table at this stage—do you see that it is reasonable to proceed with this bill with those other bills not being even put together? Is it better to have this bill passed than to have nothing at all, or is it better to wait until one gets the whole approach, as the chair indicated?

Mr Coogan—From an institute point of view, our view is that it should wait until we have looked at taking a holistic approach not just looked at this particular bill but at the broader policy issue.

Senator HOGG—So it would be possible to proceed with this bill—and I do not know the legalistic side of this—but to give it the operational date of when the other pieces of legislation come into operation?

Mr Coogan—Yes.

Senator HOGG—So without this actually having the practical effect of operating—and I think there are real problems with that, let me just say—you could theoretically have it sitting there, having been passed but not operational, until the other pieces of legislation are addressed?

Mr Coogan—Yes.

Senator HOGG—That would address your concerns?

Mr Coogan—Yes, we would support that.

CHAIR—Just to follow that last line of reasoning: how would you suggest that the issue be pursued further? It is all very well to have legislation sitting there doing nothing but you favour trying to overcome the problem. How do you perceive the next step should proceed?

Mr Coogan—I think you would need to put together some sort of representation from different parts of the community—social security, the Australian Taxation Office and ASFA—to get down to some of the practical issues of potential overlaps with other legislation so that all those issues are identified. That would be our suggestion.

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CHAIR—What sort of committee do you think should be looking at that? Under whose authority would it be established?

Mr Coogan—I am really not in a position to answer that, I am not aware of the different structures to provide a proper answer to that question.

CHAIR—I think that is an interesting approach and certainly one that the committee will consider.

Senator HOGG—Can I go to another issue, and that is the issue of how same sex partners should be treated when there is a split in the relationship prior to the operation of this legislation. In normal marriage and de facto relationships, there is now provision for a delayed claim on the superannuant—whether it be a death or whatever it might be when that superannuation is cashed in, so to speak. Does that cause any problems for same sex partners in respect of this legislation in your institute's view?

Mr Coogan—My initial reaction to that is that I wouldn't think so. If that arrangement is already there in terms of the deferred superannuation benefit and the previous marriage, then we would not see that as changing under this legislation.

Senator HOGG—There are same sex couples out there currently who may well have had a heterosexual partner, former dependants—by way of children—or a previous same sex partner. If this legislation is passed, should those people now become eligible, because of the change in the definition that would take place, to lay a claim of previous dependency on some of the realisable benefit of the superannuation?

Mr Coogan—That is difficult.

Senator HOGG—That is one of the consequences of what you do once you give so-called equality under the legislation because, currently, individuals can lay claim to that superannuation if they are a dependant and whereas it may well exist for a previous heterosexual partner or for a previous child dependant, it does not exist for a previous same sex partner. I am just wondering how you view that, because that is something that we may well need to address.

Mr Coogan—Our view would be that if you go retrospective, that is going to cause all sorts of complexities, particularly if the trustee is making decisions in those situations. We would see it as something on a moving forward basis rather than retrospective.

Senator HOGG—So you are saying that if there were two people who had a very long same sex relationship—let us say for 15 years—and they had split in the last 12 months, you would see the dependant person in that same sex relationship as having no claim whatsoever on their previous partner's superannuation after the passage of this legislation?

Mr Coogan—That is right.

Senator HOGG—Was that the same way it operated for heterosexual de facto couples?

Mr Coogan—I am not sure on that.

Senator HOGG—I am not sure myself; that is why I am asking the question.

Mr Coogan—No, I do not know.

Senator HOGG—The reason I raise that is that I know someone who has been down this path of splitting up and putting a claim on the major superannuant's wage.

CHAIR—Thank you very much, Mr Coogan, for assisting us today.

Mr Coogan—It was a pleasure.

Proceedings suspended from 10.26 a.m. to 10.50 a.m.

ALBANESE, Mr Anthony Norman, MP

CHAIR—We welcome Mr Anthony Albanese. This is not the first time we have had a member of the House of Representatives before our committee. We look forward to your presentation, and we presume you are prepared to answer questions from the committee.

Mr Albanese—Thanks very much. I congratulate the Senate for taking the initiative in having this inquiry today. I will speak briefly to my submission and, firstly, outline the reason why I believe reform is necessary in this area; secondly, outline the process of how we have got here; and, thirdly, give a human dimension to the need for reform. The explanatory memorandum to the bill which I introduced into the House of Representatives, the Superannuation (Entitlements of same sex couples) Bill 1999, outlined five areas of discrimination. First, on the retirement of a contributor, a refusal to pay a joint pension for the contributor and his or her same sex partner; second, on retirement of the contributor, refusal to pay a lump sum benefit in respect of a same sex partner; third, on the death of the contributor, refusal to pay death benefits to a same sex partner, either by reversionary pension or lump sum benefits; fourth, on the death of the contributor, failure to investigate or acknowledge the claim to dependency of a child of a same sex couple when the contributor is not the biological parent of the child; fifth, on the death of the contributor, payment of death benefits to the estate of the contributor rather than to the same sex partner as a dependent.

This discrimination comes about because of the definition of ‘partner’ in a way which excludes same sex partners. At a time when superannuation contributions are universal and compulsory, it is untenable to continue a situation whereby the benefits of those superannuation contributions are also not universal. This is not an issue about special rights for same sex couples; this is an issue about equal rights for all. As someone who believes in the Martin Luther King philosophy that an injustice in one place is an injustice to all, I believe this is an issue which concerns the community in a very broad way.

In terms of the process of how we have got here, when I was a candidate for the House of Representatives on behalf of the Australian Labor Party prior to 1996, this issue was raised with me by many members of the community. I raised this in the House of Representatives for the first time at the end of 1996. I then conducted a campaign, including writing to the Prime Minister suggesting that it was appropriate that reform take place. On 25 May 1998, I received a reply from the then member for Braddon, who was the parliamentary secretary to the Prime Minister, and he stated, ‘The government is not inclined to amend the superannuation and taxation legislation at this time to recognise same sex partners as dependents and spouses for the purpose of superannuation death benefits.’

As a result of that, I introduced a private member’s bill into the House of Representatives on 22 June 1998. It lapsed when parliament was prorogued and the election called, and I reintroduced that bill on 7 December 1998. After having a second reading it lapsed, and I reintroduced it on 22 November 1999 for the third time.

In the meantime, the principles embodied in my bill gained the support of a very wide section of the business and other parts of the community. I understand that you have heard from the Australian superannuation association this morning, and it is in support of the principles embodied in my bill. The Society of Certified Practising Accountants had an article published in the *Australian Financial Review* today, once again supporting my bill.

The Human Rights and Equal Opportunity Commission in June of last year handed down a report entitled, *Superannuation Entitlements of Same Sex Couples*. It was unfortunate that it was tabled late on a Thursday afternoon so that no-one could comment on it. But what that did was outline, through Commissioner Chris Sidoti, the fact that the current legislation as it stands is a breach of a number of conventions, including the International Covenant on Civil and Political Rights. He recommended that Commonwealth legislation be amended to allow surviving same sex partners to benefit in superannuation schemes. He said the problem at the moment was that it was discrimination but it was legal discrimination. I find it impossible to justify, or how anyone could justify, in the year 2000 a situation in which the Australian parliament would support legislation which can be defined by its human rights commissioner as legal discrimination.

The real impact is perhaps shown by how Commissioner Sidoti came to produce that report. That came about through Greg Brown whose partner, Robert Corva, died some years ago. Greg is a tenacious fellow. After being unsuccessful with the superannuation trustees—his partner was a Commonwealth public servant—he went to the Administrative Appeals Tribunal and lost there. He then went to the Human Rights and Equal Opportunity Commission and lost there. He basically pursued it to the end point that he could. I guess I want to conclude my submission by saying that whilst a lot of the principles in this legislation, in this campaign that has been run are very important, there is also a very real human face to this discrimination, and the human face is the face of people like Greg Brown. It is their courage in pursuing this legislation which I think obligates me and the Senate committee to give support to that human face and to that courage and make sure that what Greg has been through does not have to be gone through by future generations. I might just leave it there, Senator Watson, but I would be happy obviously to take any questions.

CHAIR—I will ask Senator Hogg to lead off the questioning.

Senator HOGG—You mentioned, in Chris Sidoti's report, breach of conventions. Are they conventions that we are signatories to?

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Mr Albanese—Yes, they are. Also we are signatory to the—

Senator HOGG—It might be helpful for the purpose of the report of the committee if you could nominate what those conventions are that we are signatories to.

Mr Albanese—Yes, certainly.

CHAIR—It is 7 June 1999.

Mr Albanese—There will be a few in there. Certainly, the International Labour Organisation is one; Employment and Occupation Convention ILO 111, and also the International Covenant on Civil and Political Rights, both of which are scheduled to the Human Rights and Equal Opportunity Commission Act 1986.

Senator HOGG—Thanks. The next question goes to the matter of the definition in the bill that you have put forward where you refer to social origin. The definitional change is under subsection 52(2), where it says:

(i) not to discriminate, in relation to a beneficiary, on the basis of race, colour ...

et cetera, and then, at the end:

... political opinion or social origin.

ASFA said to us this morning that they were concerned about the words 'social origin' because there is no definition, as such, of social origin, whereas the others may well be covered elsewhere. I do not think I am being too hard in saying that they said it might be worth while to delete those words 'or social origin' rather than put another complicating factor in the way of the legislation. As you put the thing together, do you know where the words 'social origin' came from and can you give us some sort of history and background as to the purpose and intent of the words in that definition?

Mr Albanese—The intent of the words essentially is to refer to something that is not spoken about much these days—class. So it is class of people in terms of discrimination. One of the great benefits of the Senate committee examining the legislation is that while I am an advocate of the principles involved in the bill I certainly would not object to changes to make it better. I am not a lawyer; I do not pretend to be an expert in drafting legislation. This bill was drafted in consultation with the clerks, in the usual way that private members' bills are, and perhaps ASFA have a point that I certainly would not object to.

Senator HOGG—Do you know the source of the words 'social origin'? It would not in any way detract from the bill if this committee recommended that those words be either deleted or changed in some way?

Mr Albanese—Not at all.

Senator HOGG—The other point that was canvassed this morning with the Institute of Chartered Accountants was the issue of the operational date of the legislation. They said that their preferred position was to have this piece of legislation not operate in isolation, that there were changes that were necessary in both the social security and tax areas as well. They said—and I hope I am not doing them a disservice in the way I paraphrase their point this morning—that they would see it would be better for changes to all three bills to operate at one and the same time because there definitely will be problems associated with the social security and the tax bill.

Let us assume that that is the case. Would you see anything wrong in this bill being considered by the Senate and passed subject to the changes being made and coming into effect in other areas such as social security and tax legislation, or do you see this legislation as being necessary to operate independently of changes that may well be needed in the social security and the tax area in the future?

Mr Albanese—You have raised a very big issue—the broadening, I guess, of the principles embodied. I am a supporter of equality across the board in terms of social security and taxation legislation. One of the things that needs to be acknowledged is that there is a potential saving of government revenue. At the moment, because the social security legislation, for example, is discriminatory, a number of people who are in same sex relationships are able to claim benefits who would not be eligible if the discrimination in that legislation were removed. So there are pluses and negatives for people who are in same sex relationships if you adopt a principle of equality across the board.

I do not think you can have your cake and eat it too. I support changes across the board. However, as my explanatory memorandum outlines, because it was a private member's bill, as you would be aware it could not have a negative impact on government revenue. Therefore the tax legislation could not be impacted directly

and therefore, also, Commonwealth public servants, members of parliament and members of the defence forces were all excluded from my bill. The reasons for that are explained in the explanatory memorandum.

I would be concerned about any suggestion that you have to get everything right before change goes through in terms of looking at the entire social security, taxation, et cetera, legislation. My concern with that is simply the time factor. Whilst the government has stalled on reform, people like Greg Brown and many others have missed out on entitlements to which, in my view, they were due. You have got a bill that has been introduced three times in the House of Representatives—and I am a fairly stubborn person in terms of having given a commitment that I am not going to go away if it lapses again—and it will be moved again.

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Senator HOGG—Could I just qualify that: I am not talking about the bill lapsing. What I am talking about is the operation of this piece of legislation. I am talking about the bill being considered by the Senate as it stands and then, presumably, passed by the Senate, but its operational date then being subject to the other areas being fixed up. In other words, the bill would not be rejected by the Senate; it would be passed but would be subject to the operation of complementary changes. I am not aware of the exact detail of those changes but they would be necessary in the areas of social security and tax. That way one might overcome difficulties in terms of legal vagaries that will arise. However, there is a problem with that and that, of course, depends then upon the government bringing forward the appropriate pieces of legislation in the tax and the social security areas because of the impact on the budget process. That is one dilemma that has been put to us this morning that the committee may well have to deal with. I am just seeking your advice and then I will come to a separate issue. If we do treat it separately then what sort of operational period would you see as being reasonable? That is another issue altogether.

Mr Albanese—I would have thought that, if it were going to go down the track of passing the legislation with an operational date after other complementary legislation was carried, you would need a safety mechanism, if you like, which put a time frame, a date, on when the complementary legislation would need to be ready. If that occurred I would certainly not have a problem with that.

Senator HOGG—Could you give me some idea of what you would consider as reasonable? The Institute of Chartered Accountants said that, on the passage of this legislation, there would be a minimum of six to nine months required to enable trustees to get their funds to have their trust deeds changed and so on. That is a bare minimum. Given that is the bare minimum to get that aspect done, what sort of timeframe would you look at if we adopt the scenario that we are now discussing?

Mr Albanese—I hesitate to put a precise date on it, but in terms of government legislation, the government has been on notice about this for years. You have had a bill in the parliament for two years. You have had numerous Senate reports in the past into this issue. In my honest assessment, I would have thought that the government could fix any complementary legislation in weeks rather than months. My bill was going to be seconded by the member for North Sydney prior to his appointment to the ministry. Of course, he is now the Minister for Financial Services and Regulation. So one senior member of the government is in a position to be very conscious of the need for change. The Treasurer certainly has been aware of this issue, as have obviously the superannuation funds themselves, as well as departments such as Treasury. I would have thought that it would need complementary legislation.

Senator HOGG—To stop you there, if there is complementary legislation, it would then require most likely that there would be a Senate committee to peruse that legislation and the processes that are involved there. Given the six to nine months, if nothing else happens and it is just treated as a single piece of legislation, would you accept, say, 12 to 18 months as being unreasonable?

Mr Albanese—I would like to see this issue completed by the end of this year. That is a view that I have. It is a view, and I know the Australian Council for Lesbian and Gay Rights who are due to appear before the committee have that view. Obviously, practical things intervene in politics, but this is an issue that has been the subject of a lot of prevarication and a lot of delay until now. I think it is a matter of relative urgency. I note that various state legislation has removed discrimination in areas that relate to financial matters—for example, New South Wales. The New South Wales government was re-elected in March of last year. They had legislation in the chamber across-the-board that was much more significant than this in terms of legal impact and the impact on people. They did that in a month.

Senator HOGG—My last question relates to this issue. Are the relevant changes necessary to either social security or tax legislation available to the committee?

Mr Albanese—The explanatory memorandum outlines some of the other bills that would need to be amended. That is not a comprehensive list, but it certainly is outlined there. So that is available to the committee.

Senator HOGG—I do not think I have the explanatory memorandum.

Mr Albanese—The one that was attached to my bill.

Senator HOGG—We did not have an explanatory memorandum in the Senate. That is the unfortunate—

Mr Albanese—We House of Reps members need more explanation than senators.

Senator HOGG—Yes, I can understand that. I am glad we have got that on the record.

Mr Albanese—He says, trying to appeal to the Senate committee.

Senator HOGG—What was the source of the cross-referencing to the other bills, do you know? Was it just through your clerks?

Mr Albanese—Through the clerks, yes.

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Senator HOGG—That is something that we can pursue, if our committee goes down that path.

Mr Albanese—That refers to a number of bills which relate to superannuation and also to the tax legislation.

Senator HOGG—Thank you, Chair.

CHAIR—In the submission, No. 20, 'The need for recognition of same sex relationships in superannuation legislation' from the gay and lesbian rights lobby, they state that, in most Australian states, legislation does not recognise same sex partners as beneficiaries where persons die intestate. In these circumstances, same sex partners will be excluded from receiving the benefits. Following the line that Senator Hogg was promoting, even if you are successful in getting changes, not only to superannuation but social security and tax, there will still be a problem in some of the states. How do you respond to that?

Mr Albanese—How I respond to that is to see social progress as something that is a continuum. What occurs in terms of a movement towards equality is that legislation should be passed by both Commonwealth and state governments which removes discrimination, whether it be on the basis of sexual preference, gender, age or race. That I think is the principle I start from. I do not pretend to be an expert on every minutia of gay and lesbian relationships and legislative status, but it would appear to me that that is an argument for more reform in fixing that up, not for saying, 'We will not do anything in the area of superannuation because there would be a problem created with state legislation, which is obviously deficient at the moment.' So that is my starting point.

I think that if that is your starting point then one of the reasons why superannuation is a logical next area of reform is that it is an obvious need for reform that does not, I believe, threaten anybody or anyone else's rights or indeed their obligations.

CHAIR—It is a question of how this committee progresses this issue and whether, for example, it takes a holistic approach—which the Institute of Chartered Accountants recommend—and establishes some sort of forum or committee. Given the concern in submission No. 20, it would appear that there would have to be state representation as well. That was the reason for my question. Staff have pointed out to me that there is a difference in what was in your legislation in the House of Representatives and in the Senate. I refer to item 5, the application of the amendments, which states:

The amendments made in this Schedule do not apply to or in connection with the public sector superannuation schemes established under the *Superannuation Act 1976*, the *Superannuation Act 1990* and the *Military Superannuation and Benefits Act 1991*.

Why was there that difference between the Senate and the House of Representatives; why was it necessary to put that in?

Mr Albanese—In the House of Representatives?

CHAIR—Yes.

Mr Albanese—Because private members bills in the House of Representatives cannot impact on government revenue, and therefore they had to exclude the public sector superannuation schemes.

CHAIR—Whereas that does not apply in the Senate?

Mr Albanese—To be accurate, I do not know. It is very clear in the House of Representatives, and I was advised that my bill would not be able to be introduced in the House of Representatives unless it did contain that clause, which is explained in the explanatory memorandum that I also introduced into the House of Representatives.

CHAIR—If it is passed by the Senate and goes back to the House of Representatives, do we or do we not have this application in it?

Mr Albanese—I am not a lawyer nor am I the Clerk of the House of Representatives

CHAIR—It is just that it has just added a complication.

Mr Albanese—I do not know, Senator. I think what is possible would need to be clarified by the appropriate Senate and House of Representatives officials.

CHAIR—If it was passed by the Senate, there may be a problem with it going back to the House of Representatives with that clause in it.

Senator HOGG—No, with that clause in, as I understand it.

Mr Albanese—I would have thought that a bill that has been passed by the Senate would have a different status from one which is moved by an individual member of the House of Representatives.

CHAIR—We need to get some clarification on that from the clerks.

Senator ALLISON—On that point, how realistic is your expectation that this bill will be successful in passing, firstly, the Senate and then the House of Representatives? What is your expectation? You say that you are a stubborn person, that you have introduced it three times and that you will keep doing it, but my question is: what, realistically, do you think will happen?

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Mr Albanese—I think it has a very good chance of entering into legislation. I think that one of the reasons why Senator Conroy, as the shadow minister for financial services, introduced the bill was to get around the roadblock which had been placed in the House of Representatives by the government regarding further debate. I am hopeful of receiving support from the Australian Democrats and the Greens as well as from my own party—and from the government as well, frankly—in the Senate. I would expect a majority there. With regard to the House of Representatives, apart from the letter sent by the Parliamentary Secretary to the Prime Minister which rejected the need for reform, a number of members are on the record as having spoken in support of the bill, including the member for North Sydney, the member for Bradfield and a number of other government members.

Only one, that I am aware of, has said that they are opposed to the reform. Certainly in a practical sense as well I am very aware that a number of ministers in the government would like to see the reform occur, including people who have ministerial responsibility in areas of economic matters simply because it is, as you have heard, probably, and seen from the submissions already, really an annoyance as much as anything else for the trustees of superannuation funds to be put in this position. For a significant section of the community it undermines the attractiveness of superannuation at a time when the government is stressing the importance of national savings to our economy and to the future in terms of income support for retiring Australians. I would have thought that this was something which could be embraced and be very much something which flows through without any fanfare. I think that, when put on the spot, the problem has been getting people to have a vote. I think it is very hard for people to put up their hand in the year 2000 and say, ‘Yes, I stand for discrimination.’

Senator ALLISON—So the ALP, when put on the spot, will vote for this legislation regardless of whether the other bits—social security and tax—are in place?

Mr Albanese—It has been introduced by the shadow minister to the Senate. It went to the appropriate caucus committee two years ago. It received support, and has also been raised by myself in the ALP caucus. I am yet to have a member of the ALP tell me that they are opposed to the bill. I understand on issues like this that some people have very strong views, and I respect those, frankly. I respect the right of people if they so choose to say, ‘On my conscience, due to a moral judgment’—from whatever political party they are from—‘I do not agree with reform.’ This bill does not ask for any moral judgment. It has nothing to do with that. You can disagree with someone’s lifestyle but still have respect for them. I think that is what the bill does.

Senator ALLISON—You suggest you are something of a reformer in this arena and you have talked about the need for gender, sexual preference, age, race and other discrimination to be eliminated. Where do you see former Senator Sid Spindler’s private member’s bill in this respect?

Mr Albanese—My personal opinion is that it is a good bill. However, I think that often the old saying ‘You have to walk before you can run’ applies in this area. I think that social progress occurs when real change occurs. I think that certainly in terms of raising consciousness in the parliament and in the community Senator Spindler’s bill is an admirable thing. However, I do not believe at the moment there is a majority, certainly in the House of Representatives, to support that. I think there is a role for people to be out front but there is also, I think, a role for legislation which is able to bring the community with it. When you have people like Christopher Pearson and others writing feature articles in the *Financial Review* specifically supporting superannuation reform, then I think we should seize the opportunity to get this reform now. I think wider bills such as Senator Spindler’s obviously require more discussion.

Senator ALLISON—To continue on that theme of the politics of all of this, the Festival of Light said that discrimination was necessary to promote the institution of marriage. In your own electorate, amongst your constituents, have you discovered a shift in attitudes? How many letters has your office had suggesting that they would agree with the Festival of Light? And what real difference has the last four years made in terms of attitude?

Mr Albanese—I think it has made a substantial difference; as time goes on, fear gets broken down. I respect their view but I am disappointed that the Festival of Light remain with that view. To give you an anecdote, at the last election campaign the Gay and Lesbian Rights Lobby had a forum for candidates in Grayndler. The Call to Australia candidate attended that forum and, whilst he certainly did not embrace the need for legislative reform, he said to that meeting that he walked away respecting people's choice. I think it was an important educative process.

In terms of my electorate, I have been pretty public about this issue for three years now. In that entire time I have not received a single negative letter or a single negative phone call about this issue. I have received a lot of positive feedback, both from my constituents and also from the broader community, industry and business. The number of people who have come up to me when I speak at a school or a function and said, 'By the way, I want to tell you my story: I've been in a relationship for 17 years—or 25 years or 40 years—and thank you for standing up for me,' is quite heartening. One of the most rewarding things about the job that we share is to get that feedback.

Tomorrow night, some 600,000 Australians, including my mum who is a pretty straight Catholic woman from inner city Sydney, will go to watch the Gay and Lesbian Mardi Gras. Twenty-two years ago that was a political act based upon asking for some legal recognition and some acknowledgment that there were gays and lesbians in the community, and people were bashed and arrested and ended up in Darlinghurst jail. Twenty-two years on, it is a celebration which will have a Liberal Party float, a Democrats float and Labor Party floats, it is of an enormous economic benefit to Sydney that is quite extraordinary, and the *Sydney Morning Herald* for the last three years has had lift-outs and guides to the Mardi Gras. That is symbolic of the change in the last four years whereby people, with more familiarity, recognise that we need to embrace the diversity that makes this country a great place to live, rather than fear it.

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Senator ALLISON—One of the constraints we operate in in the Senate, and no doubt in the Reps as well, is the argument on this issue that it is too complex, that too many bits of legislation need to be changed and that nobody can tell us where they are and what they are and how they need to be altered. The Democrats put up an amendment to legislation not all that long ago suggesting that the government be sent away to actually do that work. The ALP did not support it, otherwise we would have got it up. On reflection, having heard a bit about the sorts of things that are being said about your bill, would you see that as a useful mechanism for advancing this whole question?

Mr Albanese—I would have hoped that the government would be doing that already. The government certainly knows that it is occurring, and the government has been asked a number of times to examine the legislation that is there. I am concerned about anything that would further provide an opportunity to delay action. In terms of the other alternatives which are there, which have been outlined pretty clearly, the ALP has been in a position whereby we have been unable to put your amendments in context; we have been unable to support legislation or amendments to legislation to the superannuation legislation amendment bills—the SLAB bills as they are known—of which we are now up to No. 4; and we have been unable to support amendments which would fix this if we are not supporting the bill itself. That is what occurred with that legislation.

We were not supporting Superannuation Legislation Amendment Bill (No. 4). Therefore, we were not able to support the amendment. That is what occurred there, because it would be a ridiculous situation for the ALP to be put in: for us to move an amendment to amend legislation and then vote against the amended legislation.

However, we were successful—thanks to the ALP and the Democrats and Senator Brown—in amending the do-it-yourself funds. That would have, as the government carried the legislation through the House of Representatives, discriminated against same sex couples. That legislation was amended so that now you have a situation whereby do-it-yourself super funds—I think that was SLAB No. 3—are okay, but its bigger employee contributory funds are not. So the world did not tumble down with that reform. It happened; the Senate supported it; it came back to the Reps; it went through the Reps in the blink of an eye. So if people were serious about their objection and if the government really intended to oppose this legislation, then what they would have done, if they were going to be consistent, is oppose the ALP, Democrat and Brown amendments that happened to the do-it-yourself funds. So it shows it is possible.

I think the argument that it is too complex is not one that really washes with me. It is pretty easy to change. My bill is a very short bill. It does not need a great deal of thought to argue for a change to things in a

fundamental way in which people's partners are recognised. That is really all it is about; it is pretty fundamental. If the government says, 'This is too hard and too complex,' I just do not think that has a lot of credibility with people out there in the community for what is, in my view, a very simple principle.

Senator HOGG—I want to raise the question that I have raised with all the witnesses this morning; that is, the effect on long-term partners who have now separated. Will they have a claim to superannuation post the operation of the date of this, where they were dependent in the sense of a former relationship, or do you see a line being drawn in the sand?

Mr Albanese—I would see that they should be treated in exactly the same way as if it were a heterosexual relationship.

CHAIR—Thank you very much.

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[11.40 a.m.]

McDONALD, Mrs Margaret, Director, Superannuation Complaints Tribunal**MULLINS, Mr Greg, Assistant Director, Superannuation Complaints Tribunal**

CHAIR—Welcome. We received your submission this morning. Thank you very much for that, and also for appearing before the committee. I ask you to speak to your submission.

Mrs McDonald—I really do not have a lot to add to it but I would like to say that you might be aware that the chairperson of the tribunal regrets that he is unable to be here today because of a prior commitment. He has, of course, signed the submission that you have received.

I suppose the first point in that submission goes to the fact that the tribunal actually receives very few complaints involving same sex partners. Those that we do, of course, are all about the distribution of death benefits, and the complainants are from same sex partners in the case where the trustees' proposal is that they not receive any of it or not all of it. As I have pointed out, we are unable to be precise about it because, unfortunately, our computerised complaints management system does not enable us to record or retrieve that sort of data.

When we do get them, the way in which we go about dealing with them is much as outlined in the submissions I had the opportunity to glance through while I was sitting here before. Because of the legislation and the way in which Commonwealth public sector superannuation funds define 'dependant' and 'spouse'—and this is echoed in other trust deeds of other regulated funds—same sex partners cannot qualify as a spouse dependant under either the legislation or the provisions of the trust deed. Therefore, the tribunal, as the trustee does, focuses on whether or not this same sex partner who is making a claim upon the benefit can meet the definition of being dependent upon the deceased member—that is, financially dependent upon.

Sometimes they can, and the only two determinations that the tribunal has handed down in these matters—one was in early 1996 and one was about halfway through 1997—went precisely to those issues of whether there was financial dependency. In both of those cases they found that there was, and they referred to financial dependency and interdependency. So they looked at matters like shared property, shared loans—loans taken out in common—and shared costs rather than looking at whether or not they lived together in a marriage-like relationship because that was irrelevant because they could not meet that part of the requirements of the trust deed.

The outcomes on the facts of the cases differed. In one case the tribunal awarded the same sex partner more of the benefit. In the other case the tribunal left the trustees' decision alone. I have set out a little bit more of the details of that and I could come back to them if the senators want me to.

At the moment we could not interrogate our database but I did do a pretty thorough manual search, assisted by Mr Mullins—it appears that we have only one complaint on the books at the moment involving a same sex partner. That is a very recently arrived complaint and it is in the early stages of inquiry. At this stage the complainant is focusing all of his arguments and providing evidence in support of those arguments around the nature of the relationship, alleging that they were a de facto couple living in a loving, caring and committed relationship rather than focusing on whether there was financial dependence or interdependence. We have written back to him seeking more information as to financial dependence and we are still awaiting his response to that. We are not quite sure where that complaint will go at this stage.

The fourth point we have made in our submission is basically saying that as to our views on the proposed amendments it is not proper for the tribunal to have views. This is a matter of government policy. Section 37 of our act requires the tribunal to make decisions that are fair and reasonable in all of the circumstances in relation to the trustees' decision and the complainant. We have simply commented that it is for the parliament to decide the boundaries of that. We have made a comment on the inconsistency in the proposed amendments between public sector superannuation members and members of other regulated superannuation funds but again commented that it is for the parliament to determine that policy. We certainly acknowledge that there will probably be a considerable call upon the public coffers if that amendment were to go the other way. That is all that I wanted to say at the moment.

CHAIR—When you say a 'considerable call' on the public coffers, of what magnitude do you think?

Mrs McDonald—I am afraid I do not know. I have not put my mind to that. Who knows how many public servants or members of the Commonwealth public sector superannuation funds are in same sex relationships? I do not know. If it is commensurate with the general population ratios—you have probably heard more than I

have on this—I understand that they are estimated at between 10 per cent and 25 per cent. That would be just a stab in the dark—I really would not know.

CHAIR—Why do you think you have heard so few complaints? Is it because trustees handle it with a degree of sensitivity, accuracy and fairness?

Mrs McDonald—Unfortunately I am not in a position to know that either because we do not know what goes on out there in the decision making by trustees until people come to us with complaints. It is possible that trustees are making decisions to award benefits to same sex partners, although I would doubt whether that were so on the basis that they have to meet this financial dependency test and that is often very hard because they are often both working. Sometimes they have considerable incomes and they may choose to live in a quasi-independent way economically. So establishing financial dependency can be very difficult. Those are the ones that come to us, I suppose.

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As to the absence of complaints in the public sector, it is possible that the same sex partners of public sector deceased members are aware of case law, particularly AAT decisions, which have scrutinised the legislation and found the denial of benefits to same sex partners to be lawful. Perhaps they have acknowledged that and have not bothered to make a complaint to the tribunal. But that is only guesswork, I am afraid.

Mr Mullins—The only other circumstance apart from financial dependency in which a benefit could possibly be paid to a homosexual de facto spouse would be where there was neither an estate nor any dependant, and in that circumstance it is generally, under the legislation, open to a trustee to pay a benefit to any other person. So there would also be some circumstances in which that may have occurred. Obviously, the success of that going through, and in terms of it going through with a complaint, relies on there not being other people related to that person who want to challenge that decision. For example, a parent who wanted to challenge that decision could seek letters of administration in respect of the person or make an objection to the tribunal in those circumstances. But that is one other way in which a benefit can actually be paid.

Senator ALLISON—Under those circumstances, is it a matter for the tribunal to deal with?

Mr Mullins—It still could be because the trustee in that circumstance where there is no estate and no person they can identify as a dependant has a discretion to pay it to any other person. So there could be a matter of choosing, for example, between the de facto spouse and the brother or sister of the person or their parents. Any of those people could come to the tribunal arguing that the discretion should have been exercised in their favour.

Senator ALLISON—Can they take this to a court of law as well, or not? Is it just the tribunal? What are the other options?

Mr Mullins—It would be open to them to sue in a court of law.

Senator ALLISON—Do you keep tabs on how much of that is happening?

Mr Mullins—No.

Senator HOGG—In what circumstances is the financial dependency test applied? Is it just in the case of same sex couples?

Mrs McDonald—No, not at all. The initial provision is the discretion for the trustee to pay to one or more dependants. If it is unable to establish a dependant—defined most typically as a spouse or child—then it will seek whether or not there is a legal personal representative, an executor of an estate or a person who has been granted letters of administration. Then, as Greg said, after that it can make payment to any other person.

In looking at dependant, if there is not found a relationship dependant, then they will look to see whether there is any other person who is, or was, dependent upon the member at the time of death. That can literally, I suppose, be any other person. But the tribunal has found sometimes financially dependent persons to be parents. In one of these cases here, there was a father and a sister in 1996 whom it found to be financially dependent because the deceased had made regular payments to them—to his father by way of supplementing his income, I think his father was a pensioner, and to his sister by way of supporting the sister's infant child by paying educational and other expenses. So both trustees and the tribunal will look to see whether any other person was financially dependent, irrespective of gender.

Senator HOGG—I will come back to that in a moment. Are the two cases you have cited in your submission in any way substantially different from the way a heterosexual couple would have been treated?

Mrs McDonald—Possibly.

Senator HOGG—If so, in what way?

Mrs McDonald—Going to the second one first, the complainant was the same sex partner of the deceased member and had been for 30 years. One could be excused for speculating that if that person had been a female

then the trustee would not have looked beyond that person to pay the benefit to anyone else; whereas in this case they looked to pay it to the father and the sister. It is quite unusual for a trustee to pay it to a father or a sister, because they do not meet the definition of dependent. They are neither spouse nor child and they are usually not financially dependent. So one might speculate, as I said, that had that same sex partner of 30 years been a woman, she might have received the totality of the benefit.

In the other case, let us imagine the same sex partner was a woman but not the mother of the deceased member's son—who, from memory, was a seven-year-old—and that they had lived together for five years, say in a de facto relationship. Would the trustee and/or the tribunal have paid 40 per cent of the benefit to the female partner and 60 per cent to the son? Again, we do not know but it is possible that there are differential values there.

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Senator HOGG—Thank you very much for that. Just going back, it seems to me you have used two terms, and I do not know if I have caught on to them correctly: one of financial dependency and one of relationship dependency. There seems to be a distinct difference. Am I correct?

Mrs McDonald—Yes.

Senator HOGG—The reason I am interested is that the bill is looking to insert a new definition in the act, and I am just wondering what definitional problems we might run into that then serve as a problem for yourself in determining matters. If there is a relationship dependency as opposed to a financial dependency, that is good. Does that raise other issues that need to be considered by this committee?

Mrs McDonald—I will address the first part of the question first. Yes, there is a distinct difference. The relationship dependency is automatic, if you like. If you are a spouse then you are a dependant in terms of the legislation and the trust deeds, even if you are no longer living together. You might have separated 15 years ago but never divorced. If you remain a spouse then you are a spouse and you meet the definition of 'dependant' in the trust deed. The trust deed does not necessarily have to give you any money but it has to take you into account in making its decision.

Senator HOGG—Would that apply to a same sex couple who had been together for a long period of time and had parted 15 years ago?

Mrs McDonald—As I understand the amendments it would, yes.

Senator HOGG—This is one of the reasons I have raised it with other people this morning.

Mr Mullins—I think the issue is that there are currently two ways of being a spouse: one is being a legally married husband or wife of that person and the other is being a de facto spouse. If you are the legally married husband or wife of that person, if the marriage certificate is still there and you have never been divorced, then you are a spouse, regardless of what your financial circumstances or your living circumstances are. If you are a de facto spouse then there are a number of factors the tribunal needs to consider, including the length of the relationship, whether it is mutually exclusive, whether or not there is a sexual relationship, financial interdependency—there are all these factors that are considered. Normally in the situation where a de facto spouse of the opposite sex had not been living with that person, or the relationship had ceased 10 years previously, then that person would not be considered to have been a spouse at the date of the person's death. In that circumstance—

Senator HOGG—Would they be recognised as having some legal claim, maybe?

Mr Mullins—They would have to demonstrate that they have financial dependency.

Senator HOGG—All right. My point is that, if this piece of legislation passes, one would consider that you would apply the same rules to the same sex couple as you would to the de facto or to the married couple who had split?

Mrs McDonald—Yes.

Mr Mullins—Except that the married couple are different. If they are not divorced, it is really just a matter of whether that person is the spouse. It is very difficult to establish once the relationship has ended whether that person was actually a de facto spouse.

Mrs McDonald—To answer the second part of your question, I do not see that it would create any different problems. I think, as you suggested, effectively trustees and the tribunal after them in reviewing their decision would apply to the same sex de facto partner the same criteria that they apply now to opposite sex de facto partners. So I do not see that it would create any more difficulties for trustees in arriving at their decisions.

Senator HOGG—Thank you. The other issue that I have raised here is that I currently understand that, where there are people who have split in a marriage, there can now be a claim on the superannuation by the

lesser partner, generally on retirement or at death. Would that be the same case for either a person living in a de facto relationship and/or a single sex relationship where they could have a claim on part of the superannuation of the person when they die or retire?

Mr Mullins—I think generally not because that entitlement is arising out of the marriage and the family law entitlements in terms of property settlements, and we have seen recent moves towards allowing superannuation to be divided as part of a property settlement. In fact there have been some Family Court orders where, as you are suggesting, they have ordered that, on retirement, the husband, for example, will provide \$100,000 of his superannuation to his wife. But those circumstances are arising out of family law and generally—

Senator HOGG—I accept that. Is that something though that you will have to deal with as a result of changes here? A complaint might come before your tribunal based on the fact that these two people had a 30-year relationship. They may have split within the last 12 months; one may have died. Will that see claims coming before your tribunal for that person to be a legitimate dependant? If so, is there a line in the sand that we need to draw to say that whatever has happened before, let us say, 1 July this year, is just bad luck but post that date, it comes into account, so that we do not end up with problems in your complaints tribunal that have been created by our legislation?

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Mrs McDonald—It is not for me to say that you should draw a line in the sand. The parliament has been careful in drafting the Superannuation (Resolution of Complaints) Act that we operate under and in amending it to put time frames around complaints, so you do not have old complaints coming in and people popping in out of the 1980s trying to make claims in the new millennium. That would be for the parliament to decide. I think there is an in-built protection. For example, if a 15-year same sex relationship ended at a certain point and some years later the member of the fund dies and there is a benefit for people to make claim upon, if that former de facto partner makes a claim, the trustee and the tribunal would look at the relative claims of that person against the relative claims of other people. They may decide that there was an entitlement to all or part of the benefit or they may decide that the relationship was long since over and there had been a form of financial settlement and therefore that person did not have strong claims upon the benefit. So again it would be treated in the same way under the proposed amendments as if the same sex partners were opposite sex partners.

Mr Mullins—Entitlement only arises if the person is the de facto spouse at the time of the member's death. We have had some situations in which there have been disputes in terms of heterosexual de facto partnerships about whether or not that person was still the de facto spouse at that time. I would imagine those same issues could arise with homosexual de facto spouses but generally it is very difficult to establish that the relationship was ongoing if the people had ceased living together.

Senator HOGG—How many such disputes would you have in any one year?

Mrs McDonald—In relation to same sex partners?

Senator HOGG—No, heterosexuals.

Mr Mullins—I would estimate one or two. It is pretty rare.

Senator HOGG—It is not something that is common?

Mrs McDonald—No.

Mr Mullins—No, it is not going to cause great problems.

Senator HOGG—So we would not expect it to be common therefore in the same sex partners as well?

Mr Mullins—No.

CHAIR—Mrs McDonald, reading from the latest tribunal newsletter, am I correct in saying that this would be your last involvement in that area of responsibility? Are you moving on or being transferred?

Mrs McDonald—No, not unless I do not know about it.

Senator HOGG—You would be surprised what you find out at these Senate committees.

CHAIR—You have had a role there though, haven't you?

Mrs McDonald—It is Neil Wilkinson's last statistical bulletin so perhaps there is a little bit of misunderstanding there. That was his farewell edition.

CHAIR—But you have been largely responsible for writing it, haven't you?

Mrs McDonald—Yes, I take responsibility for writing it.

CHAIR—Also, I think, you had strong advocacy for the continuance of the tribunal at a time when its future was very much under the microscope. You provided a lot of support there. I would like to take this opportunity of publicly thanking you for that.

Mrs McDonald—Thank you.

Senator ALLISON—While we are on that subject, can I ask how the waiting list on complaints is going now that you have three new commissioners?

Mrs McDonald—As far as I know, we do not have three new commissioners. We have a new deputy chairperson who began two weeks ago—about 14 February but do not quote me on the date. Neil Wilkinson finishes on the 13th and the new chairperson takes over on 14 March. I have heard it said that there is perhaps an intention by the minister to appoint three new part-time members to the tribunal.

Senator ALLISON—It has not eventuated yet?

Mrs McDonald—To the best of my knowledge the minister has not made an announcement on those new part-time members. The act allows for 10 part-time members. At the moment there are seven.

Senator ALLISON—We will try and hurry that up for you next week.

Mrs McDonald—Thank you. In answer to your question as to the state of the queue, it has not really moved insofar as while the tribunal is back in business and is hearing matters at review, newer complaints are taking their place in the queue, so because of the—in my opinion—current state of the resourcing of the tribunal we have not been able to really tackle that backlog effectively.

CHAIR—Thank you very much, Mrs McDonald and Mr Mullins.

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Mrs McDonald—Thank you.

Proceedings suspended from 12.08 p.m. to 13.35 p.m.

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DORAN, Ms Jennifer Anne, Senior Industrial Officer, Australian Council of Trade Unions

CHAIR—Welcome. It is not the first time that you have appeared before our committee, so I think you are aware of the usual processes of questioning and I invite you first to speak to your submission.

Ms Doran—Thank you, Senator. The ACTU welcomes this opportunity to put our position to this Senate committee. We have not put in a written submission to the committee, but that was on the basis that we would be giving an oral submission in these proceedings. We strongly support the bill that is being investigated by this committee, the Superannuation (Entitlements of Same Sex Couples) Bill. We do so on two grounds: our longstanding commitment to equality of opportunity and opposition to discrimination, both in the workplace and in society generally, and our longstanding support for superannuation entitlements for all Australian workers.

With respect to discrimination, the ACTU Congress in 1995, in the latest restatement of our policy principles, adopted a policy regarding equal employment opportunity that specified that all workers are entitled to equal employment opportunity and, in particular, that there should be no discrimination in wages and employment on the basis of sex, race, religion, disability, sexual preference, pregnancy, marital status or family responsibilities. Over time, our commitment to antidiscrimination has been broadened as a union movement and now clearly encompasses sexual preference. In all of its policies and programs the ACTU seeks to have this fundamental policy commitment upheld. On behalf of affiliated unions, the ACTU regularly comments on public policy issues such as this legislation and, in terms of our submissions on any proposed legislation, both federal and state, we seek to have this policy position supported.

We supported the Sex Discrimination Act federally and were deeply involved in the consultation process and drafting process of that legislation, the establishment of the Human Rights and Equal Opportunity Commission and the associated legislation that that commission oversees. We have strongly supported the inclusion of antidiscrimination provisions in the Workplace Relations Act and its antecedent legislation. So we support this legislation as an extension of the fundamental right of all Australians to equality of opportunity and freedom from discrimination. We also support this legislation on the grounds of our longstanding commitment to superannuation. The ACTU has been committed to expanding the spread of superannuation coverage equitably to all members of the Australian community since the 1970s. At a time when this committee is probably being asked to look at all the problems that might arise in terms of extending superannuation benefits in this legislation, it is worth remembering just how bad the superannuation industry was not so very long ago.

At the time that the ACTU embarked on its campaign to extend superannuation to all members in the work force, superannuation was the domain of a very small section of the community. Only one in four women had superannuation in the early 1980s and only one in two men. There were many industries which had no access to superannuation at all, and at that time they were industries where women predominated. Many schemes specifically disallowed women and part-time workers joining—the schemes were designed for male breadwinners with dependants, with discriminatory entitlements for female workers. At that time, even if women were involved in superannuation schemes they normally did not get anything out of it because of the vesting requirements in relation to continuous employment not catering for women moving in and out of the work force.

Those requirements and those arrangements were in place not very long ago; that is, in the early 1980s. Since then we have obviously seen a sea change in expectations of, and the performance of, the superannuation industry. Since the 1986 national wage case introduced three per cent award superannuation and since the superannuation guarantee charge legislation, we have seen the gradual extension of superannuation to the majority of Australian workers. In 1991 our superannuation policy was noted at congress. At that stage industry funds were a new part of the sector and, including union employee trusteeship control, were approaching 2.25 million members. That was over the space of approximately five years.

So we now have a far greater and more equitable spread of superannuation. There do, however, remain concerns that not all employees have access to those benefits. It is also noteworthy that when the Sex Discrimination Act was first introduced superannuation was exempted from that legislation because the superannuation funds said it would be much too hard and too difficult for superannuation to come within the auspices of that legislation. We have had the situation changed with superannuation now required to comply generally with the added discrimination provisions of the Sex Discrimination Act, including direct discrimination and indirect discrimination. Indirect discrimination was a major concern to the superannuation funds at the time, noting that you can still discriminate based on actuarial or statistical data that comes from a reliable source. But even with respect to that exemption, there is continuing pressure to remove that exemption. These are discriminatory measures that have been overcome in terms of women workers, and I would say that

a similar approach can be taken to same sex partners. The problems that people might envisage can readily be resolved.

Even now, in terms of the application of the Sex Discrimination Act to the superannuation industry, there is ongoing debate within the funds about how they will deal with issues to make sure that they are not indirectly discriminating against groups of employees such as casual workers and part-time workers in terms of ensuring those workers get sufficient superannuation coverage. Funds are also considering how vesting preservation and portability of benefits can be improved to cater for people who frequently change employers or who move in and out of the work force.

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With respect to all of those issues, the debate in terms of superannuation is moving on. I think it is timely now that this legislation is debated. It has been the subject of debate before and the issues really in relation to it have been aired in the community now for some time, and we certainly strongly support the legislation being passed. The ACTU made a submission to a previous Senate inquiry into sexuality discrimination in which we went into detail about how those two issues, discrimination and superannuation, interrelate. I would now make those available to the committee.

CHAIR—Is it the wish of the committee that the document be tabled? There being no objection, it is so ordered.

Ms Doran—This submission was made in 1996. I think it is as relevant today and is particularly relevant to the issues that you are now considering. I will take you to the overview at the start of that document, page 1, where we refer to our commitment to equal employment opportunity that I have already taken you to. We addressed the committee that was looking into discrimination generally. We looked at areas of discrimination in employment and identified there that one of the key areas that remained outstanding was discrimination in terms of superannuation. That is at page 4 of the document. We state there how we see the extension of superannuation coverage as one of the key gains of the trade union movement as part of the social wage, and the fact that most employees now have basic superannuation entitlement, including death and disability cover, in many of those entitlements.

Superannuation payments are now an integral part of wage remuneration and conditions. Superannuation is a form of enforced savings for the benefit of workers and their families. That has been a long debate within the trade union movement amongst workers. We are now at a stage where workers clearly see superannuation benefits and entitlements as a part of their employment conditions. It is commonly an issue in enterprise bargaining. It is of concern to us that the families of lesbian and gay workers do not enjoy these benefits to the extent enjoyed by the families of heterosexual workers, although they make the same superannuation contributions as their heterosexual work mates.

We note that superannuation benefits allow heterosexual families to plan financially in the event of a death of a contributor. Lesbians and gay men in bona fide domestic relations are obliged, if they are aware that their partners will not receive death benefits, to make additional arrangements at extra expense such as insurance policies to ensure their partners are not financially disadvantaged upon their death.

On page 6 we note that trade unions have received many complaints from lesbian and gay workers on the lack of recognition of their rights in respect of superannuation. A number of industry superannuation funds have recognised the inequity in their treatment of lesbian and gay workers and support the changes in the law to enable equitable treatment of all workers by superannuation funds. I know there have been some submissions along those lines to your committee.

We note that the main areas of discrimination revolve around the denial of superannuation benefits to same sex partners and their families. When same sex partners do access superannuation benefits inequity exists through the differential taxation treatment of moneys received. How the discrimination is manifest is listed on pages 7 and 8, and I will not read those out to the committee.

At page 12 we speak specifically about the Superannuation Industry (Supervision) Act and the definition of spouse. We note that many superannuation funds rely upon that section to argue they are prevented from paying benefits to partners of lesbian and gay contributors. Other funds have been required to request special permission from the insurance commissioner to pay same sex partners as spouses in order to retain concessional tax treatment as a complying fund. The Insurance and Superannuation Commission has issued a circular stating that 'spouse' does not include a partner of the same sex. Consequently, most fund trustees interpret section 10 and 62 to exclude the payment of benefits to a same sex spouse, thereby discriminating against gay and lesbian members of superannuation funds. We note that such discriminatory treatment is contrary to the very spirit of the Superannuation Industry (Supervision) Act as it requires that trustees treat different classes of members differently.

Our recommendations are at page 16. In there we support a change to the definition of 'spouse' in the act. That concludes my presentation. I am happy to answer questions.

CHAIR—Thank you. I note you support the passage of the bill, but the author of the bill and a number of commentators admit that there are problems and that it may need amendment. There are other pieces of legislation that impact on the issue much more dramatically than superannuation. If you accept the philosophy of antidiscrimination—and we note that you believe that we should pass the bill—do you think that is the best way of getting this up on the national agenda, given that it is likely to sit in the Senate and not proceed in the House of Representatives or die in the House of Representatives? What is the purpose of doing something that is going to have a limited life?

Ms Doran—Our experience, both in terms of antidiscrimination reform and superannuation reform, is that you take each step that you can. Although we would like to resolve all the problems facing people who are subjected to discrimination and fix up all the problems of superannuation overnight, that is not the way it happens. Why I went a little to the issues that were facing women and superannuation and why we strongly supported the extension of superannuation to women in the early days was that the response was, 'Oh, it can't be done. It's too difficult. You can't have superannuation subjected to the Sex Discrimination Act,' and so on. I think small steps are as good a way to go as any. We support this bill being placed before the parliament, we support the community debate about the bill and I think it would be a nonsense to say, 'We have the bill and let's not do anything with it.' We would urge the Senate to pass the bill and to see what it can do to make sure that the bill is passed by both houses of parliament. Whether or not that is likely to occur, I think it is the responsibility of the Senate and of members hearing this community debate to pass this legislation as a step on the way to more fundamental reform that will, of necessity follow sooner or later.

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CHAIR—The history of private members bills passing the Senate is reasonably strong, but they tend to get lost or put aside in the House of Representatives. Would you advocate pursuing that sort of approach, vis-a-vis an approach for a wider inquiry?

Ms Doran—I think we would support a continuing public debate about it. Whether that means that this bill should not be passed is another question entirely. You can pass this bill and continue the debate about other aspects that would then need to be followed, but I do not think they are mutually exclusive and I support both.

CHAIR—My suggestion is that, in hindsight, this bill may be seen to be a catalyst for some wider inquiry or it may be just a means of getting a bill through the Senate. They are some of the choices that members of the committee are going to have to make.

Senator HOGG—In fairness, I think we should say that this discussion has arisen out of some of the earlier evidence given today, and it goes to the issue of the timing of the legislation. We have been told that we may pass a piece of legislation that has warts attached to it, because there is no complementary legislation in other areas—namely tax and social security. So, in addressing this bill, one is not really addressing the totality of the issue. This committee is charged only with looking at the piece of legislation that is before it. When we were discussing this earlier this morning, a suggestion came up from the Institute of Chartered Accountants regarding the actual timing. I suggested then that there might be a means by which this piece of legislation proceeds so that, assuming that it get support in both the Senate and the House of Representatives—if it does not get the support in the House of Representatives then it is dead anyway, but assuming that it does—it does not come into force until the complementary pieces of legislation are passed in the social security and tax areas.

That was put to Anthony Albanese, who sponsored the bill in the House of Representatives. He said that, whilst he could embrace that proposition, he would not like it to be open ended; that if the tax and the social security aspects had not been addressed within a specific time—and he did not set a time, but let us just say notionally it might be six months or 12 months—then this bill, having passed both houses, would come into force anyway. That would still leave some legal difficulties for people pursuing what they might otherwise think had been unravelled by this committee.

We do not have legal opinion before us to substantiate the intermeshing of the social security and other areas, the tax areas, but undoubtedly without that legal opinion we can at least take it that there are difficulties there. So it is in that context that this idea of a broader inquiry has come up. I must say that that is not my preferred position. My preferred position is to see that the legislation goes through—just to place that in context for you. You have got an option of two. You can either have a broader inquiry—and I am not against the broader inquiry—

Ms Doran—I do not think they are mutually exclusive.

Senator HOGG—No, potentially there may well be difficulties subject to whatever legal advice is forthcoming.

Ms Doran—The passage of the bill might lead to a broader inquiry anyway.

Senator HOGG—No, I think it goes a little bit beyond that. I think that one could say the evidence before the committee seems to indicate that unless one addresses the issue of taxation and social security there will still be problems encountered in spite of the passage of this piece of legislation. I think that is fair, colleagues?

CHAIR—That is right.

Senator HOGG—So it is not a matter of may but, if those other bits do not go ahead, it may still be possible for this piece of legislation to operate if passed but operate with some difficulty. Is that a reasonable summation, colleagues?

CHAIR—Let us put it this way: in a very narrow area.

Senator HOGG—It is in that light that your comment is being sought.

Ms Doran—My view is that you can take small steps along the way. Our support for this legislation is that we support in principle the policy objective that it seeks to achieve. We are obviously in the hands of the legislators and the legal fraternity, and the taxation and accounting fraternity to see how effectively that can be done. So my response to the issues you have raised is that we would seek that the committee would do what it can to best facilitate the objective of this legislation being met. My point about the effect of trying to get superannuation to adequately address the concerns of women's needs in the work force is that you had lots of people saying that it could not be done; it was all too hard; superannuation funds could never be subject to indirect discrimination provisions because they had to be indirectly discriminatory, and those problems were resolved once you got over the initial step and said, 'You will not discriminate against women. Women can come into these funds. You will organise your affairs so that you do not discriminate against women.'

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CHAIR—But that was never in dispute as far as our committee was concerned.

Ms Doran—No, but the superannuation industry and others around can always say that there are all these terrible hurdles to be overcome. It is all too complicated because the social security system and the taxation system cannot manage it. Once you get the policy objective clearly stated then they can accommodate those issues.

CHAIR—Over the years our committee has facilitated that because of the unanimous approach that it has taken. But the problem seems to be how best to achieve a particular outcome and in what time frame.

Senator ALLISON—I would like to go back to the private member's bill that was the subject of your submission. Earlier today we heard that this is too far-reaching and too much ahead of its time to some degree. What do you say four years on after this bill? I know we are not inquiring into this bill anymore but it has relevance and if we had had this bill up we would not have any need for the bill that we are dealing with.

Ms Doran—As we said in 1996, we supported that legislation and we do not think it is too far-reaching or incapable of being effective.

Senator ALLISON—Do you see the same kind of movement in that period of time?

Ms Doran—I think there has been a great community movement in acceptance of the principles of antidiscrimination and the extension of the principle of antidiscrimination to sexual preference over that period of time. Certainly in terms of the trade union movement, we have seen a great groundswell of acceptance of the extension of the principle of antidiscrimination to that and other areas. We have seen the same extension to disabilities and to the broader range of groups covered by antidiscrimination law. It is reflected in the trade union movement and in the community. I think the community is ready for this legislation that you are specifically inquiring into now.

Senator ALLISON—The question is whether or not we can proceed with this in its incomplete form. Again, just to let you know, since you were not here this morning, we heard from ASFA and from other groups representing the superannuation industry and I would say to you that they are not in fact saying we need to hold off. There was certainly one witness who said that but I think that has been the only example that we have had so far.

Concerning the need for a broader inquiry, it is my perception—and I wonder if it is yours as well—amongst gay and lesbian groups that this issue has been inquired into over and over again. We all know the answer; the real question is pushing what you have identified and that is policy. I wonder if you can firstly comment on the need for a further inquiry. It seems to me we are looking at the technical requirements to change bits of law in order to implement it, not any more at whether we want to do it. Can you comment about a broader inquiry before we get too much further and just indicate, I guess, what you think has to happen apart from more public debate to shift policy along far enough?

Ms Doran—I do not know that I can take it any further in terms of the broader inquiry. We have not discussed that. Beyond what you have told me today, we would not want to see a broader inquiry just to rehash the arguments that you have already heard and that have, as indicated by my referring back to the 1996 submission we made, been in the public domain for some time now. It would only be useful if it was going to address very specifically the technical issues that people are raising as the reason for having it. That is what makes me a bit doubtful about it. You can always raise technical difficulties for things, but once you have the policy decision taken to do it, people can do it.

That is really the point I am trying to make about the experience of bringing women effectively into superannuation, so I do not support an inquiry just to rehash old things. Obviously, these inquiries and this sort of legislation do stimulate public debate about the issue and therefore advance the cause that we seek to have advanced, which is community acceptance of these sorts of laws, but that is not a reason in itself for continually having inquiries. I would be very wary of having an inquiry just about the general principles. If you were going to consider an inquiry, it would have to be very specifically dealing with the very technical issues that you have been asked to address.

Senator HOGG—I think you could take it that it would be a very specific inquiry. I think, in fairness to Senator Watson, it was never designed to be a far-reaching wide-ranging inquiry. We have received specific evidence this morning which indicates that there are, quite legitimately, impacts in social security and in tax. I think that that is the sort of inquiry that would be envisaged. I am not signing up to that by the way. I am just looking at it as the evidence was presented. I must apologise; I had to step out in the early part of your oral submission. I may well have missed what you said about the level of complaints that the trade union movement receives where this poses a problem.

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Ms Doran—I referred to it. We are the peak council so we do not get complaints directly.

Senator HOGG—That is why I am asking.

Ms Doran—But we are advised by our affiliated unions that they are receiving increasing numbers of complaints from lesbian and gay workers.

Senator HOGG—Do you have any numbers on that?

Ms Doran—No, I do not.

Senator HOGG—Do we know if it is in specific areas of the work force? One of the things that this bill does is to exclude the Public Service areas. That is why I am asking you if you can identify where the sources of difficulty are. Are they more pronounced in one area of the work force than in others?

Ms Doran—Not to my knowledge.

Senator HOGG—Could you take that on notice and inquire of your affiliates?

Ms Doran—I will do so. In the 1996 inquiry, there was a complaint from a teacher and a plumber about general harassment in the workplace. The industry funds that have raised this as a problem specifically in terms of the superannuation benefits might have some information about how often it arises and whether they have a problem in dealing with that. I will take that on notice.

Senator HOGG—If the information is too difficult to come by, we will understand. It would be interesting for the committee to have that evidence before it.

CHAIR—A submission to the committee recommended the removal of the discrimination because it was felt that the removal would assist the trustees.

Ms Doran—Yes, certainly the information we have from the industry funds who seek to provide the benefits to same sex couples is that they have difficulty doing so. They support this legislation for that purpose.

CHAIR—Thank you very much for appearing before the committee.

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[2.08 p.m.]

PRAGNELL, Mr Bradley John, Superannuation and Financial Planning Consultant, Australian Society of Certified Practising Accountants

CHAIR—Mr Pragnell, you have been with us most of the day. Welcome to the inquiry. We appreciate the interest of the CPA in matters of superannuation. Thank you for giving us your experience. Have you a copy of your article in the *Financial Review*?

Mr Pragnell—I have it in my handbag. I can get it out if you like.

CHAIR—It would be useful to table the article for the purpose of the record. The article is from the *Australian Financial Review*, dated 3 March, page 45, entitled 'A time to come to the party on super reform.' It might be difficult to reproduce the photo.

Mr Pragnell—I just want to say that I am not in the photo. Mr Chairman, I will make a brief opening statement. The Australian Society of Certified Practising Accountants is the largest professional body in Australia, with over 90,000 members. Our members work in the areas of business finance and are very active in the area of superannuation.

This submission was prepared by our Superannuation Centre of Excellence, chaired by Mr Murray Wyatt, FCPA. Mr Wyatt sends his apologies as he is currently doing member training on SLAB 3 and SLAB 4 today. In terms of the preparation of the society's written submission, we articulate our support for the principle of this legislation. We believe that this reform creates a more inclusive superannuation system which is mandatory for the vast majority of Australians to reflect current social trends. We believe that this reform is positive in the sense that it affects real people. It creates an easier environment for trustees to be able to make direct payments to same sex partners. It allows trustees to accept binding beneficiary nominations for same sex partners. As well, it obviously benefits same sex partners who are members of funds being assured that their surviving partners will be in receipt of a superannuation death benefit upon their death.

In our written submission we do make some minor technical amendment suggestions, primarily to do with the standardisation of spouse and de facto. Spouse is actually used much more in the SIS Act now than it was used pre October 1999. Amendments contained in Superannuation Legislation Amendment Bill (No. 3) regarding self-managed funds do contain references to 'spouse'. As well, changes contained in Superannuation Legislation Amendment Bill (No. 4) contain references to 'spouse' in regard to part 8, associates. So I would suggest that the committee look at those sections of the submission.

I would like to comment briefly on a couple of the major issues that have been discussed by this committee today. First of all, the society would argue that it is probably not absolutely mandatory that the income tax and the social security legislation be amended to ensure that this legislation actually functions. Yes, there is considerable interconnection between the Superannuation Industry (Supervision) Act, the Income Tax Assessment Act and social security legislation. However, there have been and continue to be certain anomalies between those sets of legislation that continue to exist and have existed for many years. I will draw the committee's attention to one example. In the Superannuation Industry (Supervision) Act, the 'dependant' definition includes the definition of child, so a superannuation fund trustee can make a direct payment of a death benefit to a child.

However, if one goes to the Income Tax Assessment Act—and correct me if I am wrong but I believe it is section 27AAA of the old 1936 act—dependant there, in terms of being able to receive a superannuation death benefit tax free up to the pension RBL, is for a child who is aged 18 or less and is dependent. So we currently do have anomalous definitions that do function in the SI(S) Act and in the Income Tax Assessment Act. I am not saying that this is necessarily what we would like. The industry would like to see standardised legislation, but we have dealt with anomalies for many years now. Though they do cause some administrative problems for trustees and, yes, they can be addressed, they are not necessarily insurmountable. So I would raise that point.

In terms of looking at the overseas experience, I would like to note that—and I did not note it in the submission but I did note it in the article that appeared in today's *Australian Financial Review*—many other countries are looking at effectively omnibus legislation that completely amends all legislation that refers to spouse to include de facto partners, including de facto partners of the same sex.

Back on 11 February this year, the Liberal government of Canada introduced the Modernisation of Benefits and Obligations Bill 2000 which amends 68 pieces of federal legislation to effectively standardise the definition of 'spouse' to a single common definition. I think that is probably where we would all like to be, both in terms of social policy objectives and also in terms of creating a legal environment that means that if you are looking at one piece of legislation and you are looking at another piece of legislation, that definition of

‘spouse’ or ‘de facto partner’ are the same across legislation. I think that that is probably the end point we would all like to get to. I will close off my opening statement. I am happy to accept questions, Mr Chairman.

CHAIR—You have given us a commentary both orally and in the presentation to the *Financial Review*, about the Canadian experience. Can you give us any other governments that have moved in a similar direction?

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Mr Pragnell—In terms of my understanding of it—and I do not claim to be an expert in this area—I know that for many years nations such as Denmark, Sweden and Holland have had systems where they have had registers where they have basically allowed recognition of same sex de facto relationships. But generally those are on a registered system, and I think that is a bit different from what we are looking at.

CHAIR—What do you mean by ‘a registered system’?

Mr Pragnell—Effectively, two individuals could go to some sort of magistrate’s-type court and become registered as a couple and be recognised as such under legislation. Registered systems work in places like Denmark and Holland. So a couple go in—and they can be a same sex couple—and they fill in a form, sign on the dotted line and their relationship is then recognised.

CHAIR—Would you like that concept extended to Australia?

Mr Pragnell—No, I am not arguing that. I think what we are looking at in terms of what is done in Canada—and I believe a similar thing was done in France about a year or so ago—is the federal government reviewing their own legislation and looking at discrimination in terms of the definition of ‘spouse’ and trying to insert, across the board, a unified definition of ‘spouse’ that would also recognise same sex de facto relationships. In Canada this came about partially due to the Supreme Court of Canada decision in May 1999, *M v. H*, where the Supreme Court found that opposite sex couples were being discriminated against on the basis of sex and this breached both the Canadian constitution and the Canadian human rights act. As such, the Canadian government had to introduce this omnibus legislation. But most of the provinces in Canada that have pension benefits acts—which basically function similar to SIS in terms of regulating superannuation or, as they are called in Canada, pension funds—have permitted payment of benefits to same sex partners generally since the mid-1990s.

Senator HOGG—Do you have any documentation as to what happens in other parts of the world? You have mentioned Denmark, Sweden and a couple of places such as that, but is there anywhere a tabulation of what happens? You mentioned that there is legislation pending in Canada. Where else is there legislation, and what sort of legislation is it and so on?

Mr Pragnell—In terms of the most recent document that I have seen, it was, I believe, the Victorian Equal Opportunity Commission which did an inquiry back in early 1999. As part of that inquiry—which was on same sex relationships and the law, which was the title of that inquiry—the Victorian Equal Opportunity Commission did do a review of the current international arrangements in terms of the treatment of same sex relationships. Other than that, I would think that a group such as the Gay and Lesbian Rights Lobby or someone like that would probably be more appropriate to give you information on that.

Senator HOGG—I have asked for the information from them already; they do not have it. As they have pointed out, they are a voluntary organisation and do not have the resources. It is like my kids telling me that everyone is going to this or everyone is going to that. I always get highly suspicious because I know that, immediately they tell me that, it is not the case at all. There have been people who have submitted to us a contrary view to the legislation that is being proposed. All I am asking is that if you have the documentation then it does assist the committee in putting forward a view one way or the other.

Mr Pragnell—I would be happy to try to present to the committee a copy of the Victorian EOC report.

Senator HOGG—Yes, that would be helpful; or any other source that you might have available to you which gives us that information would be well received. Whilst this is seen as a piece of legislation in isolation—and I took your point before that it is not really linked—there is no doubt that it is intrinsically related to a number of other pieces of legislation and, whilst some people may see this as delivering to them the equity that they desire, my problem as a legislator is that people’s aspirations and what they think is being delivered can sometimes be different from what is really happening. I do not want anyone to be under any illusion as to what this piece of legislation is designed to deliver.

Mr Pragnell—I agree with that. I think in terms of the Canadian experience—and I can speak on the Canadian experience—there has been considerable review of this area. I think Canada is probably a good example because, in terms of its cultural and political heritage, and even cultural background, it is very similar to Australia. Quite often I think when we do rely on, say, northern European countries, the argument is always thrown up that they quite often have a fundamentally different political and cultural system. Canada may, in this instance, provide a bit of a guide for future legislation. I think in terms of a more inclusive review, this is

obviously something that this committee and this piece of legislation do not address, but in terms of more long-term legislated policy outcomes, it is something that governments will probably have to address one day.

Senator HOGG—What about the position in the United States? Do you know that, by any chance?

Mr Pragnell—I have not really been following that very closely.

Senator HOGG—I have no idea myself, but I was thinking that there is a place that has enormous retirement funds, and I am just wondering how they deal with the issue.

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Mr Pragnell—I really could not comment on that.

Senator ALLISON—Could I ask you to perhaps expand on your recommendation on page 3, where you say:

We would support the principle of extension of anti-discrimination principles. However we would request consultation be conducted with the Institute of Actuaries and the actuarial profession to ensure that such a provision does not impact on matters such as annuities or insurance, where gender-based actuarial calculations are often used.

Can you expand for the committee on the problems associated with annuities and insurance?

Mr Pragnell—On that specific issue, I would probably defer to my colleagues at the Institute of Actuaries, but I suspect the issue—and this has been a vexed issue that has confronted this industry for many, many years—has been the fact that in terms of actuarial calculations and statistical calculations in terms of things such as payment of benefits, insurance and so forth, there has been reliance on gender based tables. Whether or not this requirement in section 52(2) would require use of unisex actuarial tables, in a sense by being a trustee covenant, does it somehow override the exemption in the Sex Discrimination Act?

Section 52 is in some ways the most important section of the SIS Act because it does put down the fundamental issues that trustees must always consider in all of their decision making. I think we would need to think through to what degree this amendment would interact with that current exemption in the Sex Discrimination Act. All we are saying is that it would probably be worth while to get a legal opinion and to open up some dialogue, or at least consult the Institute of Actuaries as to whether this could be problematic, because sex is included in there and if one wanted to take a really broad reading then the question is: does it clash with that exemption in the Sex Discrimination Act? I think that just needs to be investigated.

Senator ALLISON—You mentioned the definition of self-managed funds and it is probably SLAB 3 you are talking about. Are there any implications for adding a de facto partner to that bill? What would the effect of that actually be?

Mr Pragnell—The changes that were made to SLAB 3 to basically remove the linkage test and replace it with the no arms-length employee test effectively means that the no arms-length test does have an exemption and that is a relative exemption. If you go back to the definition of relative in section 17A, which includes spouse, the current situation would be that if you employ your opposite sex spouse you could be in the same self-managed fund together. But if you employ your same sex partner you could not be in the same self-managed fund together because you are breaching the no arms-length employee test and you do not get the relief of the relative exemption.

Senator ALLISON—So to some degree we have gone backwards?

Mr Pragnell—I do not know whether we have gone backwards. I think that what we ended up with in terms of SLAB 3 was better than what was being proposed because it is an exclusive test rather than an inclusive test. In a sense, if the two individuals are not linked by an employment relationship, then they need to satisfy nothing other than both being members of the fund and both being trustees of the fund. It becomes problematic when there is an employment relationship there. When the employment relationship exists then you have to apply the relative test. To a certain degree, in those specific instances, we are back where we had some problems with the original SLAB 3. It is not as widespread but it would still exist in certain quarters definitely.

Senator ALLISON—Can I just ask you another question on that—nothing to do with what we are dealing with today. I understand, too, that an interpretation of SLAB 3 is that if there are two directors and each of the two directors has an opposite sex partner employed in the firm they cannot be members because they are not linked to both of the directors. Is that your reading of it as well?

Mr Pragnell—I have seen that interpretation from the tax office in some of the materials that they have provided. We have some concerns with that interpretation but we have not sought legal advice or made submissions on that issue yet. But, yes, we have seen the tax office advising individuals of that.

Senator ALLISON—Thank you.

CHAIR—Are you going to challenge it?

Senator ALLISON—Yes, please.

Senator HOGG—Do not be shy.

Mr Pragnell—Our view would be that the intent of the legislation was not to exclude those sorts of arrangements. I think that is what the legislators had in mind.

Senator HOGG—I have just one final question. You may have heard a range of scenarios discussed here today as to the timing. Just assuming that those more complex issues do not come into play and that we are considering only the passage of this piece of legislation—as we are—what sort of time frame is necessary from the passing of the legislation to the enforcement of the legislation by which trust deeds would have to be changed and so on? Give us some idea of what you think is a reasonable time.

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Mr Pragnell—We have not really given much thought to that issue. I know that other people have mentioned six to nine months lead time. I would not want to dispute that, but I also—

Senator HOGG—Could you take it on notice then and come back to us with a view as to what sort of time frame would be reasonable?

Mr Pragnell—Yes.

Senator HOGG—I do not want to take it any further than that now.

Mr Pragnell—That is fine. In terms of the timing issue, we did not raise this in our submission but I know that ASFA did with the issue of retrospectivity. I think that would have to be taken into account when introducing this legislation to a certain degree that—

Senator HOGG—How? Could you expand for me? What do you mean by that?

Mr Pragnell—In the sense that, as was mentioned by ASFA and I think also by the Superannuation Complaints Tribunal, trustees would have to be comfortable that issues that they had thought had been resolved under a certain set of rules many years ago they are not in a sense having to revisit under a new set of rules to a certain degree. I think it is about the certainty for trustees on that issue, really.

Senator HOGG—All right. So you are looking for not only prospectivity but also that there is some protection there for the past sins and omissions of trustees, if I can put it in as broad a sense as that.

Mr Pragnell—I think that is a very unfortunate situation but I think you are really catching trustees in a terrible situation otherwise.

CHAIR—You can't blame the trustees.

Senator HOGG—No. That is right; you can't.

Mr Pragnell—If they were making the decision on the basis of what was in SIS at that time, it would put them in a very difficult and a no-win situation.

CHAIR—Thank you very much, Mr Pragnell. We appreciate your coming before the committee.

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[2.33 p.m.]

KNOX, Dr David, President, Institute of Actuaries of Australia**SHALLUE, Mr Paul Anthony, Member, Superannuation Practice Committee, Institute of Actuaries of Australia****CHAIR**—Thank you very much for appearing before the committee today. We always appreciate the input from the institute.**Dr Knox**—Thank you very much for having us. I might begin with a couple of early remarks and then most certainly we are open to questions and comments.**CHAIR**—Feel free to give us your views.**Dr Knox**—For the record, as senators know, the Institute of Actuaries of Australia is the only professional body of actuaries in Australia. It has had a longstanding interest in superannuation and has made many appearances before this and other Senate committees.

In terms of what is before us today, there are four remarks I would like to make. Firstly, we have no problem in terms of the overall direction of the change proposed. We see it as a social change, reflecting changes in our society. We have no serious problems with the overall intent of what is here. Having said that, there are a couple issues we do want to draw to the committee's attention. For most superannuation funds, we suggest that this will not be a major problem. It may have a minor increase in benefit payouts for some funds, or fairly negligible. There could be circumstances in a particular fund where we see an increase in the number of death benefits paid that could be quite significant. But that would be a very special case. So, for most funds, we would suggest that it is not going to have a major financial impact.

The second impact that is perhaps a touch more worrying is the amendments to subsection 52(2), which I am sure have been discussed already today. In particular, the inclusion of the words 'sex' and 'family responsibilities' in that new subsection suggest that, if the benefits cannot be determined according to the sex or gender of the member, that raises significant changes to the way superannuation is operating in some cases.

Senator HOGG—Could you go through those words again, please?**CHAIR**—The reference.**Dr Knox**—The reference is the changes to subsection 52(2), and there is a whole list of words there. The words that pose us most problems are 'sex' and 'family responsibilities'. The inability to discriminate on the grounds of sex, as the previous witness alluded to, may have an impact on insurance and annuity benefits. We take it that this main amendment is in terms of same sex, and it could be read here that actuaries and trustees are no longer allowed to discriminate by male or female in terms of insurance premiums or annuity rates.**CHAIR**—Despite the fact that females generally live longer.**Dr Knox**—Correct, but there are situations where a fund may offer a retired person the opportunity to buy a pension or annuity from that fund, and the price of that annuity would be determined by the age of the retiree and their gender.**CHAIR**—That is a good point.**Dr Knox**—If you take this interpretation, we could not make that distinction anymore. Similarly, in terms of insurance—**Senator HOGG**—These are obviously not insignificant: would you have some idea of the cost implications for us? Even if it is a ballpark figure, it would be good if you could give us some idea. If you cannot do it today, you could take it on notice. I want to know how significant the cost impact is going to be.**Dr Knox**—I certainly cannot give you a number in terms of cost impact today.**CHAIR**—But that raises a wider issue, doesn't it, rather than what we are looking at today?**Dr Knox**—It raises an issue of choice and opportunity of benefits.**Senator HOGG**—I understand that, but there must be a cost impact as well.**Dr Knox**—We may find that trustees withdraw some of the options that are currently in place.**Senator ALLISON**—Could you give an example?**Dr Knox**—For instance, let us say that somebody retires with a lump sum of \$100,000 just for the sake of the argument. The trustee says that we can convert that into an annuity or a pension at the member's option. So the person can choose that option of the level of the pension according to their age and gender. The trustee may

guarantee that pension by buying an annuity from a life insurance company that is gender based. If that opportunity for the trustee not to distinguish by gender is not there, the trustee could just remove the option and say, 'I am sorry, we are not going to make that opportunity available to you because we no longer have the exact risk matched with our life office annuity.'

Senator HOGG—Or make the opportunity more expensive.

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Dr Knox—Or make the opportunity more expensive.

Senator HOGG—In other words, not go to the lowest common denominator, but go to the highest?

Dr Knox—In other words, you could have a selection impact.

CHAIR—But if you did that, you could be seen to be discriminating against the females that are currently enjoying it. That will open up a can of worms.

Dr Knox—I think you can start to begin to see some of the problems by including that one there.

Senator ALLISON—Are there other examples?

Dr Knox—Another example could be in the insurance side. I gave you the example of the annuity. In many group life insurance schemes for a superannuation plan, there is a unisex rate quoted by the insurer. But in some cases, perhaps where there is an all-female fund, or predominantly female fund, the premium rates are cheaper because of females lower probability of dying. If it is an all-male fund, or predominantly male, the premium rates will be higher. That discrimination is based on gender, and the insurance charges follow. If the insurance charges cannot be determined by gender, we will end up with a unisex rate with no ability to price according to gender. There are other examples where, in some superannuation plans, rather than a group insurance you may have premiums taken out by individuals, on an individual basis, in smaller superannuation plans where, again, the premium could be according to the gender.

Mr Shallue—Or in personal superannuation.

Dr Knox—Yes, or in personal superannuation. What we are alerting you to is that the inclusion of the word 'sex' here raises problems much broader than the intent of this amendment.

Senator HOGG—Before we get off subsection 52(2), are there any other words there that—

Dr Knox—The other one that I wish to draw your attention to is family responsibilities.

Senator HOGG—Besides family responsibilities, are there any other words?

CHAIR—Let him finish family responsibilities.

Dr Knox—Family responsibilities we take to include dependent children, for instance, and there are situations where higher benefits are paid out where you have more dependent children. We are not lawyers, but the question I want to raise is whether the inclusion of this 'family responsibilities' phrase would prohibit higher benefits being paid out where there are children—nothing to do with same sex partners but to do with the presence or otherwise of children.

CHAIR—I am not quite across this. You are objecting to the inclusion of—

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

CHAIR—Whereas currently?

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

Senator HOGG—Could you give an example of what the differential would be? Is it significant?

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

Senator HOGG—How many funds would offer such an option to pay a higher family benefit? Is it a widespread practice?

Mr Shallue—It is much less common these days, but you would find that some of the larger corporate funds which have been going for a lot of years might offer those. I would say it is a minority of funds, but there would be some funds.

Senator HOGG—Could you give us some example of the incidence of the problem? As I said to someone before, it is like my kids coming home and saying, ‘Everyone does it.’ Could I have some evidence as to the incidence of these things? You can take it on notice.

Mr Shallue—Okay.

Dr Knox—As Paul said, it is a minority of funds but some of the major corporates.

Senator HOGG—So it could still affect a not insignificant number of people?

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Mr Shallue—Definitely it could.

Senator HOGG—I take your evidence at face value and I am not disputing what you say, but if you could give us something hard that supports it, then that would be fine.

Senator ALLISON—If I can pursue that question a little more, you are saying that some funds, like the corporate funds, will actually designate a different kind of benefit, a higher benefit, based on family responsibilities. But you have some discretion, don’t you, or perhaps the tribunal would, in distributing benefits in certain circumstances? Is that what you are saying, that there are other discretions that can be applied based on family responsibilities other than those previously dictated?

Mr Shallue—Could I draw a distinction here. We have one situation where the benefits are actually defined under a trust deed, and it says that the spouse will get X amount and the children will get X amount.

Senator ALLISON—What is the other bit?

Mr Shallue—That is a pension benefit. You also have a situation where there is a lump-sum benefit payable. It might be \$200,000, say, and the trustee has to decide on the distribution of that \$200,000. In making that decision, it would be common to take into account the family responsibilities of the potential beneficiaries.

Senator ALLISON—What do the actuaries have to do with that, if anything?

Mr Shallue—The actuaries are not involved in that issue at all.

Senator ALLISON—Fine, that is exactly what I needed to know.

Dr Knox—It is not an actuarial issue. We are drawing attention to a potential problem that the trustees could face where, in the past, they have been discriminating in favour of beneficiaries with dependent children and, if this stays, they may not be able to do so.

Senator ALLISON—And to remove the words ‘sex and/or family responsibilities’ would not make a difference to same sex couples per se, would it?

Dr Knox—Correct. That would be my reading of it. The changes to subsection 10(1) have in fact picked up the changes you wanted to introduce, and therefore I do not see that removing those would—

Senator ALLISON—They are extraneous.

Dr Knox—Yes.

Mr Shallue—Perhaps I could just put a qualifier on that. It seems to me that, by modifying the definition of ‘dependant’, that may not necessarily require trustees to recognise de facto same sex partners as dependants. My feeling was that the idea of the change to subsection 52(2) was to make it compulsory for trustees to adopt that wider definition, if you like. I am not sure that, with the removal of ‘sex’ from the extra part there, that would still apply. That is what I would raise as a question: whether the amendment would perhaps need modification in other areas to achieve the aim, which would be to compel all funds to adopt the wider definition of ‘dependant’.

CHAIR—We have already heard objections to ‘social origin’, so do you think any of those words need to be added to subsection 52(2) at all? Would that do anything to what is intended?

Dr Knox—That was a question I was going to raise.

CHAIR—I am sorry.

Dr Knox—That is fine. You have raised a valid question: if you have changed subsection 10(1) to achieve perhaps what you wanted to, why do you need 52(2) to change?

Senator ALLISON—Yes.

Senator HOGG—Assuming we might need 52(2)—and I do not know whether or not we do—you have isolated the words ‘sex’ and ‘family responsibilities’?

Dr Knox—Correct.

Senator HOGG—As Senator Watson has indicated, someone else has isolated ‘social origin’. Are there any other words there that cause an actuarial concern? I am not talking about anything else.

Dr Knox—Not as far as I am aware.

CHAIR—Do those extra words, that whole paragraph, add anything to what they are trying to achieve?

Dr Knox—That is a good question.

Senator ALLISON—And if you take some out, what are the implications of doing that and leaving the others in?

Dr Knox—Correct. And just to round up the point we were trying to make, by having those two words in, there are unintended consequences of a broader nature than this amendment.

Senator HOGG—Let us assume that 52(2) went, and a matter of interpretation came up, that would be up to the courts to—

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Dr Knox—Yes. If this addition to 52(2) did not occur, you would still change subsection 10(1).

Senator HOGG—Yes, I accept that.

CHAIR—That is very thorough. Continue.

Dr Knox—They were the major points we had in terms of the amendments. The other point we wanted to make was that we recognise that this is what I might call a minor but important change. It will affect some members; it does not effect the majority of superannuation fund members, we would suggest. As the committee is well aware, the Institute of Actuaries submits that superannuation needs a bigger reform to be made more attractive to more Australians, primarily in terms of tax and perhaps even in terms of social security integration. This is particularly so following the tax changes coming in on 1 July of this year. As marginal tax rates come down, superannuation tax rates remain virtually unchanged and superannuation, we would submit, is losing its relative attractiveness. That, in a sense, is a much broader and more important issue that we would like to place on your committee’s agenda.

Senator HOGG—Is this another plea on the surcharge?

Dr Knox—We are very happy to plead against the surcharge any time you like.

Senator ALLISON—Are you suggesting that, by dealing with the same sex couples, you will increase the attractiveness of superannuation? Is that the point you want to make?

Dr Knox—No. It is a fairly minor change for most Australians. The point I was trying to make was that, with the surcharge and reduction of marginal tax rates in July, superannuation is becoming less and less attractive as a savings option.

Senator ALLISON—I read that in what you said, but the consequences of what you are saying makes quite a lot of sense. There must be some people in same sex relationships who think twice about putting money into superannuation, given that the benefits cannot be said to be—

Dr Knox—I would agree. Therefore, this amendment makes it more attractive for those people.

CHAIR—Slightly more attractive.

Dr Knox—Yes, depending on their circumstances and, of course, if death occurs and things of that nature.

Senator HOGG—One of the things in schedule 1 of the bill is that this bill does not in any way affect the Commonwealth schemes. Do you have any evidence that the changes in this bill will affect the private sector schemes more than the Commonwealth schemes, or whether changes ultimately brought into the Commonwealth scheme will impact in a similar way as they did in the public private sector schemes?

Dr Knox—I imagine the consequences would be similar. One needs to recognise that, in the public sector scheme, there is a higher preponderance of pension schemes as opposed to lump sum schemes. Therefore, it could cost the public sector schemes relatively more because there are more pension payments in that system and we could have a high level of pensions for a longer period of time from the public sector schemes as opposed to the private sector.

Mr Shallue—I do not claim to be an expert on public sector schemes, but my impression is that it is also more common for public sector schemes not to have any death benefit payable where there is no dependent for the purpose of the legislation. So they are the ones where there is the biggest amount at stake for same sex partners. In most private sector schemes, you would find the benefit is still paid. It might not be paid in the most tax effective or the most direct way. But in most private sector schemes, you would probably find that it still finds its way to the same sex partner, assuming there are no other beneficiaries via the will. But in schemes

where the benefit does not actually get paid if there is no legal dependent, you have the problem where the benefit gets lost entirely.

CHAIR—What sort of cost would this be to the Commonwealth?

Dr Knox—I have no idea. I think there are very few statistics available on what the percentage of the population might be in same sex couple relationships. I am not aware of too much data on it.

CHAIR—Assuming there is about 10 per cent proportion of the population, and you might take advantage of this, what would be the cost? That will just give us some idea of its import.

Dr Knox—Let us say it is a 10 per cent figure and we are just looking at death benefits. The proportion of members who receive death benefits or who die in service is still a very small proportion of all members. Most members reach retirement, so we are still looking at maybe 10 per cent. Paul might correct me on that, but it is certainly a minority of scheme members who die in service, 10 per cent of whom might be same sex partners. Therefore, yes, there are some financial consequences, but, in the whole scheme of things, it would still be fairly minor.

CHAIR—Don't the statistics show that perhaps same sex partners do not live as long as the normal population, or am I incorrect?

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Dr Knox—Certainly AIDS has had an impact, but we are also seeing that people suffering HIV are now living longer due to medical treatment. The early deaths that we might have seen in the 1980s are still present, but that is not as significant as we perhaps once postulated.

CHAIR—You cannot give us a figure on the 10 per cent?

Dr Knox—I am sorry, I cannot give one off the top of my head.

Mr Shallue—No, I would not be brave enough to. We will take that on notice.

Senator HOGG—Surely you must have a figure somewhere. Your business is being actuaries, and people would look to you to have these sorts of figures somewhere in your goodies box so that you can predict this, that and everything else.

Dr Knox—I accept that. One has to recognise that what we are dealing with here is a subset of the population which, up to recent times, has not been separately identified and therefore the level of data and statistics available is rather limited. But we will take it on notice and come back to you.

Senator ALLISON—Can I just pursue that a bit further. You said that the instances of somebody dying in service are quite small. Assuming we have no discrimination whatever against couples—de facto, same sex or otherwise—doesn't the benefit continue to flow once the employee has died, which might be 10 years or 20 years after retirement, if they are survived by their spouse?

Dr Knox—This would depend on the form of benefit it was.

Senator ALLISON—Are we talking about the Commonwealth Public Service?

Dr Knox—In the Commonwealth Public Service, yes, you have pensions and you are quite correct that pensions are payable for longer than we would otherwise expect. Again, it is interesting to note that with a same sex partnership you would not have the longevity difference that you would have in a heterosexual partnership. In a normal heterosexual partnership, let us assume it is the male that dies first, the female partner is often younger and is also going to live longer. In a same sex partnership, you would not have that expected difference.

Senator ALLISON—You would need to look at patterns of partnership, wouldn't you?

Dr Knox—Exactly.

Senator ALLISON—And I do not know that that is necessarily the case.

Senator HOGG—You have got a bit of actuarial work to do.

Dr Knox—As I said, we will explore and see if we can get back to you, but I fear that the data may not be readily available.

CHAIR—We have agreed to extend the reporting deadline, so it is no longer next Tuesday.

Dr Knox—It has been extended to when?

CHAIR—Approximately three weeks.

Senator HOGG—Three weeks I think we will agree to.

Dr Knox—Okay, we will see if we can get you something within three weeks.

Senator HOGG—Two weeks—we need a bit of time.

CHAIR—We have to write the report. Any other concluding remarks?

Dr Knox—No, I think we have covered the territory that we wanted to present.

CHAIR—Thank you both and I must congratulate you on the very thorough analysis of the legislation. It could have had unforeseen consequences if it had proceeded without your drawing attention to these couple of important issues.

[3.01 p.m.]

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CASEY, Mr Kevin Lawrence, Senior Strategy and Technical Adviser, AMP Financial Services

CHAIR—I welcome Mr Kevin Casey. Mr Casey has been a frequent contributor to our committee. We appreciate your views and the support that you give through the AMP Society. It is very much appreciated.

Mr Casey—Thank you, Senator. It is a pleasure to be able to present again to the committee on this matter. I would like to read a brief opening presentation and then I am happy to answer your questions. Through its approved trustee company, AMP Superannuation Ltd, AMP provides superannuation benefits to approximately one and half million Australians. Through its insurance arm it also provides the insurance of the death benefits for around another two million Australians whose benefits are managed by corporate and industry funds.

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

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

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

To achieve this definition, the SIS Act will need to change. The draft bill, in items 1 to 3, seeks to amend the definitions. AMP believes that these definitions achieve the intent of including same sex partners as automatic dependants. AMP would, however, like to see the words 'or any other person who is financially dependent on the deceased at the date of death' added to the definition of 'dependant' in item 1.

Senator HOGG—Could you just repeat that?

Mr Casey—I will provide a written—

Senator HOGG—No, we understand; but just for us now.

Mr Casey—'or any other person who is financially dependent on the deceased at the date of death'.

Senator HOGG—That is in item one?

Mr Casey—Yes, at the end of the definition of 'dependant'. The bill seeks to add a further condition regarding discrimination on the basis of race, colour, sex, sexual preference, transgender status, marital status, family responsibilities, religion, political opinion or social origin, in respect of a beneficiary of a superannuation fund. AMP believes that this condition goes further than the original intentions and is likely to cause difficulties for trustees and, at times, put them in an untenable position.

Discrimination on the basis described is abhorrent, and federal and state legislation has been enacted to make it unlawful. However, the vast majority of this legislation allows some exceptions where the discrimination is based on statistical or actuarial data. It is a fact of life that life expectancy and mortality experience are different for males and females, and life insurance providers receive exemption to enable them to differentiate where the differences are substantiated.

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

AMP believes that such provisions are best left to antidiscrimination legislation and all parties to superannuation be brought under those same rules. However, if the parliament wishes to include such a provision in SIS it should provide trustees with exemptions in line with those provided to insurers. This would enact the basic intentions and would allow trustees to meet provisions without causing difficulties with other essential contracts. I am happy to answer any questions that you have.

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CHAIR—Thanks Mr Casey. The previous witnesses suggested that subsection 52(2) may well be omitted because item 3, subsection 10(1), is inclusive enough. Would you agree with that?

Mr Casey—I would agree with that, without knowing all of the implications of the other applications of the law, but I would have thought that the changes proposed in sections 1 to 3 are sufficient to meet the intentions of being able to pay same sex partners in an automatic sense and that the changes to 52(2) are not necessary in order to meet that intention.

Senator HOGG—Do you have a legal opinion to that effect?

Mr Casey—I do not have a legal opinion to that effect, Senator, but I would be happy to get—

Senator HOGG—I just thought that might have been the basis of your conclusion.

CHAIR—Do you think superannuation is the appropriate vehicle to bring about such fundamental social reform?

Mr Casey—I think that it cannot be excluded from such fundamental reform.

CHAIR—We know that.

Mr Casey—Whether it is the appropriate place to actually initiate it is another question. The fact that we have benefits that are payable directly by a superannuation trust to dependents and the fact that same sex relationships are not automatically included in that dependency definition can cause difficulties. As I said in my statement, with the way in which we have been able to administer the payment of death benefits we have been able to establish a financial dependency in all cases where a couple has been legitimately cohabiting. Therefore, we have not had to exclude anybody. There have been recent cases at law where the definition of financial dependency has been toughened up by the courts, and that may put trustees ultimately in a more difficult position if a more difficult test of financial dependency were to emerge. Under those circumstances, I think it would be appropriate for superannuation to be a lead vehicle in terms of being able to—

CHAIR—It would be appropriate or inappropriate?

Mr Casey—It would be appropriate for superannuation to be a lead vehicle in recognising same sex partnerships.

CHAIR—What about the interaction of income tax law? Isn't there a problem if superannuation goes it alone?

Mr Casey—There is. The definitions of 'dependant' under SIS and under tax law are at the moment very similar, but there is one essential difference—that is, a child is always a dependant under SIS, but under tax law, a child is a dependant only if they are under the age of 18 or, if 18 or over, only if they are financially dependent upon the deceased. Under those circumstances, you can always pay a child from a superannuation fund, but if you pay a child aged 18 or more out of a superannuation fund that is not financially dependent upon the deceased, that benefit will be taxable. So it is taxed in a different way than if the child is dependent. At the moment if you include a same sex partner in the definition of SIS and you pay that person automatically then, unless you make the definition under tax law relatively compatible, you can get differentiation in the tax treatment between a same sex partner and a de facto partner, for instance.

CHAIR—And that is one of the weaknesses of this bill?

Mr Casey—Yes.

CHAIR—How should that be addressed?

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

Senator HOGG—Would this lead to confusion?

Mr Casey—It will lead to confusion, but I guess to some extent, whilst we have differentiation between federal and state legislation, you are going to get confusion on a whole range of matters. For instance, the federal government cannot legislate in respect of de facto relationships but it can in terms of marriage relationships. Changes at the moment that are mooted in respect of family law will create a difference in superannuation between a de facto partner and a legitimately married partner. We are faced with those differences because of the differences in making those law.

CHAIR—Philosophically and practically, if you wanted to remove this discrimination, what would be the best practical means of bringing that about?

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Mr Casey—It is probably best brought about by changes to the discrimination acts themselves which will require cooperation between the federal legislation and the state legislation. At the moment there has been agreement and there is a fairly comprehensive package of antidiscrimination laws that are relatively consistent across federal and states depending upon the powers. This is an issue that certainly the states should be involved with in terms of looking at their discrimination laws.

CHAIR—So you think the states should be involved first, through the Attorney-General's Department?

Mr Casey—Yes, through the Attorney-General's Department. If this is to be a change that the parliament believes is appropriate from a social point of view, then it should be looked at across all of the relative legislation, not just superannuation and not just federal legislation.

Senator ALLISON—Does that suggest that Sid Spindler's private member's bill is a preferable piece of legislation from your point of view?

Mr Casey—Yes. I think it is probably better to attack it from that direction than from a superannuation point of view. I think there is a margin in there for superannuation at the moment for some same sex partners to be excluded, but we have found in practical experience we have been able to work around the restrictions and have been able to pay same sex partners on a financial dependency basis. I would think that if this is to be a general social change which is introduced by the parliament then it would be better to look at the broader range of issues rather than just through superannuation.

Senator ALLISON—You said you have been able to pay out based on financial dependency. Can you give an example of the sort of extreme end of that? Does that mean that you have been able to provide benefits, say, where the beneficiary is already earning a full and generous salary?

Mr Casey—Yes.

Senator ALLISON—Is it a sort of no holds barred situation?

Mr Casey—Not quite to that extent although the definition of 'financial dependency' is a fairly tenuous one. It goes from partial right through to wholly dependent. In many cases, yes, both partners are working at reasonable levels of potential income but, for instance, they are sharing the expenses. They might have a joint mortgage where they are sharing the payment of the mortgage or, if they are renting, they are sharing the rent and sharing the expenses so that if one partner actually moved out the other partner would incur a higher expense, so therefore there is an element of financial dependency. We have been able to establish that, where you would regard people as having a genuine relationship.

Again, when you are looking at these situations it can become a fairly sensitive issue because you do not want to delve, necessarily, into all of the private aspects of an individual particularly where there is the death of a partner. It is a very sensitive time. If we can establish a financial dependency then it can be any individual. It is irrelevant as to whether they have a same sex relationship or not. It can be a heterosexual relationship et cetera. So long as there is a financial dependency we can pay that person. We seek to establish that first and foremost. If we can satisfy that, then the person is paid and we do not have to delve into their private circumstances. That is why I would favour the extension of the definition that has been put in the draft legislation to explicitly include financial dependency because it does help to overcome a lot of these fairly sensitive issues.

Senator ALLISON—Other witnesses have suggested that trustees are in a vulnerable position and that, in fact, there is a fair amount of concern about making decisions like that which could be legally challenged. It is obviously not a concern for the AMP?

Mr Casey—For six years of my employment in AMP I was a director of AMP Superannuation Ltd. It is a very difficult task, particularly when you are at arm's length from the dependants and the deceased. You are not sure of all of their personal details et cetera. You have to make inquiries. Some of those are very sensitive inquiries. It is a very difficult area but ultimately at the end of the day when you put the hat on as a trustee you take on the responsibility of administering the trust according to the trust deed and the law and you have to

make at times some very difficult decisions. You have to wear the result of those decisions which at times may mean you are legally challenged.

Senator HOGG—If this piece of legislation proceeds through the Senate and the House of Representatives and gets the tick, how long would you see it being before it comes into effect? We have had a figure put to us this morning of six to nine months but that was not really hard and fast. What sort of time would be necessary for trust deeds to be amended? I know you are in a fairly large company and you must have a number of different types of trustees, many of which would be changed fairly quickly, but, bearing in mind the vagaries of the industry in general, how long would you think?

Mr Casey—I would think that if it was just the change in respect of the definitions of ‘dependant’ and ‘de facto’, then a three- to six-month lead time would be quite sufficient. But with the additional change to section 52(2), all trust deeds would have to be examined, and examined very thoroughly, to ensure that there was nothing in the deed which would bring the trustees into conflict. You have 10 or 15 aspects where you have to check that there is no discriminatory aspect within the trust. I would think that something of the order of six to 12 months would be necessary.

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Senator HOGG—So if the change to section 52(2) that is envisaged were to be included—and there are a couple of minor alterations people have suggested to us—even taking those into account, you would still suggest that it would be a lot longer than with section 2 eliminated completely?

Mr Casey—Yes, because I believe that if you are looking at just the definition of ‘dependant’ to include same sex partners, the area of the deed that would need to be looked at is the death benefits, and that would be pretty much the only area that would need to be looked at, whereas with the inclusion of 52(2) you would be looking at every aspect of that deed and that would be a much greater challenge for trustees. There would be a much greater cost involved in that also, Senator.

Senator HOGG—Let us just take another case that might emerge in this whole debate, and that is that this piece of legislation is accepted and the committee might accept that there are changes necessary in the area of tax and social security and a range of other areas, but this is not going down your broad path of changing the antidiscrimination legislation. This committee could determine that we would recommend passing this legislation, subject to there being complementary changes in tax, social security and other areas, but that would be the responsibility of the government rather than a private member’s bill that we are considering to come before the parliament. The government might not be of a mind, because of budgetary implications, to bring those changes before parliament so the committee could entertain the view that we would recommend that this piece of legislation go through, subject to there being changes in these other bills and operating from the time of the changes to these other bills, but if these other bills do not come into operation, let us say within a period of 12 months, then this piece of legislation would operate anyway. Would that be more desirable than the current situation?

Mr Casey—I do not think so, Senator. I think there has to be some element of certainty for the way in which we progress in legislative change. If the government believes that there should be some change in terms of the social definition of a partnership, then I think it has to carry the responsibility of ensuring that there is a consistency across all law, otherwise you are going to finish up with further discrimination between the various laws.

Senator HOGG—I understand your point, Mr Casey, but the point that has been made to us is that some see this incremental change as being necessary to put the pressure on for changes to take place in the other areas, and if you are waiting for an overall and overarching change to take place then that might not take place, given that this has been on the agenda now for some substantial period of time.

Mr Casey—If you were to remove the changes for 52(2), I would have no problems because the ultimate effect on superannuation funds will be relatively minor. To a large extent, certainly from my organisation’s point of view, it would be relatively superficial because we already pay in these situations. There might be circumstances where we would not pay, but up to this point we have paid each and every one of them. As a general rule it would not cause the industry a great deal of pain to implement the same sex partnership part of it.

Senator HOGG—But your preferred option is clearly to change the antidiscrimination legislation and use that as the vehicle for implementing the change in superannuation, tax and the other areas?

Mr Casey—To get a common definition across all legislation of what we as a society are prepared to define as a spousal arrangement, whether that be a formal marriage relationship or a non-married relationship between opposite or same sex partners.

Senator HOGG—If I can I take you back to part of your submission, and you have gone over this figure a couple of times: you have knocked no-one back, you said there are about 1,000 to 1,500 people who die each year and that is out of a population of 1½ million who are individual policyholders—

Mr Casey—Covered by the policies, yes.

Senator HOGG—and a couple of million who are covered by corporate and industry type funds?

Mr Casey—No, that 1,000 to 1,500 excludes those people because we are not involved in that decision making process. The 1,000 to 1,500 figure is only relevant to the 1½ million people.

Senator HOGG—Out of the two million, do you have any idea of what the knock-back rate is?

Mr Casey—I could not give you an estimate of that in these circumstances. My gut feeling would be that there would be relatively few situations where same sex partners are actually excluded.

Senator HOGG—So to the best of your knowledge, and whilst one will take it that the evidence you give on this is anecdotal, you would say it is not a major problem?

Mr Casey—I do not believe this situation in terms of same sex partnerships and the right to the flow-on of a death benefit of their partner is a major problem for superannuation. I believe we have the mechanisms in the vast majority of cases to get around it. That is why I believe that superannuation is not the appropriate vehicle to drive the social change. I believe there are other vehicles which would be better to drive that social change.

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Senator HOGG—That brings me to the issue of whether you believe this is not a private sector problem—

Mr Casey—No.

Senator HOGG—Is it a public sector problem?

Mr Casey—As was explained by the last presenters, in terms of the public sector schemes there is a higher proportion of those that have benefits which do differentiate on the marital status of the individual, the number of dependents, et cetera, so that if the broader implications of the changes to section 52(2) were to apply, then the associated cost to the public sector would be higher than the private sector. But that is a different situation than the same sex partnerships. On the same sex partnerships, basically I would not believe that the public sector is any different from the private sector in terms of the proportion of relationships that there would be.

Senator HOGG—Could I ask one further question—

CHAIR—Before we get off that one, do you think your position in relation to payment to same sex partners is similar to that of your competitors?

Mr Casey—Yes, I believe so.

CHAIR—So you are not out there in front?

Mr Casey—Let us say we are not unique in going down this route. The vast majority of public trustees follow this route.

CHAIR—So it would not be a big ask to expect the Commonwealth schemes to step into line with the general practice in the private sector?

Mr Casey—I would not have thought so. Incidentally, Senator, you asked before about whether there were any relevant figures available for the public sector. I would have thought the government actuary was probably the best person to provide some of the details in terms of the Commonwealth schemes. He would have some idea of the state schemes as well. You asked a question about other countries' position.

Senator HOGG—Yes.

Mr Casey—The Privacy Commissioner, Malcolm Crompton, may have that information. I am having lunch with Malcolm next week, so I will ask him.

Senator HOGG—You can follow it up privately.

Mr Casey—I will follow that through for you privately.

Senator HOGG—None of us will let it out until he reads the *Hansard*.

Mr Casey—That is right—and, hopefully, he won't have seen the *Hansard* before Thursday.

Senator HOGG—So you will have a real win. Can I raise the proposed change that you suggested to section 3—that is, subsection 10(1)—by the addition of the words 'or any other person who is financially dependent on the deceased at the date of death'. It is the words 'at the date of death' that interested me.

Mr Casey—Why is that relevant?

Senator HOGG—Is that an industry standard, 'at the date of death'?

Mr Casey—Yes. The reason for that is that there is a range of ways in which superannuation trustees can pay benefits to beneficiaries. One of them is that they have a nomination from the member which may or may not be binding on the trustees. To establish financial dependency, it must be at the time the benefit becomes payable, not at the time you get the notice from the member, because at the time you get a notice from the member, they may indeed have a person who is financially dependent who, at a future point in time, will not be financially dependent. So you have to determine the financial dependence at the time of the death of the individual. For instance, a parent is not a natural dependant of the child.

Senator HOGG—If you are in my place, you are.

Mr Casey—This is why dependants are always financially dependent upon us, I think. A child living at home, by virtue of paying board, helping to provide for the day-to-day expenses of the household, can provide a link of financial dependency of the parent. If the child moves away from home, then that link is not there any longer. So at the time that the person says, 'I nominate my parents as a dependant,' they might indeed be financially dependent. By the time the person dies, they may not be financially dependent. That is why I include 'as at the date of death'. One point which you mentioned earlier, with respect to that phrase that I included in terms of financial dependency, was in respect of 10(1), subsection 3. It is in 10(1) in the definition of 'dependant'. It is at the end of the definition of 'dependant' rather than the definition of 'de facto partner'.

Senator HOGG—Sorry, I misread that. That is quite rightly corrected. I want to refer you to something that was put in submission 20 by the Gay and Lesbian Rights Lobby Inc., where they state:

In 1999 the Commonwealth Government amended superannuation legislation to make it possible for superannuation funds to change their rules, if they choose to do so, to accept binding death benefit nominations from fund members.

They go on to say that not many funds have changed their rules. Do you know why?

Mr Casey—Yes, I do know why. The administration that has been proposed under the regulations is extremely difficult—I will not say unworkable but very difficult—and also there is not any reasonable period of time being granted for superannuation funds to make the transition. Indeed, we enacted binding benefit nominations in 1994 for the fund that I referred to that had our 1.5 million members. As a matter of fact we were the lead organisation in seeking to have this situation clarified.

The expectation of the members of our funds in actual fact is that those nominations will be binding. To change to the current administration as required under SIS we have to get each and every one of those amended which, for 1½ million members, takes a fair time. We believe that in the interim period the existing nominations should be able to be maintained as binding by the trustees. It is the difficulties associated with moving to the new arrangement which has caused a lot of superannuation trustees to say it is not worth it and we will just now have non-binding nominations. Many of them have in actual fact decided that they will just pay directly to the estate. I do not believe that that is in the best interests of the members of the superannuation funds. I believe that there needs to be a review of the binding benefit nomination procedure to enable trustees to have a smoother transition to be able to put it into place because it is in the best interests of the trustees and the members.

Senator HOGG—I am getting a nod from Senator Watson but I note in their submission they go on to to say:

The government has suggested that these changes solve the problem for same sex couples.

CHAIR—No, they thought they would but they have not.

Senator HOGG—That was their submission. I am sorry. This is the submission of the Gay and Lesbian Rights Lobby Incorporated.

Mr Casey—The binding benefit nomination has no effect whatsoever on the ability to pay a same sex partner. The binding benefit nomination says if there is a valid nomination then the trustees must pay that person, but if the trustees cannot determine that the same sex partner is indeed a dependant—and they cannot say they are an automatic dependant; they have to go through the financial leg of it—then they could not pay that person. It has had no effect whatsoever on the ability to pay same sex partners.

CHAIR—As a consequence, the legislation or the regulation was defective.

Senator HOGG—These people submitted it to us. That is why I was looking for your comment, Mr Casey, because it does cut across the issue that is contained in this piece of legislation.

Mr Casey—Certainly, Senator, I believe if we get the overall social legislation right and we get binding death benefit nominations it will make life infinitely easier because then same sex partners will be able to effectively pass their superannuation benefit through to their partner in the same way as they could in a will but in a much more time efficient manner.

Senator HOGG—Thank you.

CHAIR—Thank you very much, Mr Casey. You have enlightened us no end and we congratulate the AMP on its progressiveness in this area.

Mr Casey—Thank you.

CHAIR—On behalf of the committee I thank all the witnesses who have given their evidence today and for their participation and that concludes the committee's proceedings.

Committee adjourned at 3.40 p.m.