



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

SELECT COMMITTEE ON SUPERANNUATION AND FINANCIAL  
SERVICES

**Reference: Superannuation (Entitlements of same sex couples) Bill 2000**

MONDAY, 13 MARCH 2000

CANBERRA

BY AUTHORITY OF THE SENATE

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**SENATE**

**SELECT COMMITTEE ON SUPERANNUATION AND FINANCIAL SERVICES**

**Monday, 13 March 2000Monday, 13 March 2000**

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

**Senators in attendance:** Senators Allison, Chapman, Conroy, Hogg, Lightfoot and Watson

**Terms of reference for the inquiry:**

Superannuation (Entitlements of same sex couples) Bill 2000.

## **WITNESSES**

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Committee met at 7.34 p.m.

**MURRAY, Mr Nigel Patrick, Director, Superannuation, Australian Taxation Office**

**PATCH, Mr Robert, Manager, Retirement Policy Unit, Retirement and Personal Income Tax Division, Treasury**

**CHAIR**—I declare this committee open. 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 tonight'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 this bill and its potential consequent impacts on members' rights and obligations and on the rights and obligations of fund administrators and on the community generally.

**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 that the Senate has power to protect them from any action which disadvantages them on account of the evidence given before them in 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 would like to welcome all of the participants to tonight's hearing. We do have a timetable. Because we have added an extra person by way of a telephone conference, that is going to place some pressure on our timetable. So we would ask everybody to be fairly concise and to the point. Mr Murray and Mr Patch, have you got an opening statement that you would like to make?**

**Mr Patch**—No, we do not have an opening statement. We would prefer just to move straight to any queries which the committee might have of us.

**Mr Murray**—Similarly, I am happy to answer any questions that the committee has.

**Senator HOGG**—Evidence the other day suggested that those people in same sex relationships currently, where they do receive the benefit, pay a higher rate of taxation. As a result of the passage of this legislation, have you got any idea of the cost to Commonwealth revenue? Should they then be treated as heterosexual partners?

**Mr Murray**—The changes in the bill before us just amend the Superannuation Industry (Supervision) Act. They do not actually flow through in the amendments to the Income Tax Assessment Act.

**Senator HOGG**—They do not flow through?

**Mr Murray**—They do not flow through. So 'dependant' under the tax act will continue to have its existing meaning and there will be no change there.

**Senator HOGG**—What if there were changes to other consequential acts? What would be the cost?

**CHAIR**—That would require a separate amendment to—

**Senator HOGG**—I understand that would require a separate bill, but one of the things the committee is looking at may well be the passage of amendments to other pieces of legislation to coincide with changes to this piece. What would be the cost to the budget under those circumstances?

**Mr Murray**—We have not examined any of those costs in detail; it is not proposed in this bill.

**Senator HOGG**—Would it be possible to get some costing appreciation for this committee? Even though it is not part of this bill, it may consequentially flow out of whatever the decision of this committee on this bill might be.

**Mr Murray**—I do not know if that would really be what the ATO would consider necessary, just considering this bill.

**Senator ALLISON**—Is it not possible just to get a ballpark figure? Are we talking about billions or hundreds of millions?

**CHAIR**—It is outside the scope of the legislation before us; that is what they are saying.

**Senator HOGG**—I understand that, but if we are discussing things in this committee which may well have knock-on effects, if there is a knock-on effect, you people can advise us of what the knock-on effect might be. It therefore is very helpful to us.

**Mr Patch**—One of the difficulties in this area is the availability of reliable statistics on the incidence of same sex partners. You need that sort of data in order to make accurate assessments on the cost of the measure.

**Senator ALLISON**—Is it possible to hone this figure down slightly by simply looking at it from the point of view of referring to all of those who are outside heterosexual couples, or opposite sex couples? What percentage of those receiving superannuation benefits would be in the position of getting the tax benefits that come from being opposite sex couples?

**Mr Murray**—We would not have any information in terms of breaking it down to those sorts of categories.

**Senator HOGG**—I turn to the piece of legislation itself. We had evidence the other day relating to page 5 of the bill, under schedule 1, where proposed subsection 52(2) reads, ‘Add:’ and then there are a number of things to add there.

**It was suggested to us that the whole or part of that expanded definition there could cause problems with the legislation in the longer term. Do you have a view? For example, the word ‘sex’ could have unintended consequences if we were to adopt that addition to subsection 52(2); the words ‘social origin’ could have some unforeseen consequences for this legislation as well. Have you given any consideration to subsection 52(2) and the consequences of the inclusion of some or all of those terms that are there?**

**Mr Patch**—It almost goes without saying that we were not involved in the preparation of the legislation.

**Senator HOGG**—I am definitely not trying to blame you.

**Mr Patch**—The committee generously provided us with a transcript of the evidence given last Friday week. I have to say that I found the evidence very informative—

**Senator HOGG**—That is saying something.

**Mr Patch**—particularly in relation to the issues raised by the Institute of Actuaries. Also, ASFA raised some issues about some of the words in section 52. I can only say that I was educated by my perusal.

**Senator HOGG**—Given that you were educated—and I am very pleased that this committee has achieved something in its time—have you in any way sought a view as to the impact of those words definitionally within the current piece of legislation?

**Mr Patch**—No.

**Senator HOGG**—Whilst you have been well informed by the hard work and effort of this committee, do you think it is necessary for this committee to pursue that issue further? Can you see that there are dangers there that were flagged with the committee?

**Mr Patch**—That is a judgment that the committee would have to make rather than leave for us.

**Senator ALLISON**—Are there absolutely no tax revenue implications in this legislation?

**Mr Murray**—That is correct. It does not impact on the definitions of spouse or dependant in the tax act; hence they continue to have their existing application and meaning.

**Senator CONROY**—I have a question in terms of definition. What is the standard definition which Treasury or Tax apply for de facto as opposed to spouse? Do you separate them out in a legal sense? Are there court determinations that you cannot go against? What is the status?

**Mr Patch**—All I can refer you to is the definition in the SIS Act which refers to spouse. From memory, it talks about people living together in a genuine domestic basis as husband and wife. I think that is the standard definition. It is designed to extend ‘spouse’ to de factos, or common law marriages.

**Senator CONROY**—We are receiving some evidence from Mr Morgan a little later. I have just been reading his submission—he argues ‘de facto’ would probably fail the test if we were to use the term ‘de

facto'. He is arguing that we need a new category called 'domestic partner', which could be recognised and defined narrowly and broadly. He argues that models are used in New South Wales and the ACT. Are you familiar with that terminology?

**Mr Patch**—I am not familiar with the expression 'domestic partner'. My experience with legislative drafting is that it is best to go to the drafter and say what you want to achieve and they will come up with some words to do it for you, rather than try to—

**Senator CONROY**—Torture Treasury!

**Mr Patch**—We are not drafters. We go to drafters with concepts and they put up some words for us.

**CHAIR**—As there are no further questions, thank you, Mr Patch and Mr Murray. This would be one or the easiest nights you have had for a long time before a Senate committee.

**Mr Murray**—Thank you.

**Senator HOGG**—And we are glad you are enlightened.

[7.48 p.m.]

**MUEHLENBERG, Mr Bill, National Secretary, Australian Family Association**

**STOKES, Mr Peter Phillip, Executive Officer, Salt Shakers, representing the Festival of Light**

**CHAIR**—I welcome the representatives of the Australian Family Association and the Festival of Light. Thank you both very much for sending in your submissions. They were a little late and missed our first hearing but we thought it was necessary to get the degree of balance that your submissions provided. For that reason we sought the permission of the Senate for an extension of time. I wish to assure not only yourselves but others who have written in and provided submissions that just because you do not get called it does not necessarily mean that we have not read your reports or we have not taken note of all the issues that you have raised.

**Mr Stokes**—I am speaking in a sense on behalf of the Festival of Light and also an organisation of my own which, had I known about the hearing, would have certainly put in a submission.

**CHAIR**—You are speaking to the submission that came from Adelaide?

**Mr Stokes**—The submission was drawn up in Adelaide. We network very closely with the Festival of Light so they asked me if I would come and speak on their behalf.

**CHAIR**—We invite you not to read the whole of their submission but to draw out particular issues that you feel we should pay attention to in our hearing. Festival of Light, would you like to have the first go?

**Mr Stokes**—Okay. I do not intend to go over the material that is in there but perhaps just to elaborate a little bit on some of it. First of all, I thank the committee for inviting us to come and speak and for its cooperation and help over the last few days. It has been very much appreciated. As I said, I work very closely with the Festival of Light. Our aims and objectives are very much the same and to that degree we tend to speak with one voice on these issues.

**Following being asked to speak at rather short notice, I was somewhat alarmed when I received the transcript of the Melbourne hearing. I found it amazing that people were speaking on behalf of the superannuation, taxation and actuarial departments in our country with apparently very little knowledge about the homosexual lifestyle or about, as we have just seen again, the numbers of people that are involved in these activities in the nation.**

**I have been researching homosexuality for over five years through the organisation I run because we were concerned about its impact coming through on the church and on society. I want to make a couple of points in relation to that and to our evidence—and I have, quite frankly, a bag full of books down here that I decided I would not lift up onto the bench to make some statement. We have done a lot of research and I would just like to make the following comments. We are very concerned about the move towards acceptance of same sex relationships in our nation. We have discovered absolutely no scientific evidence to show that people are born homosexual. There is no genetic evidence that has been substantiated, and yet there is tremendous evidence to say that homosexuality comes from dysfunctional families and from child abuse.**

**I have, as I said, many books down there. I have got one by Geoff Konrad, *You Don't Have To Be Gay*, written by an ex-homosexual who says that he accepts it was a choice and he has changed. It is actually a book of letters written to his friend who is still a practising homosexual. At the beginning of that book he says:**

I am not talking just about superficial change. I am talking about total change, orientation, lifestyle, everything.

And we have numerous testimonies of people who have gone through that. I do not want to suggest it is easy for somebody that has been addicted to something for many years, as I was addicted to smoking for many years. It was difficult to give up—or at least, I did not have a lot of difficulty giving up but I know a lot of people do—but we have to understand where these things come from in order to treat them in the right way. If we are going to start making laws and making lifestyles like this acceptable in our nation we are not doing

them proper justice. We are locking people into lifestyles that, quite frankly, have proven to be suicidal and very unhappy because they are not dealing with deep-seated problems that need to be dealt with. I liken it to what we do with young women who have trouble relating to men and often receive counselling. It is because of child abuse or some other reason in their childhood and we do not leave them there. We counsel them and bring them through so that they can carry on normal relationships. This is what we need to do for our homosexual community.

**I could speak a lot about that issue of change. We had a very interesting article in the *Age* newspaper this last year about a woman who for 20 years had ridden down Oxford Street on her motorcycle as a lesbian, one of the founders of the Mardi Gras. Last December she got married to a man because she met the right person. That is the changeability of this lifestyle that we are talking about entrenching in legislation that makes it just another choice, an alternative to a heterosexual lifestyle, and we find that quite wrong.**

**When it comes to the numbers of homosexuals, the 10 per cent figure that I saw quoted in one of the references at a previous hearing is a figure that has been grossly overrated and has, in fact, been debunked completely. The Kinsey institute which set up the research to do that back in 1948-1952 used prison inmates and paedophiles to do the research on. The Kinsey institute has now come out and said—and that original report was called the Male report and was instigated in 1948—that that figure in the US is, in fact, about 1.4 per cent. I think that something like 17 surveys have been done around the world about the actual figures for homosexual population and we see none of them at more than two per cent.**

**I have this written here and I am happy to give you these notes. For the USA, as I said, Kinsey have now said 1.4 per cent. Seventeen other studies have been done around the world. The *Wall Street Journal* presented such figures and said that the USA was 1.2; France, 1.4 for men and 0.4 per cent for women; in Britain, 1.4 per cent, and that was in 1992; in Canada, 1 per cent of men were homosexual and 1 per cent were bisexual; and in Norway, 0.9 per cent of males and females, and in Denmark 1 per cent of males between the ages of 18 and 59 were exclusively homosexual. So the figures are very small. I will deal in a moment, as briefly as I can, with how that relates to the idea of marriage.**

**Senator HOGG**—If I could I just take you back, you said USA, Canada, Norway and Denmark.

**Mr Stokes**—USA; France, 1.4 per cent of men and 0.4 per cent of women; Britain, 1.4 per cent; Canada—I think you got that one; Norway and Denmark.

**CHAIR**—If there is a perceived injustice, does it really matter if it is 1 per cent or if it is 10 per cent?

**Mr Stokes**—It is a good question. Perceived injustice may be a word that we have got to look at carefully. In his evidence, Mr Casey from AMP made the comment that if we do this through SIS, then this has potentially a flow-on effect through the whole range of other legislation. It is something the parliament would need to consider because the tax act would have to be amended and the Social Security Act may need to be reviewed. We are initiating here what is a very substantial social change.

**Senator HOGG**—Could I just stop you there. I know it is your opening statement but while Mr Casey said that, he also said that the problem was predominantly one not in the private sector, it was one in the public sector. As I understood his evidence, he said that basically the private sector paid out anyway.

**Mr Stokes**—It would appear that where there is a financial interest they do. So, again, we really have no need to entrench something in legislation which actually changes our social structure in this country—in other words, we move from a situation where married couples and de facto partners are male and female to a situation where we move the same sex relationship area into a de facto status. That is the status that is being quoted on a number of occasions as being the move we are talking about making, putting these things under the de facto status. That is a very dramatic social change in this nation from the traditional, long held belief that a family were a male and a female and subsequently children to now include same sex couples who cannot have children and cannot in fact even fulfil a love act properly. That is a dramatic social change and a social change that we have to think very seriously about when we consider what causes homosexuality and what their relationships actually pertain to.

In this particular book, which is a very revolting book—none of us would probably like to look at too many of the photographs in there, I can assure you—it says monogamy basically does not exist. In other words, there is not the traditional idea of having one partner and of the two partners being monogamous. It is negotiated relationships. It can be a situation where one may be the sole partner but the other may go off and have other partners. It is an agreed terminology. Basically, they say the word monogamy, in the sense of traditional heterosexual relationships, should not exist. When you also look at the percentages of people that are involved in permanent relationships, the evidence is very freely available in the Sydney gay community reports that come out of New South Wales. In fact, these reports use a terminology which is quite unusual, because where they talk about—

**Senator HOGG**—Excuse me, if you are referring to a report, for the sake of the *Hansard* could you give the name of the report, so that if people are trying to look up the information later they can.

**Mr Stokes**—I have listed it in here, but it is the National Centre in HIV Social Research, University of New South Wales, *Sydney gay community surveillance report*, and this is the update to December 1999. What it basically says is that the figures are that between 25 per cent and 15 per cent of homosexuals are involved in any form of an ongoing relationship. The two per cent is a figure we use basically to say that—bearing in mind that all the figures come out at less than that—we are looking at 20 per cent of that two per cent. In fact, 70 per cent of those relationships do not last two years. This is the evidence coming out from their own statistics. They do not last more than two years. Many of the other 30 per cent that last more than two years do not last more than five years. We are talking about a very changing situation here, and I can see nightmares. I used to be with AMP for 10 years. I know a little bit about the superannuation business, although I am not an expert and I would never claim to be an expert in that area. But I can imagine the nightmare involved in trying to keep tabs of nominated beneficiaries in the sort of scenario that we clearly see here, where a very small percentage of these people have any sort of long-term relationship and, in fact, where those relationships are changing very regularly.

**The survey found that between 30 per cent and 40 per cent of relationships had changed in the previous six months. As I said, I will give you a copy of this. You must also then look at the whole political agenda that is being pushed by a group of people who have chosen—and I use that word wisely—a lifestyle. We firmly believe that some of them do choose it and others believe that is the way they are, but with proper counselling we can certainly find out very quickly that the cause is usually early abuse or sexual assault by a male, or whatever.**

We are talking about a group of people that are not black or white or male or female. They are not designed that way and therefore they cannot do anything about it. I have many friends who used to be homosexuals; they are no longer homosexuals. I have friends who are now married with three or four children who had lived the life of a homosexual. One of my friends lived the life of a homosexual for 11 years. I have a young friend who is now married. She actually had a sex change operation to change from being a female to a male. She realised that it was not right when she had had it done. She then went back to Monash and had a revamped operation, as best as they could do, and that young lady is now married. She is not an unintelligent young lady; she is a vet. That was her story of how she was seduced into the lesbian lifestyle in university, because she had been abused by a male earlier in her years and found it difficult to relate to men. She went to Melbourne University, tried a couple of male relationships and did not do too well.

**CHAIR**—Do not be too specific, because the lady might not want to be identified.

**Mr Stokes**—She has allowed me to print her testimony in our newsletter, so that is not a problem. I am not going to name her, but I can. I have printed it and our newsletter goes out to 3,500 people around Australia.

**CHAIR**—We have to be very careful about protecting people's privacy.

**Mr Stokes**—But that is the situation. She is now married and I tremendously admire her husband knowing, as he does, all that background. But these are situations where people have come out of this so-called genetically based lifestyle of which there is no evidence. We have to also look at the damage that this bill may do to traditional marriage. I think Bill is going to cover this a little more.

I think we have always held marriage and family—the traditional style of marriage, male-female with children—in very high esteem. In fact, every society that has moved away from that has collapsed. In every society in which its government has actually put it to the people as to whether they want that sort of relationship, the people have overwhelmingly said no. In Hawaii recently they expected same sex marriage to be approved; it was knocked back by 70 per cent of the people in a referendum. Just last week in California, 66 per cent of Californians said no to accepting same sex relationships—and that is California where there is San Francisco with probably one of the highest rates of homosexual community in America.

Over 30 states in America have passed rules in recent years to stop same sex couples coming in from other states and being accepted in their state, because they will not accept same sex relationships. Yet we are moving down that track. We have already done it to a partial degree at state level. The question is: why? And the question I would ask is—and I am asking the question; I suppose this is your chance to ask questions—as senators of Australia, how can you, without asking the people, decide to make a societal change which completely changes the structure of family in this nation? I ask that you do not do it.

**CHAIR**—Thank you very much.

**Mr Muehlenberg**—Again, thank you for allowing us to come. It was a late submission. I think a few expressed concerns that the weekend papers allowed about nine days. That may be traditional, but for many, I suppose, it is hard to pull a submission together on time, especially on a fairly important issue like this. So thank you for allowing us to get a late one in. This one did come from the Perth office. Being based in Melbourne, I am taking their place.

I have a few other documents which I would like to table here. I suppose our main concern is something that perhaps has not been picked up a whole lot by many of the others who gave oral testimony in the last week or so. As Peter hinted, that is simply looking at the bigger picture—how will something like this, along with a whole lot of other bits and pieces of legislation, impact on family and society? Will there be an effect? If so, will it be a good effect or a bad effect? I found very few people really addressing that broader issue. It seems to me that, if you are going to go down a road which again, as some have hinted, may involve fairly substantial social change, stepping back and looking at some of those bigger questions is in order.

Very briefly, our concerns are that indeed this proposal—like many bits of legislation that have already gone by and others that are forthcoming, bit by bit—maybe not so much in and of itself, but taken together with others, will chip away at the basis of what society has regarded as a fairly important social institution, namely marriage and family. In fact, we would ask everyone here simply: why is it that not only Australian society but so many other societies throughout history, not only now but throughout the many generations, have for some reason said that there is something about the institutions of marriage and family that deserve, if you will, special recognition, that deserve special attention, if you want to use the special, even preferential treatment? Why is it? Why is it that so many societies, both currently and throughout history, have looked to marriage and family as being of such importance that they were willing to grant to them recognitions, special privileges, if you will, which other types of relationships have not been granted. I think that is the question we need to be looking at a bit more carefully before we go ahead both with this and related bits and pieces of legislation.

To perhaps ward off a question that may be arising—in fact some of the submissions have already noted this—families are changing, society is changing. Families do not seem to be what they used to be. That is almost thrown up as perhaps an excuse to keep going down this road—that marriage and family may be less important one day.

To respond to that I would simply say that social trends are not necessarily irreversible. Today we certainly see a lot of indicators which make it look that marriage in some degree is

in decline, that the family is in decline, but then again we are talking perhaps decades in terms of perspective, not centuries. Who knows, a lot of this may not turn around. In the United States where I am from, it looks like there are a number of indicators which would show that things are turning around, that marriage and family is receiving renewed attention. Even Bill Clinton, who is not necessarily known as a rabid right winger or redneck, has stated how important marriage and family is. In fact, the US Congress passed recently what is called the Defense of Marriage Act, which basically affirmed the importance of marriage and family as against some of these other types of relationships.

Marriage has historically been an important institution and most societies have recognised that and therefore have given it special recognition. A paper I have here entitled, *In defence of the family: the historicity and universality of the family*, gives some of the evidence. I notice in some of the submissions that there is the idea that families are a fairly recent invention. In fact, I have heard it said on a few occasions that the family was an invention of the 1950s, perhaps from America, but the paper shows—

**CHAIR**—Is it the wish of the committee that this be accepted as a tabled document? There being no objection, it can be tabled.

**Mr Muehlenberg**—Thank you. It is a short paper but well footnoted. It shows that historically and throughout the world today marriage has been the preferred option of the way societies have looked at the ideal social grouping, the way of raising children as a kind of social cohesion. There are a whole number of reasons why societies have tended to look at this relationship as something special. So when we look at bits and pieces of legislation that talk about granting or extending benefits to other kinds of relationships, the question is: do they deserve that kind of extension of benefit? Do they contribute the same value to society in the same way that the institutions of marriage and family traditionally have?

Not only is it a question of simply same sex couples. It seems to me that if you take the reasoning of the homosexual lobby any number of other groups could suffice, such as any group where there is, if not economic dependency, at least a close kind of relationship, perhaps a common purpose. In other words, why stop there? It seems a lot of groups here could qualify—maybe a football club. Even a gang of bank robbers would have a fair amount of economic interdependence and a shared purpose.

I bring this up simply because last week in Melbourne we had the case of a court ruling that two lesbians were entitled to go through the IVF program to get access to a child. The couple just did not really make it clear that they were homosexual so the IVF act in Victoria, which precludes homosexual couples, ended up allowing them access and they now have a child. Of course, the claim is, ‘Why should we be discriminated against? Why can’t we have the rights to children like anybody else?’ The cry goes on and on.

Marriage and adoption rights have long been argued for by the homosexual community, but again we would say, ‘Is it possible to demand a right for something which is maybe not yours to be given?’ Homosexual couples certainly cannot demand, at least in a biological sense, the right to children any more than I could demand the right to be 10 feet tall. To speak of rights being denied or privileges being held back or discrimination seems to me to be the wrong terminology. Nobody is denying a homosexual the right to a child. They can go through it by the same means that any other person does if they go through the normal, natural, biological means to do so, but if you choose to live in a relationship which by definition precludes you having the right to children, then to say that society somehow discriminates against you from having children seems to me a bit silly.

It seems a lot of similar thinking is here. There is talk of justice denied, rights denied and discrimination. Again, I am not sure if we are really having rights denied. Nobody is saying a homosexual cannot enter into a heterosexual relationship and avail themselves of the benefits of marriage and family if they are willing to take on the duties and obligations. But as with so

many of these rights debates, the benefits are always being claimed but the responsibilities that go with them are usually overlooked.

So again, the broader perspective is: why did we treat families specially in the past, and should we now be looking at other groups? Do they really warrant special attention as well? We are just concerned. As we grant different relationships special privileges once reserved for a marriage and family, in effect it diminishes marriage and family. It takes away from the importance of marriage and family and basically says society no longer values you, no longer says you are important and any kind of relationship will do. I just do not know if society is ready as yet to say that we just have that lower view of marriage and family.

Again, the piece of legislation may not be all that earth shaking in and of itself, but taken together with many other such demands, put together it is a pretty cumulative case that this same sex kind of relationship is just as good as marriage and family. It seems to me at the moment most Australians would say, 'No. That is not the case. There is something special about marriage and family.' Until there is perhaps a referendum to say, 'All right, you, you or you in your relationship are just as equal in value to society as marriage and family,' and until we get to that point I do not think we should be making changes that would reflect something society at large really does not approve of at this point. I think that is the overall framework from which the AFA is coming and perhaps we will leave it there.

**CHAIR**—Can you substantiate the claim that was made by Mr Stokes that these relationships generally only last a couple of years and could cause a lot of problems for the superannuation industry in terms of nominated dependants who may not be dependants after a couple of years? Have you got any statistics on that?

**Mr Muehlenberg**—I have, yes.

**CHAIR**—Is that a recognised statistic, for example, because I would like to try to get some validity on that.

**Mr Muehlenberg**—If I can table some more at this late stage, this has got 120-odd footnotes simply on a whole range of issues related to homosexuality. Part of what I do, as well as my job defending marriage and family, I actually read a fair amount of the homosexual press.

**CHAIR**—I only want to accept it actually if it is related to superannuation issues, rather than the issue generally.

**Mr Muehlenberg**—In there there is a section on how many homosexuals, relationships and lifestyle. In there we actually quote a fair amount from the gay press itself in which they actually look at that question: is monogamy something that we are happy with? Is marriage an option? And there has been quite a bit of debate within the gay press about this issue and most of them seem to think that monogamy is not really a viable option. Many of them think it is just the multiple partners, which tends to be the norm within the homosexual community. These are quotes. I have got them listed in there, but the idea of settling down with one person for life is really averse to many, if not most, of the homosexual community. Simply going from their sources, it looks like this idea of long-term or monogamous relationships tends to be fairly rare and not exactly something that many homosexuals actually desire. So in there we have tried to table some of that evidence.

**CHAIR**—Is it the committee's wish that the report be tabled? There being no objection, it is so ordered.

**Mr Stokes**—Could I actually table these three documents which were the three that I was trying to point to a minute ago. These are from *Men and Sexual Health*, June 1997. This one is from the report that I mentioned earlier, June 1999. This one clearly says, 'one regular partner only.' There is a little (a) there and it says, 'includes monogamous and regular, and my partner has casual partners.' That is as close as they can get to a 'one regular partner only'. The statistics are quite clear, and I have highlighted them. They show the figure between 20 per cent and 15 per cent.

**CHAIR**—What is the source of that document?

**Mr Stokes**—The source of that document is this report which I talked about—the *Sydney Gay Community Surveillance Report*. These statistics are from the gay community. The *Men and Sexual Health* reports come out on a regular basis—June 1999, June 1998, December 1997, June 1996—from New South Wales. Some of

them are in that concise form and some of them come out in A4 size. This table shows the percentage of men in regular but not monogamous relationships—24 per cent in Sydney, 23 per cent in Melbourne and 19 per cent in Brisbane. Going on from that, on the next page there is a table headed 'Length of relationships with men'. In that table under the heading 'Changed in previous six months', there were 30 per cent in Sydney, 40 per cent in Melbourne and 38 per cent in Brisbane. In that same table under the heading 'Over five years old', there were 14 per cent in Sydney, 15 per cent in Melbourne and 11 per cent in Brisbane.

**Senator HOGG**—Could I just stop you and ask a question there. Do you have a comparison between the gay and lesbian community and the heterosexual community? Is that broken down into those who are married those who are in a de facto relationship?

**Mr Stokes**—In terms of length of relationship?

**Senator HOGG**—The length of monogamous relationships and so on. Do you have that sort of information so that the committee can see a comparison? Are the relationships that you are describing to us in terms of the gay and lesbian community reflected in the rest of the community as being the period by which relationships last?

**Mr Muehlenberg**—I do not have them with me, but I was just reading some statistics from the Australian Bureau of Statistics. They come out with a number of books on marriage, the average length of marriage and all those kinds of things. Certainly those kinds of figures can be obtained. So you can do a bit of a comparison in terms of what the average marriage is and how long it lasts.

**Senator HOGG**—I would think that, if you have come to put an argument to us, you would present those figures to us as well. Without those, the argument that you have put to us is certainly not complete from my perspective.

**Mr Muehlenberg**—I can certainly send those in, if it is all right.

**CHAIR**—We now have two more documents: the *Sydney Gay Community Surveillance Report* and *Men and Sexual Health*. Is it the wish of the committee that we table these documents? There being no objection, it is so ordered.

**You mention that there are perhaps some other groups in society who are disadvantaged. One case that comes to mind is where you might have two sisters. One sister has looked after her mother all her life. Mum has lived to a ripe old age in her late 50s. She is alone, she has a sister and the sister is financially dependent on her. She has been out to work, say, with the Commonwealth and got an entitlement, but no superannuation pension can pass. Do you see an injustice in that situation?**

**Mr Muehlenberg**—I can certainly see a stronger case to be made for that kind of situation. It seems you would perhaps have stronger grounds to make a case like that, and it may well be that perhaps that is something that could be looked into. In our definition of family—which is any group of people related by blood, marriage or adoption—they would certainly qualify as a family. I believe at the moment that for siblings after the age of 18 or something that cuts out those kinds of benefit. But, yes, I think certainly a case could be made much stronger for that kind of situation than, say, that of same sex couples. So there may well be other kinds of significant relationships in which perhaps there has been injustice in the past. Again, because two sisters would certainly qualify as a type of family, I would certainly have less of a problem recognising that kind of relationship than, say, the same sex relationship.

**Senator CONROY**—I have the Festival of Light submission from Mrs Roslyn Phillips. Have you have seen that one?

**Mr Stokes**—Yes.

**Senator CONROY**—In the first section, 'Discrimination is necessary to promote and protect the institution of marriage', it makes the statement:

De facto heterosexual couples should not receive special encouragement, because their relationships have been shown to be much more unstable, and more prone to domestic violence and child abuse...

It goes on to argue:

We believe de facto heterosexual couples should not receive superannuation entitlements.

**Mr Stokes**—The opening up to non-committed relationships, which is what you basically call a de facto relationship, is a general concern. If people are not prepared to commit to one another for the long haul, even though we know that some of those do fail, I still believe, as Ros has intimated here, that in many senses that was the start of the slippery slide in how we as a society saw the family and devalued the family. Basically, it was done for the sake of the children in those relationships, not so much the couples. It was felt that the children were disadvantaged and therefore we should give those benefits. Of course, they have to prove that they have been together for a length of time before they are eligible for that benefit in superannuation. I would certainly agree that that is where we open the door to the abuse of family and the benefits that Bill talked about being paid to family—the recognition of a commitment. I have not got the statistics. I have got an interesting rundown on the relevance of gay parenting but not on de facto parenting.

**There is enormous evidence—and I know that can be a very glib statement, but almost every time you hear about child abuse, it is a de facto partner that is involved in that child abuse. I am not saying no child abuse exists within the structure of the family, but if you read the stories, they relate to a very big proportion of the children that are talked about in the newspapers, just as you read the story about somebody who is a homosexual and they are saying, ‘Homosexuals are normal,’ they inevitably go back to their childhood and talk about some sort of abuse or a dysfunctional family. Peter Tatchell was a classic one. He was highlighted in the *Age* newspaper last week. He is an Australian living in England and leads the organisation called Outrage. He has caused all sorts of problems for the English. He is a gay activist. His story was there. There again, you read about his childhood and it was a disrupted childhood; it was an unhappy childhood. In fact, in that statement he says, ‘I have three sexual partners at this time.’ He admits that in that article. I have it typed up somewhere. It is in the submission that I am happy to leave with you. He says, ‘I have three sexual partners at the moment.’ That is typical of what we read about those relationships. So I would endorse what Ros said. When we opened the door to extra benefits in the name of family for non-committed families, we started the trend to what we are seeing today.**

**Senator HOGG**—Could I follow up Senator Conroy’s question. I have asked this of others who have appeared before the committee. Can you give us the statistical evidence to back up what you are saying?

**Mr Stokes**—Yes, we can. I may not have it here today.

**Senator HOGG**—I understand that. If you have got to take it on notice, that is fine. As I said at the committee meeting in Melbourne, it is very easy for people to make sweeping statements. It is like my kids saying to me ‘Everyone is going to’ and when you start to narrow it down, everyone is ‘one’. If you can give us—

**Mr Muehlenberg**—I have two things that I want to table. One relates to the benefits of marriage and the other is the case for the two-parent family. Again, both have roughly 100 footnotes. Each one has a section on de factos and child abuse. There is a fair amount of good evidence both from Australia and overseas which I have documented here. For example, our former human rights commissioner, Brian Burdekin, said there is a 500 per cent greater chance of a child being sexually abused if the father is not the biological father. That is just one that I remember of many which I have documented in those two papers. So there is a fair amount of information.

**Senator CONROY**—Do they draw a line between parents that remarry? To use one of the sweeping generalisations in the world, that is apparently where a lot of the child abuse occurs as well, where the parents marry and they have both got children, and those sorts of circumstances.

**Mr Muehlenberg**—Especially the step-parent home. That is right.

**Senator CONROY**—Are they contained in that or is that a separate category?

**Mr Muehlenberg**—You have got several, of course. You have got the de facto, you have got the live-in, you have got blended families of different kinds. Various shades are all recorded in the evidence I present there. Unfortunately, it just is often the case that the stepdad is really the one more likely to do the abusing. Again, children, generally speaking, are safer in a biological or natural family. That is just the evidence; it is really overwhelming. So in a homosexual relationship, where you do not have at least one natural biological parent, there may, by extension, be equal concern if children are part of the equation.

**Senator CONROY**—In terms of what the bill is trying to grapple with, in this set of circumstances, the irony is that, in most cases, there are no children involved.

**Mr Muehlenberg**—That is right.

**Senator CONROY**—I am the mover of the bill in the Senate. I guess what we are trying to grapple with, for the purpose of this discussion, is that they identify themselves as couples and would like that formally recognised and, in the circumstance of a death, to pass their benefit on. Your arguments, from the Festival of Light and from what you have been saying today, seem to be more about trying to protect the institution of marriage and the nurturing of children. You are arguing about something over here, and what we are dealing with is over here, slightly removed, particularly given that in most cases there are no children involved. You seem to be mounting a case about the sanctity of marriage, the importance of marriage, the benefits and wellbeing, and there is a lifestyle over here which you may agree or disagree with. It is just that that is what happens. We are trying to grapple with fairness and equity in that sense.

**Senator HOGG**—Their argument is, ‘It is my money. Why can’t I give it away to whomever I might choose?’

**Mr Stokes**—The argument is a very valid one, but, of course, they can give it away to whomever they choose if they simply write a will. Yes, there are—

**Senator CONROY**—You recognise and you are happy with that?

**CHAIR**—But the legislation does not provide for an entitlement in the first place. It does not get into the will because there is no entitlement. That is the problem.

**Mr Stokes**—I think it was AMP that said it was when they established a financial relationship, and that was what the superannuation clause for passing on the money was designed for—for families, children or a spouse, who had a financial stake, if you like, in that person’s life and therefore became the beneficiary of that money. Mr Casey said that, in most cases, where AMP established that there was, in fact, a legitimate financial thing, AMP had no problem in paying out the money. Rather than putting another nail in the coffin of marriage and devaluing it a little more, as this legislation will do, I think there are probably ways of doing a better job for more people and enhancing that idea that if there is a financial loss, then that person is entitled to some recompense.

**Senator CONROY**—So you can live with—if that is the phrase—finding a mechanism for money to be passed over if, in your view, it does not in any way undermine your view of marriage?

**Mr Stokes**—If there is a legitimate financial reason why these two people have committed themselves to a financial situation. We have to remember that what we are talking about in this case are mainly same sex couples with no children, in most cases they both work, and in most cases they have got more than certainly I have got. When one dies, what major financial problem is there that one has been left with? It may be that they have taken a mortgage on a house. Any two people can share a mortgage on a house. My son is 23, he is living in a unit with two other guys—he is not homosexual—and he may decide, ‘Why don’t we buy a house?’ So there would be three guys and they would have a financial commitment. I would see that, if one of those died, it would be a bit like a business agreement where you have a financial partner.

**Senator CONROY**—I am actually older than I look.

**Mr Stokes**—And you do not have a will? I would advise you to do something about that tomorrow.

**Senator CONROY**—I would be concerned that my property assets would not pass to my beneficiary.

**Mr Stokes**—But they would, through your will.

**Senator CONROY**—But I do not have a will. Notwithstanding your imploring me to get one, I am not planning on it. Maybe I do not like to confront mortality; maybe I am just not ready to do that yet.

**Mr Stokes**—May I ask if you are married?

**Senator CONROY**—I am not.

**Mr Stokes**—And you have children?

**Senator CONROY**—I do not.

**Mr Stokes**—Then your financial estate would automatically pass to your parents, if they are alive. It would automatically go into your estate and your estate would be decided by a trustee. Because you have not nominated one and because you have not nominated in your will—

**Senator CONROY**—I have nominated someone as my beneficiary.

**Mr Stokes**—That person would be responsible for making sure that your wishes were upheld after your death, and there is no problem with that. You can do with that money whatever you like. You can give it all away to a charity, if you want to, in your estate, if you have told that person. You might not have a formal will but you can write out a document and sign it. That is your will.

**Senator CONROY**—But I have not done that. As you say, you may implore me to get one tomorrow but I am not planning on running out and doing it.

**Mr Stokes**—I think the other interesting thing to look at in this whole situation is that the Superannuation Board that decide on claims that are disputed said they had very few disputes, so clearly the system is working quite well already.

**Senator CONROY**—Part of my reason for being supportive and moving the bill is that, like you, I worked in the superannuation industry for years before I came into parliament. I had to confront a number of situations of same sex relationships, the question of beneficiary and potential court direction and all those sorts of issues. There were genuinely some concerns about how it should happen and what should take place.

**Mr Stokes**—It is very simple: make a will.

**Senator CONROY**—As I said, maybe it is a matter of not wanting to confront my own mortality yet, but not everyone is comfortable making a will. It is not something that I think about and go out and plan for. I still consider myself—

**Mr Muehlenberg**—Then you cannot talk about discrimination. If there is a vehicle by which you can deal, hopefully, with a good hunk of these cases, but you do not want to go down that path, you really cannot talk about society discriminating against you. If there is a way by which you can rectify much of this, avail yourselves of it.

**Mr Stokes**—That is the answer rather than somebody claiming discrimination when they have chosen either to not make a will or to be in a different sort of relationship. Quite frankly, this book talks about—and this is rather gross—sex with animals as being fine and okay. I could read you out the passage but I will not. It talks about that, in the sense of where our relationships are going. That is in that book. What we are saying is: what are we going to do? Are we going to move down the track a little later? This seems absurd, and you will say, ‘You’re blowing it all out of proportion.’ But are we going to leave our money to our cat or dog?

**Senator CONROY**—People do leave their assets to their cats; it happens now.

**Mr Stokes**—Could I also say that I had 10 years in insurance and never came up against a same sex relationship.

**CHAIR**—We have two more documents by Mr Bill Muehlenberg, *The benefits of marriage* and *The case for the two-parent family*. Does the committee wish to accept these documents as being tabled?

**Mr Stokes**—Could I add a copy of what I said at the beginning, if you want it? If you do not want it because it is in *Hansard*, that is fine.

**Senator HOGG**—If it is in *Hansard*, it does not matter.

**Mr Stokes**—That is fine, although there is more in there than what I said.

**CHAIR**—It is so ordered. The next question is from Senator Allison. You have about five minutes.

**Senator ALLISON**—Can I come back to what I think is your central proposition and that is that homosexuality is undesirable for a range of reasons that you have put on the table today and that the best thing to do is to discriminate against it in order to discourage it? Would that be a fair—?

**Mr Muehlenberg**—The first half perhaps. It is simply that society has tended, if you want to use that language, to discriminate in favour of the traditional family and marriage relationships. You can call it discrimination or simply special recognition of the value that this institution gives society. Other people who do not find themselves for whatever reason in that institution miss out on some of that special recognition—on some of the benefits, if you will—but I do not think anybody in the past has said this is a case of discriminating against everybody from stamp collectors or tuba players, whatever situation you are in. That is

not the point. The point is that society has positively given recognition of marriage and family. If society comes to a point where it wants to change that, fine, but I think at the moment if you did a referendum on it—in fact, any survey that has been done recently still says that marriage and family are the ideals and we are not yet ready to jettison these institutions. Maybe if we come to that then you have got another discussion. But at the moment I think most of society is unhappy recognising all kinds of other relationships simply on the basis of what they do in the bedroom. Why should they be entitled because of that sexual preference to what has traditionally gone to marriage and family?

**Senator ALLISON**—You have already suggested that siblings who might be living together could perhaps be considered—

**Mr Muehlenberg**—I would consider that a family.

**Senator ALLISON**—Just a minute. Senator Watson has already given you a case in which you can obviously find some sympathy. I believe you said earlier that one of the reasons you hold the views you do was that you make a judgment on the basis of the value that they contribute to society. I wrote it down. I think it was you, Mr Muehlenberg, who said it. What is the rationale behind then saying that a benefit can flow to siblings who might be dependent financially on each other, but not to same sex couples?

**Mr Muehlenberg**—As I said, the definition of a family is any group of people related by blood, marriage or adoption.

**Senator ALLISON**—What is the same value that they add to society as a man and a woman and a family of children? Isn't that what you are talking about, nurturing children?

**Mr Stokes**—I think, with due respect, we are clouding the issues because we make judgments on all sorts of things every day. Everybody was horrified when I talked about sex with animals. We have boundaries that we draw and we discriminate every day of the week.

**Senator ALLISON**—I am sorry to interrupt, Mr Stokes, but you did say same value and I am trying to get at what this value you refer to is. I thought it was the raising and nurturing of children. Now you are telling me it is something else.

**Mr Stokes**—No, basically that is the value and that is why those people were set aside to have, if you like, special benefit because they were committed to each other and they were raising a family.

**Senator ALLISON**—Okay, let me put another proposition to you. A male and a female are married but choose not to have children; do they add the same value as those who do have children? And if you extrapolate from that, are they entitled to the same benefits in terms of the superannuation they might want to will to one another?

**Mr Stokes**—If they have committed themselves to each other.

**Senator ALLISON**—They have, but they have not committed themselves to children. I thought it was your central proposition that this was about children and families?

**Mr Stokes**—What we said was that that was why the legislation was passed in the first place, because when the legislation was passed, most families had children. It has become another modern trend of family to say, 'We're not going to have any children.'

**Senator ALLISON**—What about those couples who cannot have children?

**Mr Stokes**—They are covered and nobody is discriminating against them.

**Senator ALLISON**—But I am asking you about your discrimination. You want to see that certain values are ascribed according to whether a family has children and nurtures them or not.

**Mr Stokes**—I guess underpinning all of us are values of some sort or another. We have values that say what sorts of relationships are normal and what relationships are what we believe are right in the sight of God.

**Senator ALLISON**—What about a relationship in which there are children—an opposite sex couple relationship in a normal marriage with children—but one or other of the partners in that relationship has an extramarital relationship? Does that downgrade the value that they add to that marriage and should they be denied benefits?

**Mr Stokes**—I think it does downgrade the relationship.

**Senator ALLISON**—Does that lead you to suggest they should be denied benefits of superannuation?

**Mr Stokes**—I think we are extrapolating this out a little beyond what the line of this legislation really is.

**Senator ALLISON**—No, I am trying to pursue your values, Mr Stokes.

**Mr Stokes**—My values are that a committed relationship should be a committed relationship. If somebody is cheating on their wife or their husband, they are devaluing that themselves. That is their choice.

**Senator ALLISON**—So would you deny them superannuation benefits?

**Mr Stokes**—If the law had to start asking those sorts of questions, it would be a nightmare.

**Senator ALLISON**—So you don't suggest that?

**Mr Stokes**—I would love to see the government step in and say, 'Because you are cheating on your wife, you can't get your superannuation.' But that is—

**Senator ALLISON**—Are there other penalties you would like to see imposed on people who don't share your values? For instance, should we find—

**Mr Stokes**—I am not saying it would happen, and I know it would not, but we are talking here about relationships. This is really—

**Senator ALLISON**—But that is the basis of your whole submission, Mr Stokes, isn't it? It is about relationships.

**Mr Stokes**—Yes, what are right relationships and the fact that those relationships should be rewarded.

**Senator ALLISON**—You have identified a couple of relationships that, in your view, are not the right relationships.

**Mr Stokes**—I think that is right. I do not think it is right for somebody to cheat on their wife or their husband, but under the law we have simply made a judgment that married couples are able to designate their superannuation to their spouse.

**Senator HOGG**—The issue of dependency does not come into it because it may well be, under your model, that the person who is being cheated on really has the dependency but does not become entitled to it.

**Mr Stokes**—No, I was suggesting that the person who is doing the cheating should maybe lose some benefit. That was a throwaway line because we really are not talking about the same sort of thing.

**Senator CONROY**—But you argue in your submission that one of the reasons for not recognising a same sex relationship in terms of superannuation—and we are confined to superannuation entitlements—is that, in your view and on the evidence and research, same sex partners are more likely to have casual sex or sex with someone other than their regular partner. I think they were your exact words—

**Mr Stokes**—Yes.

**Senator CONROY**—You argue that they should not be given their spouse's superannuation, but you are not prepared to argue that on the basis of a heterosexual couple that are married and have casual sex with someone other than their regular partner.

**Mr Stokes**—I think I said that personally I would love to see some discrimination against them because they are cheating on their wife. But the law we have set up is a law that says that, if you are married, you have the right—obviously if somebody has superannuation and they are cheating and they are prepared to leave their money to their spouse, that is fine, isn't it? The right person is going to get the money.

**Senator CONROY**—It is just the heading of section 2 in your submission accuses the bill of being inconsistent. To me, the bill seems to be consistent. It does not matter if you cheat on your partner, you get the benefit. Whereas you are only arguing that cheating by one type of partner should be punished rather than both in terms of what you have submitted to us. I am just trying to get a clarification around which is the consistent-inconsistent part?

**Mr Muehlenberg**—Originally the issue reflected a phrase I used—perhaps I should jump back to it—about value or an importance that society attaches to marriage and family. The raising and nurturing of children is one such value. It is not the exclusive or only value. Obviously many couples for any number of reasons do not or cannot have children, but that does not mean they no longer offer value to society.

What I am trying to say to address both points is simply that for whatever reasons, and I think they were good reasons in the past, societies have recognised that the institutions of marriage and family with or without kids—in the past kids was the norm—offer quite a lot to society. They offer something that no other type of relationship ever has, at least up until now. Therefore, we as a society so value what they are doing in terms of social cohesion, passing on of traditional values or whatever to the next generation. It is a mini-welfare city—education, welfare, and health. There are so many things a family does without taxpayers' money.

Societies have long recognised marriage and family as important. Therefore, we are according to marriage and family certain privileges, if you will, that not every type of relationship will get. That does not mean you will find bad marriages or any number of inconsistencies. We are talking about ideals, I suppose, just as in trade you have an ideal trade policy that you aim for. It seems to me governments and societies have always had an ideal in terms of what they think is good for society. Up until now, societies have said there is the ideal of marriage and family.

Exceptions do not make the rule. We know there are a lot of bad families; a lot of divorce is not a good vote for marriage and cheating on wives and husbands is not either. That is another whole question of whether we can legislate all these kinds of morality. I do not think we can necessarily. But the point is that the fact that we have had the system or the ideal tarnished in so many ways does not mean we necessarily throw out the ideal. We can still uphold an ideal even though we so often fall short in the process. If society wants to jettison that idea or create a whole new set of ideals, I suppose it is welcome to and, again, perhaps a referendum would be one way in which the general public could put in their two cents. But as long as that is the preferred ideal up until now, I am just saying let us be careful about bits and pieces of legislation which really in effect chip away at that ideal.

**Senator ALLISON**—Mr Muehlenberg, you acknowledge that people other than those who are married and have children add value to society in various ways. You are not suggesting that people who are homosexual do not add value to society?

**Mr Muehlenberg**—Certainly not in the same sense. I am not saying they do not add value. They may be great artists, they may be musicians or they may pay a lot of taxes, which governments would be especially keen on. Certainly they add all kinds of value, but we are simply saying there were certain values which in the past only the institutions of marriage and family could give, especially centring on the raising of the next generation and all the kinds of things that went with that.

**Senator ALLISON**—Can't you see the contradiction in your support for opposite sex couples who do not have children but your problem with same sex couples or even individuals in the same way?

**Mr Muehlenberg**—No. As I said, the ideal includes the importance of children, but it is not exhausted by it. Simply a longstanding relationship adds certain value; at least in the past societies have felt that was important. Again, today, you or others may feel it is not such a big deal. Again, fine, maybe there are shifts in values. But in the past this idea of somebody hanging it out for life and a long-term commitment was valued and seen as something quite important—in a male-female relationship, I might add.

**CHAIR**—In fairness to the other witnesses, I think we have to start terminating this because we have restricted other witnesses.

**Senator ALLISON**—Mr Stokes, you suggested in your opening remarks that there was a need for people who, I think you said, were addicted to homosexuality to be offered a way through their addiction. Can I put to you that even though there are still discriminations against people who choose to live in same sex relationships, neither those discriminations nor legislation which has sought in the past, for some hundreds of years, even to outlaw acts of homosexuality, has worked? Can you indicate why you think it is that the rejection of this bill will make any difference?

**Mr Stokes**—I think the case is, as Bill has said and we have said, that what we are doing is moving society in a different direction—and this may be a very small chip, as Bill put it—but we are moving towards redefining what we class as normal relationships. In fact, the ongoing part of that is redefining what we class as family, because not only are they talking about superannuation; they are talking about all sorts of other

bills including IVF legislation to give them access to the sort of technology which Bill mentioned. What we are seeing is a total redefining of relationships. What we are seeing is, if you like, a normalisation of something that for thousands of years has been seen as not normal. It is not a normal relationship that exists between two men. They cannot carry out the same sort of physical relationship or emotional relationship which is why they break down so often. They are two men and life is not designed around two men being a relationship; it is designed around a male and a female being a relationship.

**I have already said that where a homosexual couple can prove that there is financial status for one or the other the AMP has already said that they are getting the money. On that basis there would seem to be little question or reason for another chink in the armour of how we define relationships. We are already giving money to those financial partners. By putting into law another bill that recognises as acceptable in the community same sex relationships, we are saying to a lot of young people that those relationships are acceptable and therefore it is okay for them to be like that. They think it is normal and will not try to sort themselves out. We are sending another message. Laws can only send messages. Another law that says that same sex relationships are okay sends the wrong message to our children. It says to them that homosexual relationships are okay, and they are not. The average life expectancy for homosexuals is about 42 years. If that were the life expectancy of Aborigines we would be up in arms.**

**Senator ALLISON**—I think you will find that it is.

**Mr Stokes**—It is a little more than that. It is a little better than 42.

**Senator ALLISON**—Barely.

**Mr Stokes**—But nobody is up in arms about the fact that the homosexual lifespan is 42 years. Why is it 42 years? Why has the state government in Victoria initiated a 12-month inquiry into homosexual health services because of the special needs of homosexuals? It is because it is a very dangerous lifestyle. By setting legislation to suggest to the people of Australia that this is okay, that we, the government of Australia, accept that this relationship is okay, sends a message to many young people that they are going to be okay. What we are doing is, in fact, sending them to a very sad life and a life which is likely to be very short. I do not think that is fair, and you have to go back to the people of Australia and say: do you want us to make this societal change and redefine relationships and, as a government, accept same sex relationships? This might put you off doing it—and I hope it does not—but everywhere I know of it being done the people of the country have said, 'No, we will not accept this.' In Alaska and Hawaii—and there was a third one—70 per cent of people when they were given the choice of accepting same sex relationships, said no. In California just last week 66 per cent said, 'No; we as a public will not change that.'

**Senator ALLISON**—It is nothing to do with a superannuation, I believe. This is about same sex marriages.

**Mr Stokes**—I believe it is all part of the same argument: do we or do we not accept same sex relationships as being normal? Do we send the message?

**Senator ALLISON**—I am not sure that is the question before this committee. The question before this committee is whether the entitlements which are paid for compulsory superannuation should be within the gift of the person who has accumulated them to pass on to whomever they choose. I think we will agree to disagree on this.

**Mr Stokes**—They can do that already by making a will. They can give it to whomever they want.

**Senator ALLISON**—Not all of them can.

**Mr Stokes**—Why not?

**Senator ALLISON**—That is why this committee is meeting.

**Mr Stokes**—There is no reason anybody cannot make a will.

**CHAIR**—Yes, but there are some people who do not get the entitlement in the first case because of Commonwealth legislation. Some people get it, say, in the private sector; some in the public sector do not. That is the issue.

**Mr Stokes**—That is a different issue again. Here we are talking about private super; we are not talking about Commonwealth government super. It is immoral that a Commonwealth government super cannot be paid into an estate. I had the same problem when I was selling insurance in Victoria

**CHAIR**—That is one of the issues we are looking at.

**Mr Stokes**—My wife was a teacher and if I was not around and she was on her own she would get only her contributions back. She would not get the government's contribution.

**CHAIR**—That is one of the issues.

**Mr Stokes**—I think that is immoral. The government super should pay out the same amount regardless to the will or the estate of the person. That is a different issue than accepting same sex relationships and cementing them further into our society as being okay.

**CHAIR**—Our time has expired.

[9.02 p.m.]

**MORGAN, Mr Wayne, Lecturer in International and Human Rights Law, Flinders University Law School**

**CHAIR**—Mr Morgan, welcome to this teleconference. You are our last witness to this inquiry this evening. Perhaps we should just ask a couple of questions to begin proceedings. You have indicated a personal relationship. Is it your wish that that person may be able to be identified through your presentation to us? Is it your wish, and do you have your partner's approval, that you—

**Mr Morgan**—I have checked that issue with my partner and my partner has no problems with being identified in that fashion.

**CHAIR**—Thank you. I now ask committee members whether it is their wish that your submission be accepted? There being no objection, it is so ordered.

**Mr Morgan, the rules of this hearing mean that you are protected by parliamentary privilege. Obviously, you were not here when the rules were read out earlier on, but you are protected in respect of evidence given before the committee. That means you are given broad protection from action arising from what you say and that the Senate has power to protect you from any action which disadvantages you on account of giving evidence before the committee. At this stage let me say we prefer to conduct our hearings in public. Because of your late submission, we felt that the only practical way to enable you to present your evidence was by way of teleconference. I invite you now to make an opening statement.**

**Mr Morgan**—Thank you, Chair, and I do appreciate the opportunity to give evidence this evening. As you know, I have made a written submission and I refer you to that submission. This evening I want to emphasise two points arising from that submission. Firstly, I want to talk briefly about Australia's international obligations and about the international context of reforms such as those that are proposed. Secondly, I want to talk also about the bill which is currently before the parliament and some proposals I have in terms of amendments and the reasons for those amendments.

**Before I turn to those two points I would like to emphasise the personal context that has already been mentioned. I am in a same sex relationship and have been so for the last 14 years. I did hear some of the evidence of the previous two witnesses and, contrary to that evidence, as far as I know this relationship has been monogamous throughout that time. Both my partner and I would be astounded by the thought that we might die at the age of 42. One of us is already over that age.**

**Apart from that, I obviously find it personally distressing, unfair, and as a lawyer, illegal, that even though I have to make the same contributions as does my partner, I am not entitled to the same entitlements under Commonwealth law. Having said that, I would like to turn to the two points that I wanted to emphasise, the first one being the context of our international obligations and also developments overseas. Here I rely primarily on the submission that I have already put in. As I say in that submission, it is now beyond doubt as a matter of treaty law, both regional and multilateral treaties, global treaties, that gay and lesbian rights are included in the international corpus of human rights. In particular, under the International Covenant on Civil and Political Rights, the equality guarantees, particularly in article 26, apply on the basis of sexuality. That has been made clear by the human rights committee in the Toonen case. And I can state from my research that that is now the accepted position of virtually every international lawyer who is commentating on these issues.**

**I would refer the committee, and it is not a comprehensive list, to the sources I cite in footnote 5 of my submission. It lists a number of recent and comprehensive and scholarly works addressing the issue of sexual orientation and human rights at an international level.**

Leaving aside the question of the International Covenant on Civil and Political Rights, under the International Labour Organisation's Convention on Discrimination in Employment, ILO111, we are also in breach of our international obligations, our superannuation scheme amounting to a term or condition of employment, and discrimination in terms and conditions of employment being prohibited by International Labour Organisation convention 111. So just on the basis of those two treaties, let alone any other sources of international law, it is now beyond doubt. I could go into more detail about how discrimination is interpreted under the International Covenant on Civil and Political Rights. Of course, distinctions are permitted, but when distinctions are made on a basis such as sexual orientation, the Human Rights Committee has said that such differentiation will only be permitted if the different treatment is reasonable and objective and has a legitimate purpose. In my submission, none of those factors would be satisfied by the discriminatory aspects of the current Commonwealth legislation.

I am sure the committee has had other submissions on international law, so I will not expand further on our obligations there. If senators have questions, they are welcome to address them to me. I thought I might just briefly mention, though, the international context in which Australia is now operating. I was an invited speaker last year in London to an international conference on exactly this topic—the recognition of same sex relationships. That conference included representatives from all of the common law countries and from many European countries as well. It included representatives of the highest courts of Australia, Canada, South Africa, the House of Lords in England was represented and the European Court of Human Rights. The consensus at that conference was that same sex relationship rights are already extensively recognised in Western developed countries and that this is a trend that will continue.

I want to also emphasise that this is creative of legal obligations. Our international obligations do not just stem from treaty law, they also stem from customary international law. And the amount of state practice now that exists with respect to recognition of same sex relationships means that Australia has obligations, both under custom and, not just, treaty. I have listed for you on page 3 of my submission some of the countries which now recognise, to varying degrees, same sex relationships.

I also want to emphasise that the issue of superannuation, known more widely overseas as pension rights and benefits, was one of the first areas where gay and lesbian couples achieved equality. Certainly in the United States, under local government schemes, by ordinances placed by cities, and also by private companies taking the initiative themselves, pension reform was one of the first reforms that was achieved. It is only because of our federal structure here in Australia and the division of powers which has led to regulation of superannuation by the Commonwealth that we have this anomaly.

Finally on this issue of context, before moving on to what I want to say about amendments to the bill, I want to emphasise that it is also possible to say now that the Commonwealth is not just falling behind internationally, the Commonwealth is falling substantially behind on a domestic basis. My submission on page 4 goes through some of the recent reforms, of which I am sure the senators are familiar. There were the comprehensive reforms in New South Wales that were just passed last year, Queensland also passed reforms recognising same sex relationships at the end of last year, Tasmania currently has proposed legislation and a parliamentary inquiry is now taking place, and Victoria has passed some reforms already and the government there is examining the comprehensive reforms proposed by the Victorian Equal Opportunity Commission a few years ago on the issue of same sex relationships. So it is really only the Commonwealth and Western Australia which refuse to recognise same sex relationships and, by doing so, place Australia in breach of our international obligations.

Apart from those comments, I would also like to make some comments on the substance of the bill. As my submission states, although I am obviously a supporter of the bill and believe that it is well intentioned, and if nothing stronger is possible, the bill should be passed, I also believe that the bill unfortunately does not go far enough and that better reforms are possible—reforms that may take some of the heat out of the whole bill, because it currently focuses just on same sex couples.

There are a couple of issues that I want to address. One is the fact, as has already been mentioned, that the proposed reforms relate only to the Superannuation Industry (Supervision) Act. They do not amend the legislation governing the Commonwealth's own superannuation schemes. Those schemes, in their legislative terms, remain discriminatory, with a discriminatory definition of 'spouse', at least according to the interpretation that has been received by courts and tribunals. That would be the first amendment that I would propose—that the bill be broadened to cover all areas of superannuation.

The other issue is that, instead of just redefining the definition of 'de facto' in the SIS Act, I think it would be possible to broaden the categories of dependant so that more relationships were recognised, so that more people who are currently excluded from being able to regulate where their superannuation contribution entitlements go would have the benefit of being able to do that. The sort of reform that I have in mind here is exactly the sort of reform that was passed in New South Wales last year. There are good models there for the Senate to draw on. What happened in New South Wales was not just an amendment to the definition of 'de facto' so that it included same sex couples. As well as that, there was the introduction of a new category of relationship—a domestic partnership model. This model, although differently defined, also exists under the laws of the Australian Capital Territory. That, indeed, would provide a separate model for the Senate to examine.

The touchstone, if you like, of the extended definition is a requirement that the partners to the relationship be adults who live together—this is the New South Wales definition—one or each of whom provides the other with domestic support and personal care. So it goes beyond what would traditionally be regarded as a couple relationship; a sexual element of the relationship is not required. But, as senators would know, family forms these days take many different types and there are certainly relationships which bear many of the features of marriage, the same sort of emotional and financial interdependence, yet many people in those relationships are denied the sorts of entitlements that married or heterosexual de factos enjoy under superannuation law.

By including such an extended definition of 'dependant', more people would be entitled to choice. Also, as happened in New South Wales, the focus is moved away from just being an issue of same sex entitlements to an issue which brings greater equality to a broader range of Australians. Of course, I am not trying to say that I do not think the gay and lesbian issue is enough. Obviously, I do. As I say in my submission, nothing but full equality is good enough. In my legal opinion as well as my personal opinion, it is not good enough to say things like, 'People can write wills; people can nominate beneficiaries.' Even if that is the case, same sex couples and other people who cannot presently benefit by leaving their entitlements to somebody else would still not be treated equally because of taxation regimes, because of the ranking in the legislation which places dependants ahead of any nominated beneficiary. It is simply not good enough to say that same sex couples or other couples who are currently excluded have to jump through these extra hoops, and somehow that is okay. As I said before, it is not okay unless we have full and complete equality, as Australia's international law obligations require. That probably concludes my remarks.

**CHAIR**—Mr Morgan, how would you respond to the statement that, if there were a national plebiscite or a referendum or where the issue is discussed in such widely represented international forums as the IPU, this sort of issue on same sex couples usually gets pretty soundly defeated?

**Mr Morgan**—I would raise a number of questions about that. First of all, I think it is very easy for selective citing of these sorts of referendums to be put forward. For example, I could cite the case of Tasmania. The UN process of law reform and decriminalisation in Tasmania showed a steady increase in the number of people in the public who supported reform on gay and lesbian issues. I know that was not about same sex relationships. What I am saying is that it is partly an issue of public education. Of course, on the basis of long-held prejudices which they have never had a chance to examine, people are going to vote in ways which perhaps are not the most informed ways to vote, so partly it is an issue of public education. But I would also say that I would hope that we have moved beyond a concept of democracy which is simply reliant upon majority rules. In our system of democracy we have always had systems of protection for minorities built in, because minorities are not always popular. There are a lot of stereotypes—a lot of them false—but they do produce an image and mean that people have negative reactions. As I said, I think our democracy is bigger than that. We can protect deserving minorities even if a majority of people do not necessarily hold that opinion.

**CHAIR**—Thank you.

**Senator ALLISON**—Mr Morgan, have you had a chance to look at all aspects of the bill? A number of witnesses have drawn attention to a paragraph—and I will quickly try to find it—which they say is in fact not likely to be necessary or useful, and that is subsection 52(2). says:

Add:

- (i) not to discriminate, in relation to a beneficiary, on the basis of race, colour, sex, sexual preference, transgender status, marital status, family responsibilities, religion, political opinion or social origin.

The view seems to be that we would be better off with that out. Do you share that view?

**Mr Morgan**—No, I certainly do not. Currently, of course, it would be the case that, if the discriminatory definition of spouse were amended, the superannuation funds I believe, at least legally, would be open to attack under state antidiscrimination laws; and possibly federal laws in some contexts, in terms of their continuing to refuse to give benefits to same sex couples. However, we do not have antidiscrimination legislation which covers this issue in all jurisdictions. Of course, Western Australia has none. The state of transgendered individuals is unclear under a number of state antidiscrimination regimes. So I think it is positively beneficial, and legally necessary in some jurisdictions, to include such a provision to make clear that superannuation funds cannot discriminate on those bases.

**But, yes, I do believe that if that were not there in those jurisdictions where antidiscrimination law exists, discriminatory funds could then be attacked. Of course, some state legislation also has fairly broad-ranging exceptions for superannuation and insurance funds, so that issue would have to be looked at as well, although I do not believe discrimination could be justified on an actuarial basis.**

**Senator ALLISON**—Another argument put—and you would have heard a bit of that this evening—is that it is happening anyway, that is, the distribution of benefits by trustees. We had earlier on some evidence that suggested that trustees were in fear of awarding benefits to same sex couples. Later on, the AMP Society and others said that it is happening anyway. Do you have a feel for whether there are some trustees reluctant to award benefits this way?

**Mr Morgan**—I know of no research which comprehensively looks at that issue. I am relying on anecdotal evidence. It is reassuring to hear the views of funds like AMP. Of course, there are some examples not coming under private superannuation, and Greg Brown's case in Victoria, stemming from a Commonwealth fund, is a classic example. He was not able to get his partner's benefits at all. Anecdotal information is that it is possible, and some schemes do, but even if they do, it is placed on the basis of discretion. It is not entitlement. There are a number of hoops that have to be jumped through yet again. Gay men and lesbians have to lay their personal lives on the line and prove all sorts of things that would never even be raised if they were a married couple or a heterosexual de facto couple. Even if that is the case—and I do not think it is the case on a practical level; there is just no problem in terms of the funds generally—my position would still be that it is not good enough. A type of indirect discrimination is taking place through all of the rules and procedures which have to be complied with by same sex couples, and those hoops that do not have to be jumped through by married or straight de facto people.

**Senator ALLISON**—I believe you said earlier that you supported this bill but that you felt there was a necessity for antidiscrimination legislation. Could you confirm that that is what you indicated?

**Mr Morgan**—I certainly mentioned that. I am a supporter of the proposition that the Commonwealth needs to pass comprehensive antidiscrimination legislation on the basis of sexuality. Now in Australia it is only Western Australia and the Commonwealth that have not passed such substantive legislation. It is absolutely clear that this affects a number of people. It means that gay men and lesbians in Western Australia have no remedy at all, at least no enforceable remedy, when this type of discrimination takes place. The Commonwealth could fix that very easily by a comprehensive bill, as proposed a few years ago by the Democrats. That is necessary, and once again I would argue—and have argued before in published work—that this yet again puts us in breach of our international obligations.

**Senator ALLISON**—Thank you.

**CHAIR**—Would you like to advise us on observations and statistics produced by the Family Association and the Festival of Light that generally these relationships are of short duration, maybe of just a couple of years. This obviously would create some problems for trustees of superannuation funds. I know your case is the exception but sometimes exceptions make bad law.

**Mr Morgan**—There are a couple of things about that. Firstly, I would dispute that my case is the exception. I could once again cite you numerous anecdotal—

**CHAIR**—Do you have any factual statistics that these relationships last only a short time?

**Mr Morgan**—I am certainly aware of those statistics put out by such groups.

**CHAIR**—Can you get them for us?

**Mr Morgan**—For every study that has been cited to you by those groups I can cite you competing and contradictory studies showing the opposite. I would be quite happy to send a supplementary submission listing some of those critiques of the sorts of studies put forward by the Family Association, et cetera.

**Senator HOGG**—The statistics they were quoting were put out by the Gay and Lesbian Association in New South Wales. Those are the statistics, I believe, that Senator Watson was referring to. *The Sydney gay community surveillance report* was what they were quoting from and that is what Senator Watson was seeking your view on.

**Mr Morgan**—Sorry, Senator, I am unfamiliar with those specific statistics that you are talking about. I was speaking more generally about studies into the length of gay and lesbian relationships, et cetera.

**Senator HOGG**—No, I think the question was quite specific in that respect.

**Mr Morgan**—No, I could not cite you anything specific on that New South Wales study or those New South Wales statistics.

**Senator CHAPMAN**—You made comments to the effect that the current legislation breached international law and that international law could be ignored for what I think you described was a legitimate purpose.

**Mr Morgan**—That is right.

**Senator CHAPMAN**—Could it not be regarded as a legitimate purpose for a government to wish to foster traditional family structures? For instance, in tax law we give specific tax benefits to single income families, recognising the particular difficulties that they face. If a government wanted to foster a traditional family structure rather than alternatives, would that be defined as a legitimate purpose?

**Mr Morgan**—In my analysis of the international jurisprudence, no it wouldn't. The international jurisprudence on this issue, as interpreted by the Human Rights Committee, does actually have a lot in common with United States jurisprudence, the sorts of tests for scrutiny under the US Constitution for heightened protection and equality protection. The Human Rights Committee has borrowed heavily from that.

**The point I would make is: exactly those issues—whether the restriction of relationship benefits to heterosexual couples formed a legitimate state purpose—were examined by the Hawaiian Supreme Court a few years ago in the case of Baehr v. Miikr. The Hawaiian Supreme Court held that there was no legitimate government interest in preserving marriage in that sense. Anything that was put forward—for example, the raising of children,**

**contributions to society, stability or whatever—was contradicted by competing arguments, and the judge ruled that there was no legitimate government interest purely in maintaining a heterosexual definition for relationship recognition.**

**Senator CHAPMAN**—Thank you.

**Senator HOGG**—Mr Morgan, can I take you back to the question raised by Senator Allison in respect of the addition to subsection 52(2). It was raised with us at the hearing in Melbourne that in the inclusion of that additional section—and I will not repeat it again—there may be words there that have unintended consequences and therefore should not be included, and that really this committee should be focusing on if it accepts the argument that you are putting forward is purely and simply subsection 10(1)—that is, repeal the definition and put in a new definition of ‘dependant’ as being the key element to achieving what you may see as the outcome of the legislation. The reason being, if you add to subsection 52(2) the word ‘sex’, it may well then, unintendedly, discriminate against women in terms of their insurance premiums. Women get a favoured premium because they have a longer expected lifespan than males. So if this committee were to adopt the word ‘sex’ in subsection 52(2), then the unintended consequences may well flow, as with the words ‘social origin’ and so on. I draw that to your attention because I think that is a point that needs to be made.

**Mr Morgan**—Certainly, and I accept that point. I would say in response though that I would have thought the answer to that then, if it were necessary, would be to write in a very brief saving clause. Of course, under most state antidiscrimination laws, there is a general exemption—what is called a special measures exemption—for discrimination which is designed to benefit a historically marginalised group or is designed to redress past discrimination. So as long as a general exemption like that was written in, then those arguments that have just been made about contributions of women would not apply.

**Senator HOGG**—I just could not think of a group that has been more marginalised or discriminated against in the past than women—

**Senator ALLISON**—In superannuation that is for sure.

**Senator HOGG**—particularly in relation to superannuation. I just raised it with you out of interest, because it is an important issue for this committee to consider.

**Mr Morgan**—Certainly and I do not discount that. As I said, I would have thought the solution then was, rather than get rid of the prohibition which is necessary, to simply save those circumstances where a special measures approach is necessary. That can be done, as I said, very easily. It is just one clause.

**Senator HOGG**—I have one final point. Another point that was made to the committee in Melbourne was the fact that most of the private sector superannuation firms do not tend to treat gay and lesbian couples any differently from heterosexual couples, whether they be married or de facto or in other relationships. They are all put through the same hoop; that is, the test being dependency. Not one case could be cited where there was a claim that was knocked back. It seems to me that the problem is in the area not covered by this legislation, in the Commonwealth area. Is that a reasonable assessment?

**Mr Morgan**—Certainly there are large problems in the Commonwealth area, but I would go back to what I said before. Speaking from personal experience, I know that I have had disputes about this very issue with my own superannuation fund. They refuse to give me an answer in advance. So I am left in a situation of extreme uncertainty as to what would happen with my superannuation benefits if anything happened to me. They will not give me a statement that my partner will be treated exactly the same as another partner.

**Senator HOGG**—Could you just clarify for us the type of fund that you are in. Are you in a master trust or what?

**Mr Morgan**—As an academic, I am a member of two compulsory funds governing academics—TESS and—

**Senator HOGG**—Thank you. I have got an idea of the type of fund you are in. I thought you might have been talking about a do-it-yourself fund or some other type of fund.

**Mr Morgan**—No, I am not. I would also repeat what I said earlier: I do not think it is proper to leave this issue as a matter of discretion for the funds. I can nominate my same sex partner as a beneficiary—yes, I can do that—but the point is, as I said earlier, that that may not be good enough, even if I do that. In my situation I do not happen to have other dependants but, if I did have other dependants, they would rank before him, regardless of how well they were provided for, regardless of whether I wanted my benefits to go to them or

not. Therefore, the situation is still discriminatory, even if some funds do currently respect the wishes of their gay and lesbian members.

**Senator HOGG**—Thank you very much.

**CHAIR**—As there are no further questions, that concludes the committee's proceedings. On behalf of the committee, I thank all witnesses who have given evidence. Mr Morgan, thank you for participating in the telephone conference.

**Mr Morgan**—Thank you, Senator.

**Committee adjourned at 9.34 p.m.**