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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**SAME-SEX RELATIONSHIPS (EQUAL TREATMENT IN COMMONWEALTH  
LAWS — SUPERANNUATION) BILL 2008**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,  
the Hon Robert McClelland MP)

# **SAME-SEX RELATIONSHIPS (EQUAL TREATMENT IN COMMONWEALTH LAWS – SUPERANNUATION) BILL 2008**

## **Outline**

1 The purpose of this Bill is to eliminate discrimination against same-sex couples and the children of same-sex relationships in the following Acts that provide for reversionary superannuation benefits upon the death of a scheme member, and in related taxation treatment of superannuation benefits. The Bill amends the Commonwealth civilian and military (defined benefit) superannuation schemes, the parliamentary, judicial and statutory legal officer pension schemes and the pension scheme for the Governor-General, established under the following Acts:

- *Defence Force Retirement and Death Benefits Act 1973*
- *Defence Forces Retirement Benefits Act 1948*
- *Federal Magistrates Act 1999*
- *Governor-General Act 1974*
- *Judges' Pensions Act 1968*
- *Law Officers Act 1964*
- *Parliamentary Contributory Superannuation Act 1948*
- *Superannuation Act 1922*
- *Superannuation Act 1976*

2 Other Commonwealth superannuation schemes, such as the Military Superannuation and Benefits Scheme and the Public Sector Superannuation Scheme, need to be amended by delegated legislation.

3 The following regulatory superannuation Acts and relevant taxation Acts will be amended by the Bill to provide equal treatment to same-sex couples and their children:

- *Retirement Savings Accounts Act 1997*
- *Small Superannuation Accounts Act 1995*
- *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*
- *Superannuation Industry (Supervision) Act 1993*
- *Income Tax (Transitional Provisions) Act 1997*

4 The same-sex partner of a beneficiary in a Commonwealth (defined benefit) superannuation scheme currently does not get any direct access to reversionary death benefits on the death of the beneficiary.

5 The Bill amends definitions in the Acts governing the Commonwealth civilian and military (defined benefit) superannuation schemes and relevant regulatory Acts and will enable death benefits to be conferred on de facto same-sex partners and children of a same-sex relationship where they currently would have no entitlement.

In order to ensure that children of opposite-sex relationships are conferred with the same entitlement the definition is expanded to include the children of these relationships.

6 Until these Acts are amended, were a member to die, his or her same-sex partner or a child of such a relationship would not be entitled to receive reversionary death benefits.

7 Superannuation legislation generally refers to a 'spouse', which currently excludes same-sex partners. While same-sex partners may be able to access some superannuation concessions as 'dependants'—for example, concessional treatment of death benefits—the amendments in this Bill will ensure equal treatment of same-sex couples and their children with respect to these concessions.

## Financial Impact Statement

8 The measures in this Bill will have the following financial impact over four years:

### Expense (\$ million)

	2008–09	2009–10	2010–11	2011–12
Department of Finance and Deregulation	6.4	6.1	6.7	7.5
Department of Defence	2.7	2.8	3.0	3.2
ComSuper	1.6	-	-	-
Attorney-General's Department	0.1	0.1	0.1	0.1
Australian Taxation Office	-	0.9	0.6	0.4
Various Agencies	-	-1.0	-1.1	-1.6

(A minus sign before an estimate indicates a reduction in expenses, no sign before an estimate indicates increased expenses.)

### Capital (\$ million)

	2008–09	2009–10	2010–11	2011–12
ComSuper	0.3	-	-	-

(A minus sign before an estimate indicates a reduction in capital, no sign before an estimate indicates increased capital.)

### Revenue (\$ million)

	2008–09	2009–10	2010–11	2011–12
Australian Taxation Office	-0.4	-0.4	-0.4	-0.4

(A minus sign before an estimate indicates a reduction in revenue, no sign before an estimate indicates a gain to revenue.)

9 The measures have an ongoing financial impact.

10 The measures in this Bill will result in the following approximate increase in unfunded liability on commencement of the Act:

	(\$ million)
Schemes administered by the Department of Finance and Deregulation	81.5
Schemes administered by the Department of Defence	30.0
Schemes administered by the Attorney-General's Department	1.0

### **Regulation Impact Statement**

11 A regulation impact statement is not required. The Office of Best Practice Regulation has advised that no further analysis was required as the Bill will have little to no regulatory impact.

## **Notes on clauses**

### ***Clause 1—Short title***

12 Clause 1 provides for the Act to be cited as the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008*.

### ***Clause 2—Commencement***

13 Clause 2 provides for the commencement of the Act.

14 Subclause 2(1) provides that each provision of the Act specified in column 1 of the table set out in the subclause commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

15 The note at the end of the table explains that the table relates only to the provisions of the Act as originally passed by both Houses of the Parliament and assented to. The table will not be expanded to deal with provisions inserted in the Act after assent.

16 Subclause 2(2) provides that column 3 of the table contains additional information that is not part of the Act. It also clarifies that information in column 3 may be added or edited in any published version of the Act.

17 Clauses 1 to 3 will commence on the day on which this Act receives the Royal Assent.

18 Schedules 1, 2, 3 and 5 to the Bill will commence on a day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months on which the Act receives Royal Assent, they commence on the first day after the end of that period.

19 Schedule 4 to the Bill will commence on 1 July 2008.

### ***Clause 3—Schedule(s)***

20 Clause 3 provides that each Act specified in a Schedule to the Bill is amended or repealed as set out in the applicable items in the Schedule and any other item in a Schedule has effect according to its terms.

## **Schedule 1—Finance and Deregulation amendments**

21 This Schedule contains amendments to the *Parliamentary Contributory Superannuation Act 1948* (PCSS Act), the *Superannuation Act 1922* (1922 Act) and the *Superannuation Act 1976* (1976 Act), which establish superannuation schemes for certain former Members of Parliament and Australian Government employees.

22 Currently, death benefits can be paid from the schemes only to a legally married spouse or an opposite-sex de facto spouse of a deceased scheme member. Where there is no spouse who is eligible to receive the benefit, benefits can be paid to eligible children of the member or their spouse and, in the case of the Commonwealth Superannuation Scheme (CSS), to partially dependent children. Eligibility as a spouse depends in part on whether the person is in a marital relationship with a scheme member or former member at the time of their death.

23 These amendments will make scheme benefits arising from the death of a scheme member available to an eligible same-sex partner of the member or former member and certain additional classes of children associated with such relationships.

24 From the commencement of these amendments, eligibility to receive a spouse benefit will be linked to whether a person was in a couple relationship with a scheme member or former member at the time of the member's death. The term couple relationship will incorporate relationships between persons of the same sex in specified circumstances as well as those relationships previously referred to as marital relationships.

25 In the case of other civilian and parliamentary superannuation arrangements, either no legislative changes are required (for example, the Public Sector Superannuation Accumulation Plan) or legislative changes need to be made to delegated legislation, which is the case for the Public Sector Superannuation Scheme.

### **Parliamentary Contributory Superannuation Act 1948**

26 The scheme established under the PCSS Act has been closed to new members since 9 October 2004. The scheme provides a contributory superannuation scheme under which benefits are paid to former members of Parliament. The PCSS Act provides for reversionary death benefits to be paid to the spouse or orphan children of a deceased contributor or pensioner.

#### ***Item 1***

27 This item inserts into subsection 4(1) of the PCSS Act a signpost to the definition of the term '*couple relationship*' in section 4B of the PCSS Act.

#### ***Item 2***

28 This item amends the definition of '*former spouse*' as a consequence of amendments made by item 6, which introduces the new concept of '*couple relationship*'.

### ***Item 3***

29 This item inserts a definition of *'partner'* into subsection 4(1) of the PCSS Act. This amendment is related to the amendment being made to section 4B of the PCSS Act by item 7 to replace the phrase *'husband or wife'* with the term *'partner'*. This will extend the range of persons who can be considered to be eligible for death benefits to include a person in a same-sex relationship with a scheme member.

### ***Item 4***

30 This item inserts a signpost into subsection 4(1) of the PCSS Act to indicate that the term *'spouse'* has a meaning as affected by section 4C of the PCSS Act, which replaces the term *'marital relationship'* with *'couple relationship'*.

### ***Item 5***

31 This item inserts subsection 4(7) into the PCSS Act. Subsection 4(7) provides that for the purposes of the PCSS Act a child cannot be considered to be the product of a relationship, whether between same or opposite-sex partners, unless the child is the biological child of at least one person in the relationship or is born to a woman in the relationship. This is relevant to new provisions, such as the new paragraph (b) of the definition of *'child'* being inserted by item 17 into the PCSS Act.

### ***Items 6 and 7***

32 Existing sections 4B and 4C of the PCSS Act set out the requirements for a person to be considered to be a spouse for the payment of death benefits. Under these provisions, a person can be considered to be a spouse if the person had a *'marital relationship'* with another person at a particular time, as defined in section 4B of the PCSS Act. One requirement of having a marital relationship is that the person ordinarily lived with another person as that other person's husband or wife. This means that currently only an opposite-sex de facto or married spouse of a deceased scheme member can be considered to have had a marital relationship with the member and therefore be eligible for death benefits as a spouse.

33 The amendments made by these items replace the term *'marital relationship'* with the term *'couple relationship'* and replace the phrase *'husband or wife'* with the term *'partner'*. The effect of this amendment is to ensure that the definition of a relationship, for the purpose of the payment of death benefits, includes a same-sex relationship as well as an opposite-sex relationship. The inclusion of same-sex relationships within this definition is not intended to change the treatment of married or opposite-sex de facto couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.

34 Item 6 replaces the term *'marital relationship'* with the term *'couple relationship'* in subsection 4B(1) of the PCSS Act. The heading to section 4B is also replaced with a new heading that refers to a *'couple relationship'*.

35 Item 7 replaces the phrase *'husband or wife'* with the term *'partner'* in subsection 4B(1). The term *'partner'* is defined in subsection 4(1) of the PCSS Act (see item 3).

### ***Item 8***

36 This item amends subsection 4B(2) of the PCSS Act as a consequence of the amendment made by item 7.

### ***Item 9***

37 This item amends subsection 4B(3) of the PCSS Act as a consequence of the amendment made by item 6.

### ***Items 10 and 11***

38 Subsection 4B(4) of the PCSS Act outlines circumstances which may be relevant for determining whether a person in a relationship of less than 3 years duration ordinarily lived with the other person as their *'partner'* on a permanent and *bona fide* domestic basis. The circumstances listed are not intended as an exhaustive list but cover some of the more common circumstances, such as where the couple are married, have a child or jointly own their home.

39 Items 10 and 11 insert paragraph 4B(4)(ba) and subparagraph 4B(4)(c)(iii) into the PCSS Act to reflect that the concepts of *'spouse'* and *'child'* used within the Act, for the purpose of the payment of death benefits, have been extended to cover persons in same-sex relationships. Item 11 also includes a note that clarifies that new subsection 4(7) is relevant to working out when a child is a product of a relationship for the purposes of the new subparagraph 4B(4)(c)(iii).

40 Relevant evidence will now include whether:

- the persons' relationship is registered under a State or Territory law prescribed for the purposes of paragraph 4AB(4)(ba) of the *Judges' Pensions Act 1968* as a kind of relationship prescribed for the purposes of that paragraph; and
- whether there is a child who is the product of the relationship between the persons.

41 This will assist the Parliamentary Retiring Allowances Trust (the Trust) in determining whether two persons, particularly where they are of the same sex, had a *'couple relationship'* where the persons were in a relationship for a period of less than 3 years.

42 As it is intended that the prescribed relationships and prescribed State and Territory legislation should be the same for the Commonwealth civilian and military (defined benefit) superannuation schemes, for administrative convenience they will be specified in the *Judges' Pensions Act*.

## ***Item 12***

43 This item amends subsections 4C(2) and (3) of the PCSS Act as a consequence of amendments made by item 6.

## ***Items 13 and 15***

44 Section 19AA of the PCSS Act provides for benefits to be paid to eligible children upon the death of a member or former member in certain circumstances. Item 13 repeals paragraph 19AA(2)(d) and substitutes a new paragraph 19AA(2)(d). Item 15 repeals paragraph 19AA(2B)(a) and substitutes a new paragraph.

45 These amendments expand the current meaning of paragraphs 19AA(2)(d) and 19AA(2B)(a) to ensure that a child born or adopted into a same-sex relationship is treated in the same way as a child born or adopted into an opposite-sex relationship in relation to the payment of orphaned children benefits.

## ***Items 14 and 16***

46 These items insert notes after new subparagraphs 19AA(2)(d)(ii) and 19AA(2B)(a)(iii) that provide that new subsection 4(7) of the PCSS Act is relevant to working out when a child is a product of a relationship for the purposes of those subparagraphs.

## ***Item 17***

47 This item repeals the definition of '*child*' in subsection 19AA(5) of the PCSS Act and inserts a new definition. The new definition expands the classes of children that may be taken to be a child of the member for the purposes of determining eligibility for orphaned children benefits. It adds a new criteria that, if at any time the person had a partner, a child who is the product of the person's relationship with that partner may be taken to be the member's child.

48 Item 17 also inserts a note at the end of the new definition of '*child*' that provides that new subsection 4(7) of the PCSS Act is relevant to working out when a child is a product of a relationship for the purposes of the paragraph (b) of the definition of '*child*'.

49 Paragraph (b) of the definition of '*child*' provides that a child can be considered to be a member's child where the child is the product of the person's relationship with their partner.

50 Subsection 4(7) requires that the child is:

- the biological child of at least one person in the relationship, i.e. is conceived utilising the gametes of one party to the relationship; or
- the birth child of a woman in the relationship.

51 Examples 1 and 2 below outline circumstances where a child would meet the requirements of paragraph (b) of subsection 19AA(5) and subsection 4(7). The circumstances indicated in example 3 would not meet these requirements.

#### Example 1

J is a scheme member and forms a relationship as a couple with S. During the relationship J and S decide that S will undergo an artificial conception procedure using gametes from S and a donor. The procedure takes place and S gives birth to H. Whilst H is the biological child of S, he is not the biological child of J.

52 H will be considered J's child for the purposes of the definition of '*child*' in the PCSS Act. That is, H is the product of the relationship between J and S and is S's biological child. This would continue to be the case even if the relationship between J and S were to break down at a later time.

#### Example 2

J is a scheme member and forms a relationship as a couple with S. During the relationship J and S decide that S will undergo an artificial conception procedure using donated gametes. The procedure takes place and S gives birth to H. Whilst H is the birth child of S, he is not the biological child of either J or S.

53 H will be considered J's child for the purposes of the definition of '*child*' in the PCSS Act. That is, H is the product of the relationship between J and S and S is H's birth mother. This would continue to be the case even if the relationship between J and S were to break down at a later time.

#### Example 3

J is a scheme member and forms a relationship as a couple with S. S has a child H from a previous relationship.

54 H cannot be considered J's child for the purposes of the definition of '*child*' in the PCSS Act. Whilst H is S's biological child, and S is in the relationship, H is not the product of the relationship between J and S. H's connection with J only arose because J commenced a relationship with S. It did not arise from any actions of the couple to add a child to their relationship.

### ***Item 18***

55 This item provides that the amendments made to the PCSS Act by Schedule 1 to the Bill only apply in respect of benefits payable as a result of the death of a person entitled to a parliamentary allowance or PCSS retiring allowance (whether or not the retiring allowance was immediately payable) that occurs on or after the commencement of Schedule 1 to the Bill.

### **Superannuation Act 1922**

56 The scheme established under the 1922 Act has been closed since 1 July 1976. At that time all contributors were transferred to the CSS. However, the 1922 Act provides for the payment of benefits to or in respect of contributors or pensioners who died or retired before that date.

57 The 1922 Act provides for reversionary death benefits to be paid to the widow or in some cases, the widower of a deceased contributor or pensioner. Pensions are also payable to eligible children.

58 Under section 48AB of the 1922 Act, the Commissioner for Superannuation, in certain circumstances, may grant a pension to or in respect of a person who would be eligible to have a pension paid to or in respect of them if Part IV of the 1976 Act applied to them. It is not necessary, therefore, to make substantive amendments to the 1922 Act in relation to a person in a same-sex relationship as the amendments made to the 1976 Act will flow through to the granting of a pension by the Commissioner under section 48AB, and to the allocation of a pension under section 48ABA, where there is more than one spouse.

### ***Item 19***

59 This item inserts subsection 48AB(4A) into the 1922 Act. This new subsection makes it clear that the amendments to the 1976 Act to extend to those persons who can be eligible for death benefits do not apply to a pensioner or contributor in the Superannuation Act 1922 scheme if they died before the commencement of Schedule 1 of the Bill.

### ***Item 20***

60 This item inserts new subsection 48ABA(9) into the 1922 Act. This new subsection makes it clear that the amendments to the 1976 Act do not apply to the definitions of '*eligible child*' and '*spouse*' in subsection 48ABA(1) of the 1922 Act if the deceased pensioner died before the commencement of Schedule 1 of the Bill.

### **Superannuation Act 1976**

61 The scheme established under the 1976 Act has been closed to new members since 1 July 1990. The scheme provides a defined benefit superannuation scheme under which benefits are paid to former employees of the Australian Government. The 1976 Act provides for reversionary death benefits to be paid to the spouse with additional amounts for eligible children or partially dependent children of the deceased contributor or pensioner. An orphan benefit is payable for eligible children or partially dependent children if a spouse's benefit is not payable.

### ***Item 21***

62 This item repeals the definition of '*child*' in subsection 3(1) of the 1976 Act and inserts a new definition. The new definition expands the classes of children that may be taken to be a child of the member for the purposes of determining eligibility for benefits. It adds a new criteria that, if, at any time, the person had a partner, a child who is the product of the person's relationship with that partner may be taken to be the member's child.

63 Item 21 also inserts a note at the end of the new definition of '*child*' that provides that new subsection 3(10) of the 1976 Act is relevant to working out when a child is a product of a relationship for the purposes of the subparagraphs (a)(ii) and (b)(ii) of the definition of '*child*'.

64 Subparagraphs (a)(ii) and (b)(ii) of the definition of '*child*' provides that a child can be considered to be a member's child where the child is the product of the person's relationship with their partner.

65 Subsection 3(10) requires that the child is:

- the biological child of at least one person in the relationship, i.e. is conceived utilising the gametes of one party to the relationship; or
- the birth child of a woman in the relationship.

66 Examples 1 and 2 below outline circumstances where a child would meet the requirements of subparagraphs (a)(ii) and (b)(ii) in subsection 3(1). The circumstances indicated in example 3 would not meet these requirements.

#### Example 1

J is a scheme member and forms a relationship as a couple with S. During the relationship J and S decide that S will undergo an artificial conception procedure using gametes from S and a donor. The procedure takes place and S gives birth to H. Whilst H is the biological child of S, he is not the biological child of J.

67 H can be considered the child of J for the purposes of the definition of '*child*' in the 1976 Act. That is, H is the product of the relationship between J and S and is S's biological child. This would continue to be the case even if the relationship between J and S were to break down at a later time.

#### Example 2

J is a scheme member and forms a relationship as a couple with S. During the relationship J and S decide that S will undergo an artificial conception procedure using donated gametes. The procedure takes place and S gives birth to H. Whilst H is the birth child of S, he is not the biological child of either J or S.

68 H can be considered the child of J for the purposes of the definition of '*child*' in the 1976 Act. That is, H is the product of the relationship between J and S and S is H's birth mother. This would continue to be the case even if the relationship between J and S were to break down at a later time.

#### Example 3

J is a scheme member and forms a relationship as a couple with S. S has a child H from a previous relationship.

69 H cannot be considered J's child for the purposes of the definition of '*child*' in the 1976 Act. Whilst H is S's biological child, and S is in the relationship, H is not the product of the relationship between J and S. H's connection with J only arose because J commenced a relationship with S.

## ***Item 22***

70 This item inserts into subsection 3(1) of the 1976 Act a signpost to the definition of the term '*couple relationship*' in section 8A of the 1976 Act.

### ***Item 23***

71 This item repeals the definition of '*late short-term marital relationship*' and inserts a new definition as a consequence of amendments made by item 27 to '*marital relationship*'.

### ***Item 24***

72 This item inserts a definition of '*partner*' into subsection 3(1) of the 1976 Act. This amendment is related to the amendment being made to section 8A of the 1976 Act by item 28 to replace the phrase '*husband or wife*' with the term '*partner*'. This will extend the range of persons who can be considered to be eligible for death benefits to include a person in a same-sex relationship with a scheme member.

### ***Item 25***

73 This item inserts a signpost into subsection 3(1) of the 1976 Act to indicate that the term '*spouse*' has a meaning as affected by section 8B of the 1976 Act.

### ***Item 26***

74 Item 26 inserts subsection 3(10) into the 1976 Act. Subsection 3(10) provides that, for the purposes of the 1976 Act, a child cannot be the product of a relationship, whether between same or opposite-sex partners, unless the child is the biological child of at least one person in the relationship or is born to a woman in the relationship. This is relevant to new provisions, such subparagraphs (a)(ii) and (b)(ii) of the definition of '*child*', being inserted by item 21 into the 1976 Act.

### ***Items 27 and 28***

75 Existing sections 8A and 8B of the 1976 Act set out the requirements for a person to be considered to be a spouse for the payment of death benefits. Under these provisions, a person can be considered to be a spouse if the person had a marital relationship with another person at a particular time as defined in section 8A of the 1976 Act. One requirement of having a marital relationship is that the person ordinarily lived with another person as that other person's husband or wife. This means that currently only a married or opposite-sex de facto spouse of a deceased scheme member can be considered to have had a marital relationship with the member and therefore be eligible for death benefits as a spouse.

76 Item 27 replaces the term '*marital relationship*' with the term '*couple relationship*' in subsection 8A(1) of the 1976 Act. The heading to section 8A is also replaced with a new heading that refers to a '*couple relationship*'.

77 Item 28 replaces the phrase '*husband or wife*' with the term '*partner*' in subsection 8A(1). The term '*partner*' is defined in subsection 3(1) of the 1976 Act (see item 24).

78 The effect of the amendments made in these items is to ensure that the definition of a relationship, for the purpose of the payment of death benefits, includes a same-

sex relationship as well as an opposite-sex relationship. The inclusion of same-sex relationships within this definition is not intended to change the treatment of married or opposite-sex de facto couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.

### ***Item 29***

79 This item amends subsection 8A(2) of the 1976 Act as a consequence of amendments made by item 28.

### ***Item 30***

80 This item amends subsection 8A(3) of the 1976 Act as a consequence of amendments made by item 27.

### ***Items 31 and 32***

81 Subsection 8A(4) of the 1976 Act outlines evidence that may be relevant for determining whether a person in a relationship of less than 3 years duration ordinarily lived with the other person as their '*partner*' on a permanent and *bona fide* domestic basis. The circumstances listed are not intended to be exhaustive but do cover some of the more common circumstances, such as where the couple are married, have a child or jointly own their home.

82 Items 31 and 32 insert paragraph's 8A(4)(ba) and subparagraph 8A(4)(c)(iii) into the 1976 Act to reflect that the concept of spouse and child used for the purpose of the payment of death benefits extend to persons in same-sex relationships. Item 32 also includes a note that provides that new subsection 3(10) is relevant to working out when a child is a product of a relationship for the purposes of the new subparagraph 8A(4)(c)(iii).

83 Relevant evidence will now include whether:

- the persons' relationship is registered under a State or Territory law prescribed for the purposes of paragraph 4AB(4)(ba) of the *Judges' Pensions Act 1968* as a kind of relationship prescribed for the purposes of that paragraph; and
- whether there is a child who is the product of the relationship between the persons.

84 This will assist the Australian Reward Investment Alliance (the Board) in determining whether two persons, particularly where they are of the same sex, had a '*couple relationship*' where the persons were in a relationship for a period of less than 3 years.

85 As it is intended that the prescribed relationships and prescribed State and Territory legislation should be the same for the Commonwealth civilian and military (defined benefit) superannuation schemes, for administrative convenience they will be specified in the *Judges' Pensions Act*.

***Items 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 47, 48, 49, 51, 53, 55 and 57***

86 These items amend the reference to '*marital relationship*' in various sections of the 1976 Act as a consequence of amendments made by item 27 to replace the term '*marital relationship*' with the term '*couple relationship*'.

***Items 44 and 46***

87 Subsection 110(5B) provides for the matters which the Board must take into account when determining the benefits payable in respect of particular children of deceased retirement pensioners who had had a '*late short-term couple relationship*'. The particular children taken into account in this provision are outlined in paragraph 110(5B)(b). Broadly speaking, they are an eligible child that was not a child of the marital relationship and was in the care, custody or control of the spouse.

88 Item 44 extends the categories of children to be taken into account by inserting subparagraph 110(5B)(b)(ia) into the 1976 Act. The new subparagraph provides that where members of a couple are of the same sex the Board must take into consideration an eligible child in the care, custody or control of the spouse who was not a child of the '*couple relationship*'.

89 Item 46 adds a note at the end of subsection 110(5B) that new subsection 3(10) of the 1976 Act is relevant to working out when a child is a product of a relationship for the purposes of the new subparagraph 110(5B)(b)(ia).

***Items 50 and 52***

90 Subsection 110(7A) applies to benefits payable in respect of particular children of deceased retirement pensioners who had had a '*late short-term couple relationship*'. The particular children taken into account in this provision are outlined in subsections (7A)(b) and (c). Broadly speaking, they are an eligible child that was a child of the couple relationship and was not in the care, custody or control of a deceased retirement pensioner or any of the surviving spouses.

91 Item 50 inserts subparagraph 7A(b)(ia) into the 1976 Act. This will ensure that a child who is the product of a relationship between a person and the pensioner that is a couple relationship will be considered as the child of a couple relationship for the purposes of this provision.

92 Item 52 adds a note at the end of paragraph 110(7A)(b) that new subsection 3(10) of the 1976 Act is relevant to working out when a child is a product of a relationship for the purposes of the new subparagraph 110(7A)(b)(ia).

***Item 54***

93 This item amends paragraph 110(14)(d) as a consequence of the new definition of '*child*' in subsection 3(1). This will ensure that children who are the product of a relationship will be included in this provision.

### ***Item 56***

94 This item amends subparagraph 136(2B)(ma)(iv) as a consequence of item 23 which replaces the definition of '*late short-term marital relationship*' with a new definition of '*late short-term couple relationship*'.

### ***Item 58***

95 This item provides that the amendments made to the 1976 Act by Schedule 1 only apply in respect of benefits payable as a result of the death of an '*eligible employee*', '*retirement pensioner*' or '*deferred benefit member*' that occurs on or after the commencement of Schedule 1. The term '*deferred benefit member*' is defined in Division 4A of Part V of the 1976 Act.

## **Schedule 2—Attorney-General's amendments**

96 This Schedule contains amendments to the *Federal Magistrates Act 1999* (FM Act), the *Judges' Pensions Act 1968* (Judges' Pensions Act) and the *Law Officers Act 1964* (Law Officers Act).

97 The FM Act provides death benefits for federal magistrates. Where a magistrate dies in office or a former magistrate in receipt of a disability pension dies before reaching age 65, a lump sum, covering the period between the date of death and age 65, is payable to the magistrate's spouse and dependent children.

98 The Judges' Pensions Act makes provision in relation to the entitlements to pensions of persons who hold office as judges of the High Court of Australia, the Federal Court of Australia and the Family Court of Australia and certain other office holders who are deemed to be judges for the purposes of the Act.

99 The Law Officers Act establishes the office of the Solicitor-General of the Commonwealth and makes provision in relation to the entitlements to pensions of persons who were appointed as Solicitor-General prior to 1 January 1998. It applies terminology from the Judges' Pensions Act and treats a person appointed as Solicitor-General as though they were, or had been, a Judge and as though their service (whether in continuous periods or not) as Solicitor-General were service as a judge.

100 Currently, death benefits or pensions can only be paid to a married or opposite-sex de facto spouse of a deceased federal magistrate or judge, or Solicitor-General, or, where there is no spouse who is eligible to receive the benefit, to eligible children of the federal magistrate or judge. Eligibility for a spouse depends in part on whether the person is in a marital relationship with a federal magistrate or judge at the time of the magistrate's or judge's death.

101 These amendments will make death and pension benefits arising from the death of a federal magistrate or judge equally available to an eligible same-sex partner of the federal magistrate or judge and certain additional classes of children associated with such relationships.

102 From the commencement of these amendments, eligibility for a spouse's entitlement will be linked to whether a person was in a couple relationship with the federal magistrate or judge at the time of the magistrate's or judge's death. A couple relationship will include relationships between persons of the same sex in specified circumstances as well as those relationships previously referred to as marital relationships.

### **Federal Magistrates Act 1999**

#### ***Item 1***

103 This item inserts into section 5 of the FM Act a "(1)" before the word "In".

### ***Item 2***

104 This item inserts into subsection 5(1) of the FM Act a signpost to the definition of the term '*couple relationship*' in subclause 9E(5) of Schedule 1 to the FM Act.

### ***Item 3***

105 This item repeals the definition of '*marital relationship*' as a consequence of amendments made by items 6, 7 and 9 which replace the term '*marital relationship*' with '*couple relationship*'.

### ***Item 4***

106 This item inserts a definition of '*partner*' into section 5 of the FM Act. This amendment is related to the amendments being made to subclauses 9E(5) of Schedule 1 to the FM Act by item 8 which replaces the phrase '*husband or wife*' with the term '*partner*' to extend the current concept of who can be considered to be eligible for death benefits to include a person in a same-sex relationship with a federal magistrate.

### ***Item 5***

107 This item inserts subsection 5(2) into the FM Act. Subsection 5(2) provides that for the purposes of the FM Act a child cannot be the product of a relationship, whether between same or opposite-sex partners, unless the child is the biological child of at least one person in the relationship or is born to a woman in the relationship. This is relevant to new subparagraph 9E(7)(c)(iii) of Schedule 1 to the FM Act inserted by item 11 and new subclause 9F(1A) of Schedule 1 inserted by item 12.

### ***Item 6***

108 Clause 9E of Schedule 1 to the FM Act defines certain relationships for the purpose of establishing status as a beneficiary for a death benefit payment.

109 Subclauses 9E(2), (3) and (4) set out the requirements for a person to be considered an '*eligible spouse*' of a federal magistrate for the payment of death benefits. A person is an '*eligible spouse*' of a federal magistrate, or a retired disabled federal magistrate, who dies, if any of the following three circumstances apply:

- the person had a marital relationship with the federal magistrate at the time of the Magistrate's death.
- the person had a marital relationship with the retired disabled federal magistrate at the time of the magistrate's death and that relationship began before the magistrate (i) retired or (ii) attained age 60.
- the person had previously had a marital relationship with the federal magistrate or the retired disabled federal magistrate, as the case may be, and did not, at the time of the magistrate's death, have such a relationship but was legally married to the magistrate and was, in the Minister's opinion, wholly or substantially dependent on the magistrate. Where the marital relationship of a retired disabled federal magistrate began after the magistrate

retired, the relationship has to have begun before the magistrate attained age 60.

110 The amendments made by item 6 replace the term '*marital relationship*' with the term '*couple relationship*'. The effect of this amendment is to ensure that the definition of a relationship, for the purpose of the payment of death benefits, includes a same-sex relationship as well as an opposite-sex relationship. The inclusion of same-sex relationships within this definition is not intended to change the treatment of married or opposite-sex de facto couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.

### ***Items 7, 8 and 9***

111 Subclause 9E(5) of Schedule 1 to the FM Act provides that a person has a '*marital relationship*' with another person at a particular time if they have been living as husband and wife (whether or not they are legally married):

- for a continuous period of at least 3 years up to that time, or
- for a continuous period of less than 3 years up to that time and the Minister, having regard to any relevant evidence, is of the opinion that they ordinarily lived with each other as husband and wife on a permanent and *bona fide* domestic basis at that time.

112 Subclause 9E(6) provides guidance on the timing of when a marital relationship has begun.

113 The amendments made by these items replace the term '*marital relationship*' with the term '*couple relationship*' and replace the phrase '*husband or wife*' with the term '*partner*'. The effect of these amendments is to ensure that the definition of a relationship, for the purpose of the payment of death benefits, includes a same-sex relationship as well as an opposite-sex relationship. The inclusion of same-sex relationships within this definition is not intended to change the treatment of married or opposite-sex de facto couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.

114 Item 7 replaces the term '*marital relationship*' with the term '*couple relationship*' in subclause 9E(5). The heading to subclause 9E(5) is also replaced with a new heading that refers to a '*couple relationship*'.

115 Item 8 replaces the phrase '*husband or wife*' with the term '*partner*' in subclause 9E(5). The term partner is defined in subsection 5(1) of the FM Act (see item 4).

116 Item 9 replaces the term '*marital relationship*' with the term '*couple relationship*' in subclause 9E(6).

### ***Items 10 and 11***

117 Subclause 9E(7) of Schedule 1 to the FM Act provides that relevant evidence for the Minister in making a decision whether a person ordinarily lived with another

person as their '*partner*' on a permanent and *bona fide* domestic basis at a particular time would include evidence:

- that the person was wholly or substantially dependent on the other person at the time.
- that they were legally married to each other at the time.
- that they had a child or had adopted a child during their relationship.
- that they jointly owned a home which was their usual residence.

118 In recognition of extending the existing concept of who can be considered to be a spouse or child for the payment of death or pension benefits to cover persons in same-sex relationships item 10 inserts paragraph 9E(7)(ba) and item 11 inserts subparagraph 9E(7)(c)(iii) into Schedule 1 to the FM Act. Item 11 also includes a note that provides that new subsection 5(2) is relevant to working out when a child is the product of the relationship for the purposes of the new subparagraph 9E(7)(c)(iii) (see item 5).

119 Relevant evidence will now include whether:

- the persons' relationship is registered under a State or Territory law prescribed for the purposes of paragraph 4AB(4)(ba) of the *Judges' Pensions Act 1968* as a kind of relationship prescribed for the purposes of that paragraph; and
- whether there is a child who was the product of the relationship between the persons.

### ***Item 12***

120 Clause 9F of Schedule 1 to the FM Act defines '*eligible child*' for the purposes of the FM Act.

121 A person is an eligible child of a federal magistrate or of a retired federal magistrate if the person:

- is under 16 years of age, or under 25 years of age and in full-time education, and
- either is a child or adopted child of the magistrate or, in the Minister's opinion, was or would have been wholly or substantially dependent on the magistrate.

122 This item inserts new subclause 9F(1A) to expand the classes of children that may be taken to be an '*eligible child*' of a federal magistrate for the purposes of determining the payment of death benefits. It adds a new criteria that, if, at any time, the federal magistrate or retired federal magistrate had a partner, a child who is the product of the federal magistrate's relationship with that partner is taken to be the federal magistrate's child.

123 Item 12 also inserts a note at the end of new subclause 9F(1A) that provides that new subsection 5(2) of the FM Act is relevant to working out if a child is the product of a relationship (see item 5).

124 New subclause 9F(1A) of Schedule 1 to the FM Act and new subsection 5(2) are intended to encompass situations as described in examples 1 and 2 below. However, they are not intended to encompass situations as described in example 3 below.

Example 1

J is a scheme member and forms a relationship as a couple with S. During the relationship J and S decide that S will undergo an artificial conception procedure using gametes from S and a donor. The procedure takes place and S gives birth to H. Whilst H is the biological child of S, he is not the biological child of J.

125 H can be considered J's child for the purposes of the definition of '*child*' in the FM Act. That is, H is the product of the relationship between J and S and is S's biological child. This would continue to be the case even if the relationship between J and S were to break down at a later time.

Example 2

J is a scheme member and forms a relationship as a couple with S. During the relationship J and S decide that S will undergo an artificial conception procedure using donated gametes. The procedure takes place and S gives birth to H. Whilst H is the birth child of S, he is not the biological child of either J or S.

126 H can be considered J's child for the purposes of the definition of '*child*' in the FM Act. That is, H is the product of the relationship between J and S and S is H's birth mother. This would continue to be the case even if the relationship between J and S were to break down at a later time.

Example 3

J is a scheme member and forms a relationship as a couple with S. S has a child H from a previous relationship.

127 H cannot be considered J's child within the meaning of '*eligible child*' in the FM Act. Whilst H is S's biological child, and S is in the relationship, H is not the product of the relationship between J and S. H's connection with J only arose because J commenced a relationship with S. It did not arise from any actions of the couple to add a child to their relationship.

***Item 13***

128 This item provides that the amendments made to the FM Act by Schedule 2 to the Bill apply in respect of benefits payable as a result of the death of a federal magistrate or a retired disabled federal magistrate only if the federal magistrate or the retired disabled federal magistrate dies on or after the commencement of Schedule 2 to the Bill.

**Judges' Pensions Act 1968**

### ***Item 14***

129 This item amends subsection 4(1) of the Judges' Pensions Act to insert a definition to clarify the meaning of '*child of a couple relationship*'. The new definition expands the classes of children that are taken to be children of a judge for the purposes of determining eligibility for pension benefits. The new definition provides that a child can be considered to be a '*child of a couple relationship*' if the child:

- was born of the couple relationship
- was adopted by the people in the couple relationship during the period of the relationship, or
- was the product of the couple relationship.

130 A definition of '*couple relationship*' is provided in section 4AB.

131 Item 14 also inserts a note at the end of the new definition that provides that subsection 4(4) of the Judges' Pensions Act is relevant to working out if a child is the product of a relationship for the purposes of paragraph (c) (see item 19).

### ***Item 15***

132 This item repeals the definition of '*child of a marital relationship*' as a consequence of amendments made by items 22, 24, 27 and 28 which replace the term '*child of a marital relationship*' with '*child of a couple relationship*'.

### ***Item 16***

133 This item inserts into subsection 4(1) of the Judges' Pensions Act a signpost to the definition of the term '*couple relationship*' in section 4AB of the Judges' Pensions Act.

### ***Item 17***

134 This item inserts a definition of '*partner*' into subsection 4(1) of the Judges' Pensions Act. This amendment is related to the amendments being made to subsections 4AB(1) and (2) of the Judges' Pensions Act by item 23 which replaces the phrase '*husband or wife*' with the term '*partner*' to extend the current concept of who can be considered to be eligible for pension benefits to include a person in a same-sex relationship with a Judge.

### ***Item 18***

135 This item inserts into subsection 4(1) of the Judges' Pensions Act a signpost to the definition of the term '*spouse*' in section 4AC of the Judges' Pensions Act.

### ***Item 19***

136 This item inserts subsection 4(4) into the Judges' Pensions Act. Subsection 4(4) provides that a child cannot be the product of a relationship, whether between same or

opposite-sex partners, unless the child is the biological child of at least one person in the relationship or is born to a woman in the relationship. This is relevant to the new definition of ‘*child of a couple relationship*’ in subsection 4(1) inserted by item 14, new subsection 4AA(2) inserted by item 21 and new subparagraph 4AB(4)(c)(iii) inserted by item 26.

### ***Item 20***

137 This item inserts into section 4AA of the Judges’ Pensions Act a “(1)” before the word “For”.

### ***Item 21***

138 Section 4AA of the Judges’ Pensions Act defines “eligible child” for the purposes of the Act.

139 A person is an eligible child of a deceased judge or of a deceased retired judge if the person:

- is the child of the deceased judge, or
- in the Attorney-General’s opinion, the child was or would have been wholly or substantially dependent on the deceased judge.

140 This item inserts new subsection 4AA(2) to expand the classes of children that may be taken to be an ‘*eligible child*’ of a deceased judge for the purposes of determining the payment of death benefits. If, at any time, the deceased judge or deceased retired judge had a partner, a child who is the product of the judge’s relationship with that partner is taken to be the judge’s child.

141 Item 21 also inserts a note at the end of new subsection 4AA(2) that provides that new subsection 4(4) of the Judges’ Pensions Act is relevant to working out if a child is the product of a relationship (see item 19).

142 New subsection 4AA(2) and new subsection 4(4) are intended to encompass situations as described in examples 1 and 2 below. However, they are not intended to encompass situations as described in example 3 below.

#### **Example 1**

J is a scheme member and forms a relationship as a couple with S. During the relationship J and S decide that S will undergo an artificial conception procedure using gametes from S and a donor. The procedure takes place and S gives birth to H. Whilst H is the biological child of S, he is not the biological child of J.

143 H can be considered J’s child within the meaning of ‘*eligible child*’ in the Judges’ Pensions Act. That is, H is the product of the relationship between J and S and S’s biological child. This would continue to be the case even if the relationship between J and S were to break down at a later time.

## Example 2

J is a scheme member and forms a relationship as a couple with S. During the relationship J and S decide that S will undergo an artificial conception procedure using donated gametes. The procedure takes place and S gives birth to H. Whilst H is the birth child of S, he is not the biological child of either J or S.

144 H can be considered J's child within the meaning of '*eligible child*' in the Judges' Pensions Act. That is, H is the product of the relationship between J and S and S is H's birth mother. This would continue to be the case even if the relationship between J and S were to break down at a later time.

## Example 3

J is a scheme member and forms a relationship as a couple with S. S has a child H from a previous relationship.

145 H cannot be considered J's child within the meaning of '*eligible child*' in the Judges' Pensions Act. Whilst H is S's biological child, and S is in the relationship, H is not the product of the relationship between J and S. H's connection with J only arose because J commenced a relationship with S. It did not arise from any actions of the couple to add a child to their relationship.

## ***Items 22, 23 and 24***

146 Subsection 4AB(1) of the Judges' Pensions Act set out the requirements for determining when a person is to be considered in a '*marital relationship*' with a judge or retired judge. A person is taken to be in a '*marital relationship*' with a judge, or a retired judge, if the person ordinarily lived with the judge as the judge's husband or wife on a permanent and *bona fide* domestic basis at that time.

147 Subsection 4AB(2) provides that a person is to be regarded as ordinarily living with another person on a permanent or *bona fide* domestic basis if they have been living as husband and wife (whether or not they are legally married):

- for a continuous period of at least three years up to that time, or
- for a continuous period of less than three years up to that time and the Attorney-General, having regard to any relevant evidence, is of the opinion that they ordinarily lived with each other as husband and wife on a permanent and *bona fide* domestic basis at that time.

148 Subsection 4AB(3) provides guidance on the timing of when a marital relationship has begun.

149 The amendments made by items 22, 23 and 24 replace the term '*marital relationship*' in subsection 4AB(1) with the term '*couple relationship*' and replace the phrase '*husband or wife*' with the term '*partner*'. The effect of this amendment is to ensure that the definition of a relationship, for the purpose of the payment of death benefits, includes a same-sex relationship as well as an opposite-sex relationship. The inclusion of same-sex relationships within this definition is not intended to change the treatment of married or opposite-sex de facto couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.

150 Item 22 replaces the term '*marital relationship*' with the term '*couple relationship*' in subclause subsection 4AB(1) of the Judges' Pensions Act. The heading to subsection 4AB(1) is also replaced with a new heading that refers to a '*couple relationship*'.

151 Item 23 replaces the phrase '*husband or wife*' with the term '*partner*' in subsections 4AB(1) and (2) of the Judges' Pensions Act. The term partner is defined in subsection 4(1) of the Judges' Pensions Act (see item 17).

152 Item 24 replaces the term '*marital relationship*' with the term '*couple relationship*' in subsection 4AB(3) of the Judges' Pensions Act.

### ***Items 25 and 26***

153 Subsection 4AB(4) of the Judges' Pensions Act provides that relevant evidence for the Attorney-General in making a decision whether a person ordinarily lived with another person as their '*partner*' on a permanent and *bona fide* domestic basis at a particular time, would include evidence:

- that the person was wholly or substantially dependent on the other person at the time.
- that they were legally married to each other at the time.
- that they had a child or had adopted a child during their relationship.
- that they jointly owned a home which was their usual residence.

154 Certain registered relationships will be able to taken into account as evidence of the existence of the relationship in recognition of extending the existing concept of who can be considered to be a spouse or child for the payment of death or pension benefits to cover persons in same-sex relationships. Item 25 inserts paragraph 4AB(4)(ba) and item 26 inserts subparagraph 4AB(4)(c)(iii) into the Judges' Pensions Act.

155 Item 26 also includes a note that provides that new subsection 4(4) is relevant to working out when a child is the product of the relationship for the purposes of the new subparagraph 4AB(4)(c)(iii) (see item 19).

156 Relevant evidence will now include whether:

- the persons' relationship is registered under a State or Territory law prescribed for the purposes of paragraph 4AB(4)(ba) of the *Judges' Pensions Act 1968* as a kind of relationship prescribed for the purposes of that paragraph; and
- there is a child who was the product of the relationship between the person and the judge.

### ***Item 27***

157 Section 4AC sets out the requirements for a person to be considered a '*spouse*' of a judge for the payment of death benefits. Subsection 4AC(2) provides that a

person is a '*spouse*' of a judge, or a retired judge, who dies if the following circumstances apply:

- the person had a marital relationship with the judge at the time of the judge's death (paragraph 4AC(2)(a)), and
- the person had a marital relationship with the retired judge at the time of the judge's death and that relationship began before the judge (i) retired or (ii) attained age 60, or (iii) the marital relationship had continued for a period of at least 5 years before the judge's death (paragraph 4AC(2)(b)), or

158 Subsection 4AC(3) provides that a person is a '*spouse*' of a judge, or a retired judge, who dies if the following circumstances apply:

- the person had previously had a marital relationship with the judge (paragraph 4AC(3)(a)), and
- the person did not, at the time of the judge's death, have such a relationship but was legally married to the deceased judge (paragraph 4AC(3)(b)), and
- where the marital relationship of a retired judge began after the judge retired, the relationship began before the judge attained age 60 (paragraph 4AC(3)(c)), and
- in the Attorney-General's opinion, the person was wholly or substantially dependent upon the judge (paragraph 4AC(3)(d)).

159 The amendments made by item 27 replace the term '*marital relationship*' with the term '*couple relationship*'. The effect of this amendment is to ensure that the definition of a relationship, for the purpose of the payment of death benefits, includes a same-sex relationship as well as an opposite-sex relationship. The inclusion of same-sex relationships within this definition is not intended to change the treatment of married or opposite-sex de facto couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.

### ***Item 28***

160 Sections 10, 11 and 12 provide guidance on when pensions will be payable in respect of children:

- on the death of a retired judge (section 10)
- on the death of a spouse (section 11), and
- on the death of a judge or retired judge when a spouse's pension is not payable (section 12).

161 The amendments made by item 28 replace the term '*marital relationship*' with the term '*couple relationship*' in subsections 10(2), 11(3), and 12(3). The effect of this amendment is to ensure that the definition of a relationship, for the purpose of the payment of a pension, includes a same-sex relationship as well as an opposite-sex relationship. The inclusion of same-sex relationships within this definition is not intended to change the treatment of married or opposite-sex de facto couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.

### ***Item 29***

162 This item amends paragraph 17A(aa) to reflect amendments made by item 20.

### ***Item 30***

163 Subclause (1) of this item provides that the amendments made to the Judges' Pensions Act by Schedule 2 to the Bill apply in respect of pensions payable as a result of the death of a judge or a retired judge only if the judge or the retired judge dies on or after the commencement of Schedule 2 to the Bill.

164 Subclause (2) of this item provides that the amendments made to the Judges' Pensions Act by Schedule 2 to the Bill apply in relation to pensions payable under the *Building and Construction Industry Improvement Act 2005* as a result of the death of a ABC Commissioner or former ABC Commissioner only if the Commissioner or former Commissioner dies on or after the commencement of Schedule 2 to the Bill.

### **Law Officers Act 1964**

### ***Item 31***

165 Subsection 16(1) of the Law Officers Act provides that the provisions of the Judges' Pensions Act other than subsection 6(3) (including the provisions relating to widows and children) apply to, and in relation to, a person who is, or has been, a Solicitor-General, as though the Solicitor-General were, or had been, a judge and as though his or her service (whether in continuous periods or not) as Solicitor-General were service as a judge. Section 16 does not apply in relation to a person appointed as Solicitor-General after 31 December 1997.

166 Subsection 16(1) of the Law Officers Act refers to 'subsection 6(3)' of the Judges' Pensions Act. This reference should have been amended by the *Superannuation Legislation Amendment (Superannuation Contributions Tax) Act 1997*, which repealed subsection 6(3) and moved the contents of that subsection to the new subsection 4(2) of the Judges' Pensions Act. Item 31 corrects this error by amending the reference so that it refers to 'subsection 4(2)' of the Judges' Pensions Act rather than 'subsection 6(3)' of the Judges' Pensions Act.

167 Subsection 16(1) of the Law Officers Act also refers to the term 'widows' in the Judges' Pensions Act. The term 'widow' (wherever occurring in the Judges' Pensions Act) was replaced by 'spouse' in the Judges' Pensions Act by the *Commonwealth Superannuation Schemes Amendment Act 1992*. This item corrects this anomaly by replacing the word 'widows' with 'spouses'.

### ***Item 32***

168 This item provides that the amendments made to the Law Officers Act by Schedule 2 to the Bill apply only in respect of pensions payable as a result of the death of a person who was appointed as Solicitor-General before 1 January 1998 if the person dies on or after the commencement of Schedule 2 to the Bill.

### **Schedule 3—Defence amendments**

169 This Schedule contains amendments to the *Defence Force Retirement and Death Benefits Act 1973* (the DFRDB Act) and the *Defence Forces Retirement Benefits Act 1948* (the DFRB Act), the acts which govern the superannuation schemes for members and former members of the Australian Defence Forces.

170 The amendments in this Schedule commence on the same day that the amendments in Schedule 1 to the Bill are proclaimed to commence. This will ensure a consistent commencement for changes in the various superannuation schemes.

171 The amendments provide for the payment of benefits to the same-sex partner, and to an eligible child who is the product of a same-sex relationship, of an eligible scheme member who dies on or after the commencement of the amendments. These classes of person have been excluded from the scope of the benefits provided under military superannuation schemes as they fall outside the scope of relevant definitions. The extension of the DFRDB Act to these previously excluded persons is achieved by amending definitions under the Act to provide that they are inclusive of same-sex partners and children that are the product of a same-sex relationship of an eligible scheme member. These new potential beneficiaries are required to meet tests for eligibility, the same as opposite-sex partners and children currently included in the scheme.

172 The amendments to the DFRB Act provide for the payment of benefits for the classes of person described above without amendment of individual definitions. As contributions to this scheme were closed from the commencement of the DFRDB Act, only recipient members remain. Rather than making extensive changes to the sources of entitlement in this scheme, a power is provided to allow payment to be made to persons who would meet the requirements for payment under the DFRDB Act, but for the deceased member having been a member of the 1948 scheme.

173 The amendments also provide for consistent use of terminology relating to the pension benefits that may be paid to a person who is entitled to be paid a spouse pension throughout the DFRDB Act. This will assist readers to more easily understand the various pension benefits conferred under that Act.

174 The *Military Superannuation and Benefits Act 1991* is not amended by Schedule 3 to the Bill, because the changes necessary to effect the policy described above will be made by the Minister for Defence under section 5 of that Act, by amendment of the *Military Superannuation and Benefits Trust Deed*.

#### **Defence Force Retirement and Death Benefits Act 1973**

##### ***Item 1***

175 This item, along with item 2, provides for the insertion of a new subparagraph (a)(iii) into the definition of child in subsection 3(1) of the DFRDB Act.

## ***Item 2***

176 Item 2 inserts a new subparagraph (a)(iii) into the extended definition of ‘*child*’ in paragraph 3(1)(a) of the DFRDB Act. The item expands the classes of children that may be taken to be a child of the member for the purpose of determining whether benefits may be paid to the child on the death of the member.

177 If the child is the product of the member’s relationship with a partner, then that child may be taken to be the member’s child. The definition applies regardless of the gender of the member’s partner.

178 Subparagraph 3(6) additionally requires that in order to be a product of a relationship, the child must also have been connected to that relationship as the biological or birth child of a person in the relationship

## ***Item 3***

179 Item 3 inserts a new paragraph (c) into the definition of ‘*child*’ in section 3 of the DFRDB Act. The new item provides that a child can be considered to be the member’s for the purpose of the scheme where the child is the child of the member’s partner and the product of a relationship that the partner had with another person. Subparagraph (c)(ii) requires that the child was wholly or substantially dependent on the member at the time the member died.

180 Subparagraph 3(6) additionally requires that in order to be a product of a relationship, the child must also have been connected to that relationship as the biological or birth child of a person in the relationship.

181 Proposed new subparagraph (a)(iii) and paragraph (c) of the definition of ‘*child*’ are intended to extend the scope of the definition to children who are the product of same-sex relationships. The new definition is limited by new subsection 3(6) inserted by item 9 and by its interaction with the existing elements of the definition of ‘*child*’. For this reason, an administrative note is inserted at the end of new paragraph (c) to ensure that the relevance of subsection 3(6) is drawn to the reader’s attention.

182 Examples 1–3 below show how the amendments may extend the definition. Example 4 shows the limits on this extension and also the way that existing parts of the definition may extend to the child of a person in a same-sex or opposite-sex couple relationship.

### **Example 1**

J is a scheme member and forms a relationship as a couple with S. During the relationship J and S decide that S will undergo an artificial conception procedure using gametes from S and a donor. The procedure takes place and S gives birth to H. Whilst H is the biological child of S, he is not the biological child of J.

183 H can be considered J’s child for the purposes of the definition of ‘*child*’ in the DFRDB Act. That is, H is the product of the relationship between J and S and is S’s biological child. This would continue to be the case even if the relationship between J and S were to break down at a later time.

#### Example 2

J is a scheme member and forms a relationship as a couple with S. During the relationship J and S decide that S will undergo an artificial conception procedure using donated gametes. The procedure takes place and S gives birth to H. Whilst H is the birth child of S, he is not the biological child of either J or S.

184 H can be taken to be J's child for the purposes of the definition of '*child*' under the DFRDB Act. That is, H is the product of the relationship between J and S and S is H's birth mother. This would continue to be the case even if the relationship between J and S were to break down at a later time.

#### Example 3

J is a scheme member and forms a relationship as a couple with S. The couple decide to provide long-term foster-care for a child, H, whose biological mother is permanently unable to provide care.

H has no biological connection to the couple but is taken to be the child of J for the purposes of the definition of '*child*' under the scheme, because J has formally fostered H. This would continue to be the case even if the relationship between J and S were to break down, providing that J continued to foster H. Recognition of foster children is already expressly provided for under the DFRDB Act.

#### Example 4

J is a scheme member and forms a relationship as a couple with S. S has a child, H, from a previous relationship.

185 H cannot be considered J's child within the meaning of '*eligible child*' in the DFRDB Act. Whilst H is S's biological child, and S is in the relationship, H is not the product of the relationship between J and S. H's connection with J only arose because J commenced a relationship with S. It did not arise from any actions of the couple to add a child to their relationship. H does not depend on J for economic support.

#### **Item 4**

186 This item inserts a signpost into the listing of definitions in section 3 of the DFRDB Act, to indicate that the term '*couple relationship*' is to be interpreted subject to section 6A of the DFRDB Act.

#### **Item 5**

187 This item inserts words into the definition of '*eligible orphan*' to ensure that a spouse pension provided under the DFRDB Act is taken into account when working out whether a pension may be payable to a child on the death of a member. Apart from same-sex partners, this change does not have the effect of extending benefits to any persons not currently taken to be eligible under the scheme. Rather, it reflects the change of terminology from '*widow*' to '*spouse*' that was originally introduced by the *Commonwealth Superannuation Schemes Amendment Act 1992*. However, this terminology has not been consistently applied through the DFRDB Act since that

time. This amendment ensures that the current terminology can be easily related to the pension entitlements provided under sections 38 and 39 of the DFRDB Act.

### ***Item 6***

188 This item inserts a new definition of the term '*partner*'. This amendment replaces the phrase '*husband or wife*' with the term '*partner*' to extend the range of persons who can be considered to be eligible for death benefits to include a person in a same-sex relationship with a scheme member. This amendment operates in conjunction with the amendments proposed to section 6A and 6B of the Act.

### ***Item 7***

189 This item inserts words into the definition of '*pension benefit*' to ensure that a spouse pension provided under the Act is included under the broad term. The amendment reflects the change of terminology from '*widow*' to '*spouse*' that was originally introduced by the *Commonwealth Superannuation Schemes Amendment Act 1992*. However, this terminology has not been consistently applied through the Act since that time. This amendment ensures that the current terminology can be easily related to the pension entitlements provided under sections 38 and 39 of the DFRDB Act.

### ***Item 8***

190 This item inserts a signpost into the listing of definitions in section 3 of the Act, to indicate that the term '*spouse*' is to be interpreted subject to section 6B of the Act.

### ***Item 9***

191 This item inserts proposed new subsection 3(6) into the DFRDB Act. The new subsection makes it clear that a child for the purposes of the DFRDB Act may only be the product of a person's relationship with a partner if the child is the biological child of at least one of the persons in the relationship, or is born to a woman in the relationship.

### ***Item 10***

192 The express wording of section 6A, as including only a '*marital relationship*' restricted to persons ordinarily living together as '*husband or wife*', means that only persons in a marriage or an opposite-sex de facto relationship could previously be considered for the purposes of benefits payable on the death of a spouse who was a member under the DFRDB Act.

193 The amendments made by this item replaces the term '*marital relationship*' with the term '*couple relationship*' in subsection 6A(1) of the DFRDB Act, and in the section title. The effect of this amendment and the amendments in item 11 is to ensure that the definition of a relationship, for the purpose of the payment of death benefits under the DFRDB Act, includes a same-sex relationship as well as an opposite-sex relationship. The inclusion of same-sex relationships within this definition is not intended to change the treatment of married or opposite-sex de facto

couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.

### ***Item 11***

194 The amendments made by this item replace the phrase '*husband or wife*' with the term '*partner*' in subsection 6A(1) of the DFRDB Act. The effect of this amendment is to ensure that the definition of a relationship, for the purpose of the payment of death benefits under the DFRDB Act, includes a same-sex relationship as well as an opposite-sex relationship. The inclusion of same-sex relationships within this definition is not intended to change the treatment of married or opposite-sex de facto couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship. The factual indicia set out in subsection 6A(4) are applied to couples in the same way whether the couples are the same sex or different sexes.

### ***Item 12***

195 This item amends subsection 6A(2) as a consequence of the amendment made by item 11.

### ***Item 13***

196 This item amends subsection 6A(3) as a consequence of the amendment made by item 10.

### ***Items 14 and 15***

197 Subsection 6(4) of the DFRDB Act outlines circumstances which may be relevant for arriving at an opinion that a person in a relationship of less than 3 years duration ordinarily lived with the other person as their partner on a permanent and *bona fide* domestic basis. The circumstances listed are not intended as an exhaustive list but do cover some of the more common circumstances, such as where the couple are married or have a child or jointly own their home.

198 Items 14 and 15 insert a new paragraph 6A(4)(ba) and subparagraph 6A(4)(c)(iii) into the DFRDB Act to reflect that the concepts of spouse and child used within the DFRDB Act, for the purpose of the payment of death benefits, have been extended to cover persons in same-sex relationships. Item 15 also includes a note that provides that new subsection 3(6) is relevant to working out when a child is a product of a relationship for the purposes of the new subparagraph 6A(4)(c)(iii).

199 Relevant evidence will now include whether:

- the persons' relationship is registered under a State or Territory law prescribed for the purposes of paragraph 4AB(4)(ba) of the *Judges' Pensions Act 1968* as a kind of relationship prescribed for the purposes of that paragraph; and
- there is a child who is the product of the relationship between the persons (see item 2).

200 The amendments made by items 14 and 15 of the Bill will assist the Defence Force Retirement and Death Benefits Authority in determining whether two persons of the same sex had a '*couple relationship*' where the relationship has less than 3 years duration.

201 As it is intended that the prescribed relationships and prescribed State and Territory legislation should be the same for the Commonwealth civilian and military (defined benefit) superannuation schemes, for administrative convenience they will be specified in the Judges' Pensions Act.

### ***Item 16***

202 This item amends subsections 6B(2) and (3) of the DFRDB Act as a consequence of the amendment made by item 10.

### ***Item 17***

203 This item amends paragraph 6BA(1)(b) of the DFRDB Act as a consequence of the amendment made by item 10.

### ***Item 18***

204 This item amends the note to subsection 49D(1) to ensure that the current terminology can be easily related to the pension entitlements provided under sections 38 and 39 of the DFRDB Act. This change does not have the effect of extending benefits to any persons not currently taken to be eligible under the scheme, rather, it reflects the change of terminology from '*widow*' to '*spouse*' that was originally introduced by the *Commonwealth Superannuation Schemes Amendment Act 1992*.

### ***Item 19***

205 This item substitutes the term '*widow's pension*' in subsection 75(5) of the DFRDB Act, which relates to benefits payable on the death of a deferred benefit member, with the term '*spouse pension*'. Apart from same-sex partners of members who die on or after the day the amendment commences, this change does not have the effect of extending benefits to any persons not currently taken to be eligible under the scheme, rather, it reflects the change of terminology from '*widow*' to '*spouse*' that was originally introduced by the *Commonwealth Superannuation Schemes Amendment Act 1992*.

### ***Item 20***

206 This item amends paragraphs 98B(4)(ab), (ac) and (c) by substituting the term '*widow*' with '*spouse*'. This ensures that the current terminology is easily related to the relevant pension entitlements provided under sections 38 and 39 of the DFRDB Act. The effect is the same as that described for item 19.

### ***Item 21***

207 This item amends paragraphs 98D(1)(a), (b) and (c) by substituting the term ‘widow’ with ‘spouse’. This ensures that the current terminology is easily related to the pension entitlements provided under sections 38 and 39 of the DFRDB Act. The effect is the same as that described for item 19.

### ***Item 22***

208 This item amends paragraphs 98D(2)(a), (b), 3(b) and (4)(b) by substituting the term ‘widow’ with ‘spouse’. This ensures that the current terminology is easily related to the pension entitlements provided under sections 38 and 39 of the DFRDB Act. The effect is the same as that described for item 19.

### ***Item 23***

209 This item substitutes the term ‘widow’s pension’ in subparagraph 98J(3)(b)(ii) of the DFRDB Act, which relates to the waiving of member contributions in certain circumstances, with the term ‘spouse pension’. Apart from same-sex partners of members who die on or after the day the amendment commences, this change does not have the effect of extending benefits to any persons not currently taken to be eligible under the scheme, rather, it reflects the change of terminology from ‘widow’ to ‘spouse’ that was originally introduced by the *Commonwealth Superannuation Schemes Amendment Act 1992*.

### ***Item 24***

210 This item provides that the amendments to the DFRDB Act only apply in relation to scheme members who die on or after the commencement of the amendments made by Schedule 3 to the Bill. It does not extend pension benefits to partners and children of members who die before the commencing day.

### ***Defence Forces Retirement Benefits Act 1948***

### ***Item 25***

211 This item inserts new sections 64AA, 64AB and 64AC into the DFRB Act. Eligibility under all three proposed sections is measured at the date of death of the recipient member. The sections each establish a power for the Authority to allow payment to be made to persons who would meet the requirements for payment under the DFRDB Act, but for the deceased member having been a member of the 1948 scheme.

212 Determinations of eligibility by the Authority are not legislative instruments for the purposes of the *Legislative Instruments Act 2003*. This is consistent with the exemption of reviewable decisions by item 21 of Schedule 1 of the *Legislative Instruments Regulations 2004*. Decisions of the Authority relating to the 1948 scheme may be reviewed by the Administrative Appeals Tribunal, in accordance with section 99 of the DFRDB Act

213 The amendments relate expressly to recipient members under the scheme because there are no current contributing members in this closed scheme.

Proposed section 64AA

214 Proposed section 64AA provides that where a pension is not payable to a person under the DFRB Act as the widow of a member, the person may be provided with a pension if they would have met the requirements for payment of a spouse pension under the DFRDB Act had the deceased member been a recipient member under that latter scheme.

215 In deciding whether to grant the pension, the Authority must be satisfied that there are necessitous circumstances, or that the pension is otherwise warranted. In this case, the discrimination that would occur were the partner of a deceased member unable to gain a pension due only to their marital status, despite the existence of a genuine couple relationship prior to the death of the member, would be a circumstance that would warrant the grant of a pension.

Proposed section 64AB

216 Proposed section 64AB provides that where a pension is not payable to a person under the DFRB Act in respect of the child of a member the child may be provided with a pension, if the child would have met the requirements for payment of a child pension under the DFRDB Act, had the deceased member been a recipient member under that latter scheme. Paragraph 64AB(2)(b) allows the Authority to approve retrospective payment of the child pension if satisfied that special circumstances exist, however, this date cannot be earlier than the commencement date for the amendments.

Proposed section 64AC

217 Proposed section 64AC provides that where a pension is not payable to a person under the Act as the orphan of a member, an orphan may be provided with a pension if they would have met the requirements for payment of an eligible orphan's pension under the DFRDB Act had the deceased member been a recipient member under that latter scheme. Paragraph 64AC(2)(b) allows the Authority to approve retrospective payment of the child pension if satisfied that special circumstances exist, however, this date cannot be earlier than the commencement date for the amendments.

***Item 26***

218 This item provides that the amendments to the DFRB Act only apply in relation to scheme members who die on or after the commencement of the amendments made by Schedule 3 to the Bill. It does not extend pension benefits to partners and children of members who die before the commencing day.

## Schedule 4—Treasury amendments

219 This Schedule contains amendments to the *Retirement Savings Accounts Act 1997* (RSA Act), *Small Superannuation Accounts Act 1995* (SSA Act), *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Co-contribution Act), *Superannuation Industry (Supervision) Act 1993* (SIS Act) and the *Income Tax (Transitional Provisions) Act 1997*.

220 Amendments contained in Part 1 of Schedule 4 to the Bill will provide members of same-sex couples and their children, with the same treatment under the superannuation regulatory framework as applies to opposite-sex de facto couples and their children. Amendments to definitions of ‘*spouse*’ and ‘*child*’ in a number of superannuation acts will ensure same-sex partners are treated the same as opposite-sex de facto couples, and children of same-sex couples are not disadvantaged.

221 Amendments contained in Part 2 of Schedule 4 will ensure same-sex partners and children of same-sex couples are treated as dependants for the purposes of the taxation of superannuation death benefits. The amendments insert transitional provisions relating to the taxation treatment of death benefit payments received by a member or a child of a same-sex couple.

### Part 1—Superannuation law

#### *Retirement Savings Accounts Act 1997*

##### *Item 1*

222 This item amends the definition of ‘*spouse*’ in subsection 20(2) of the RSA Act.

223 Under this provision in its current form, a person can be considered to be a spouse if the person lives ‘*as the husband or wife of the person*’. Currently, only a married or opposite-sex de facto spouse of a person can be considered to have a relationship as a husband or wife with the person, and therefore be eligible through this definition to receive superannuation benefits upon the death of their partner.

224 The amendment made by this item is intended to extend the existing concept of a spouse as used within the RSA Act, only so that a person in a same-sex relationship with an account holder will be eligible to the same entitlements and recognition provided to persons in an opposite-sex de facto relationship.

225 The phrase ‘*in a relationship as a couple*’ will incorporate relationships between persons of the same sex in specified circumstances as well as those relationships previously referred to as marital relationships. The inclusion of same-sex relationships within this definition is not intended to change the treatment of married or opposite-sex de facto couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.

## *Item 2*

226 This item repeals subsection 20(3) of the RSA Act and substitutes an amended definition of ‘*child*’ to include a child of a person’s relationship with another person. The new definition expands the classes of children that may be taken to be a child of the person for the purposes of determining the person’s dependants. If at any time the person was in a relationship as a couple, a child who is the product of that couple’s relationship may be taken to be the person’s child.

227 The current law does not recognise the child of a same-sex couple as the child of both members of the couple. While the child of a married couple or opposite-sex de facto couple is recognised as the child of both the birth mother and birth father, the status of a child of a same-sex couple is often uncertain. For example, while the current definition of a child recognises the child’s relationship with the biological mother or father, it generally excludes the mother’s or father’s same-sex partner.

228 The amendments to the definition of ‘*child*’ in the RSA Act will ensure that where a deceased account holder was a member of a same-sex couple and had a child who was a product of that relationship, the child is able to receive the deceased account holder’s death benefits as a dependant. The phrase ‘*relationship as a couple*’ has the same meaning as set out at Item 1 above.

229 Paragraph 3(b) of the definition of ‘*child*’ provides that a child can be considered to be a member’s child where the child is the product of the person’s relationship with their partner.

230 Subsection 20(3A) requires that the child is:

- the biological child of at least one person in the relationship, i.e. is conceived utilising the gametes of one party to the relationship; or
- the birth child of a woman in the relationship.

231 A child, who is the product of a person’s previous relationship, and who is brought into the person’s current relationship, is not a child of the person’s current relationship.

232 Examples 1 and 2 below outline the circumstances where a child would meet the requirements of paragraph (b) of subsection 20(3) and subsection 20(3A) (which relies on the amended definition of ‘*child*’ in the RSA Act). The circumstances indicated in example 3 would not meet these requirements.

### Example 1

J is an account holder and forms a relationship as a couple with S. During the relationship J and S decide that S will undergo an artificial conception procedure using gametes from S and a donor. The procedure takes place and S gives birth to H. Whilst H is the biological child of S, he is not the biological child of J.

233 H can be considered J’s child for the purposes of the definition of ‘*child*’ in the RSA Act. That is, H is the product of the relationship between J and S and is S’s biological child. This would continue to be the case even if the relationship between J and S were to break down at a later time.

### Example 2

J is an account holder and forms a relationship as a couple with S. During the relationship J and S decide that S will undergo an artificial conception procedure using donated gametes. The procedure takes place and S gives birth to H. Whilst H is the birth child of S, he is not the biological child of either J or S.

234 H can be considered J's child for the purposes of the definition of '*child*' in the RSA Act. That is, H is the product of the relationship between J and S and S is H's birth mother. This would continue to be the case even if the relationship between J and S were to break down at a later time.

### Example 3

J is an account holder and forms a relationship as a couple with S. S has a child, H, from a previous relationship.

235 H cannot be considered J's child for the purposes of the definition of '*child*' in the RSA Act. Whilst H is S's biological child who is in the relationship, H is not the product of a relationship between J and S. H's connection with J only arises because J commenced a relationship with S. It did not arise from any actions of the couple to add a child to their relationship and therefore is not a product of the person's relationship with that partner.

### ***Item 3***

236 This item provides that amendments to the RSA Act made by Schedule 4 to the Bill are to apply to the 2008–2009 year of income and later years.

### ***Small Superannuation Accounts Act 1995***

#### ***Item 4***

237 This item inserts a definition of '*child*' into the SSA Act. For the purposes of the SSA Act, the term '*child*' has the same meaning as the definition of '*child*' in the SIS Act.

238 Inserting a definition of '*child*' into the SSA Act clarifies the nature of employer deposits that can be made to an individual's account in the Superannuation Holding Accounts Special Account. It reflects the definition in the SIS Act which will recognise children who are the product of a person's relationship with another person as a couple.

#### ***Item 5***

239 This item amends the definition of '*spouse*' in the SSA Act to include a person who is in a relationship with another person as a couple, whether or not the persons are of the same sex or different sexes.

240 Under this provision in its current form, a person can be considered to be a spouse if the person lives '*as the husband or wife of the person*'. Currently, only an

opposite-sex de facto or married spouse of a person can be considered to have a relationship as a husband or wife with the person.

241 The amendment made by this item extends the existing concept of a spouse as used within the SSA Act, only so that a person in a same-sex relationship with an account holder will be eligible to the same entitlements and recognition provided to persons in an opposite-sex de facto relationship. The amendments, other than extending to same-sex partners, should not be taken to cover any other type of relationship not already covered by the SSA Act.

242 The phrase *'in a relationship as a couple'* will incorporate both relationships between persons of the same sex in specified circumstances as well as those relationships previously referred to as marital relationships. The inclusion of same-sex relationships within this definition is not intended to change the treatment of married or opposite-sex de facto couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.

243 The amendment to the definition of *'spouse'* in the SSA Act will ensure a partner in a same-sex relationship is recognised as a dependant of the account holder for the purposes of determining allowable employer deposits to the Superannuation Holding Accounts Special Account.

#### ***Item 6***

244 This item provides that amendments to the SSA Act made by Schedule 4 to the Bill are to apply to the 2008–2009 year of income and later years.

#### ***Superannuation (Government Co-contribution for Low Income Earners) Act 2003***

#### ***Item 7***

245 This item amends the definition of *'spouse'* in the Co-contribution Act to include a person who is in a relationship as a couple with a beneficiary of a Government co-contribution, whether the beneficiary and the person are different sexes or the same sex.

246 Under this provision in its current form, a person can be considered to be a spouse if the person lives *'as the beneficiary's husband or wife'*. Currently, only an opposite-sex de facto or married spouse of a person can be considered to have a relationship as a husband or wife with the beneficiary.

247 The amendment made by this item is intended to extend the existing concept of a spouse as used within the Co-contribution Act, only so that a person in a same-sex relationship with a beneficiary will be eligible for the same recognition provided to persons in an opposite-sex de facto relationship.

248 The phrase *'in a relationship as a couple'* will incorporate both relationships between persons of the same sex in specified circumstances as well as those relationships previously referred to as marital relationships. The inclusion of same-sex relationships within this definition is not intended to change the treatment of

married or opposite-sex de facto couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.

249 For the purpose of the Minister reporting to Parliament on the Government co-contribution for low income earners, the extended definition of *'spouse'* in the Co-contribution Act recognises that a beneficiary of a Government co-contribution can have a same-sex de facto partner.

### ***Item 8***

250 This item provides that amendments to the Co-contribution Act made by this Schedule are to apply to the 2008–2009 year of income and later income years.

### **Superannuation Industry (Supervision) Act 1993**

### ***Item 9***

251 This item amends the definition of *'child'* in the SIS Act to include a child of a person's relationship as a couple. The new definition expands the classes of children that may be taken to be a child of the person for the purposes of determining the person's dependants. If at any time the person was in a relationship as a couple, a child who is the product of that couple's relationship may be taken to be the person's child.

252 The current law does not recognise the child of a same-sex couple as the child of both members of the couple. While the child of a married couple or opposite-sex de facto couple is recognised as the child of both the birth mother and birth father, the status of a child of a same-sex couple is often uncertain. For example, while the current definition of a child recognises the child's relationship with the biological mother or father, it generally excludes the mother's or father's same-sex partner.

253 The amendments to the definition of *'child'* in the SIS Act will ensure that, where a fund member was a member of a same-sex couple and had a child who was a product of that relationship, the child is able to receive the deceased member's superannuation death benefits as a dependant. The phrase *'in a relationship as a couple'* has the same meaning as set out at item 10 below.

254 Paragraph (b) of the definition of *'child'* in subsection 10(1) inserted by item 11 provides that a child can be considered to be a member's child where the child is the product of the person's relationship with their partner.

255 Subsection 10(5) requires that the child is:

- the biological child of at least one person in the relationship, i.e. is conceived utilising the gametes of one party to the relationship; or
- the birth child of a woman in the relationship.

256 A child, who is the product of a person's previous relationship, and who is brought into the person's current relationship, is not a child of the person's current relationship.

257 Item 9 also inserts a note at the end of the new definition of *'child'*, to identify that new subsection 10(5) of the SIS Act is relevant to working out when a child is a product of a relationship for the purposes of paragraph (b) of the definition of *'child'*.

258 Examples 1 and 2 below outline the circumstances where a child would meet the requirements of paragraph (b) of the definition of *'child'* in subsection 10(1) and subsection 10(5). The circumstances indicated in example 3 would not meet these requirements.

#### Example 1

J is a fund member and forms a relationship as a couple with S. During the relationship J and S decide that S will undergo an artificial conception procedure using gametes from S and a donor. The procedure takes place and S gives birth to H. Whilst H is the biological child of S, he is not the biological child of J.

259 H can be considered J's child for the purposes of the definition of *'child'* in the SIS Act. That is, H is the product of the relationship between J and S and is S's biological child. This would continue to be the case even if the relationship between J and S were to break down at a later time.

#### Example 2

J is a fund member and forms a relationship as a couple with S. During the relationship J and S decide that S will undergo an artificial conception procedure using donated gametes. The procedure takes place and S gives birth to H. Whilst H is the birth child of S, he is not the biological child of either J or S.

260 H can be considered J's child for the purposes of the definition of *'child'* in the SIS Act. That is, H is the product of the relationship between J and S and S is H's birth mother. This would continue to be the case even if the relationship between J and S were to break down at a later time.

#### Example 3

J is a fund member and forms a relationship as a couple with S. S has a child, H, from a previous relationship.

261 H cannot be considered J's child for the purposes of the definition of *'child'* in the SIS Act. Whilst H is S's biological child who is in the relationship, H is not the product of a relationship between J and S. H's connection with J only arises because J commenced a relationship with S. It did not arise from any actions of the couple to add a child to their relationship and therefore is not a product of the person's relationship with that partner.

262 The amendments to the definition of *'child'* in the SIS Act will ensure that a child who is a product of a same-sex relationship is able to receive superannuation death benefits as a dependant, upon the death of the fund member in the same-sex relationship.

### ***Item 10***

263 This item amends the definition of ‘*spouse*’ in the SIS Act to include a person who is in a relationship with another person as a couple, whether or not the persons are of the same sex or different sexes.

264 Under this provision in its current form, a person can be considered to be a spouse if the person lives ‘*as the husband or wife of the person*’. Currently, only a married or opposite-sex de facto spouse of a person can be considered to have a relationship as a husband or wife with the person and therefore, for example, be eligible through this definition to receive superannuation benefits upon the death of their partner.

265 The amendment made by this item is intended to extend the existing concept of a spouse as used within the SIS Act, only so that a person in a same-sex relationship with a fund member will be eligible to the same entitlements and recognition provided to persons in an opposite-sex de facto relationship.

266 The phrase ‘*in a relationship as a couple*’ will incorporate relationships between persons of the same sex in specified circumstances as well as those relationships previously referred to as marital relationships. The inclusion of same-sex relationships within this definition is not intended to change the treatment of married or opposite-sex de facto couples. It removes same-sex discrimination but does not change or re-define any other indicia of a relationship.

267 The amendments to the definitions of ‘*spouse*’ in the SIS Act will ensure a person in a same-sex relationship is able to receive their partner’s superannuation benefits as a dependant, upon the death of their partner.

### ***Item 11***

268 This item inserts subsection 10(5) to provide that for the purposes of the SIS Act a child cannot be the product of a relationship, whether between same or opposite-sex partners, unless the child is the biological child of at least one person in the relationship or is born to a woman in the relationship. This is relevant to provisions, such as the new paragraph (b) of the definition of ‘*child*’ in subsection 10(1) being inserted by item 9 into the SIS Act.

### ***Item 12***

269 This item provides that amendments to the SIS Act made by Schedule 4 to the Bill are to apply to the 2008–2009 year of income and later years.

## **Part 2—Taxation law**

### ***Income Tax (Transitional Provisions) Act 1997***

### ***Item 13***

270 The meaning of ‘*spouse*’ and ‘*child*’ in section 295–485 of the *Income Tax Assessment Act 1997* (ITAA 97) will be modified by reference to amended definitions

in the SIS Act. This amendment removes the differential treatment between opposite-sex couples and their children, and same-sex couples and their children, with regard to the ability of a trustee of a superannuation fund to increase the amount of a superannuation lump sum death benefit.

271 The modified meanings of '*spouse*' and '*child*' will ensure a trustee of a superannuation fund can claim a deduction, where the superannuation fund refunds tax paid on contributions made during the lifetime of the deceased member, to the member's same-sex partner, former same-sex partner or a child who is a product of the deceased member's relationship with another person.

272 The amendments to the definitions of '*spouse*' and '*child*' in the superannuation acts apply to the 2008-09 income year and later years. These amendments apply for the 2008-09 income year only.

273 A transitional provision is necessary for the taxation of superannuation as a consequence of the amendments to superannuation law applying from 2008-09. The removal of same-sex discrimination in tax law more generally is intended to apply for the 2009-10 income year and later years under the phased-in introduction of the relevant legislation to remove discrimination against same-sex couples.

#### ***Item 14***

274 The definition of '*death benefits dependant*' used in Subdivision 82-B of Division 82, Division 302 and section 303-5 of the ITAA 97, is modified by reference to the amended definitions of '*spouse*' and '*child*' in the SIS Act. These provisions in the ITAA 97 relate to the taxation of superannuation death benefit payments, superannuation death benefits paid in special circumstances and death benefit termination payments. These amendments remove the differential tax treatment of superannuation death benefit payments to members of same-sex couples and their children.

275 Under current income tax law, a member of a same-sex couple who receives his or her deceased partner's superannuation death benefits is taxed concessionally only where the person satisfies the criteria for an interdependency relationship with the deceased member. If the criteria cannot be satisfied, the person is unable to receive the deceased member's benefits as a reversionary pension, and will be taxed as a non-dependant on lump sum death benefit payments.

276 The modified meaning of '*death benefits dependant*' ensures a member of a same-sex couple is taxed concessionally on the deceased member's death benefits, regardless of whether he or she satisfies the interdependency criteria. That is, the surviving member of the couple may receive the deceased member's superannuation benefits as a reversionary pension, or alternatively receive the superannuation death benefits as a lump sum tax-free.

277 Similarly, upon the death of a person in a same-sex relationship, a child of that relationship who is under 18 years of age is taxed concessionally on receipt of the deceased member's superannuation death benefits.

278 The amendments to the definitions of *'spouse'* and *'child'* in the superannuation acts apply to the 2008-09 year of income and later years.

279 The modified meaning of *'death benefits dependant'*, *'spouse'* and *'child'* in the death benefit provisions of the ITAA 97 apply to the 2008–09 income year only. This transitional provision ensures that a member or a child of a same-sex couple who receives the deceased member's death benefits, is taxed concessionally on those benefits for the 2008–09 income year.

280 A transitional provision is necessary for the taxation of superannuation death benefits as a consequence of the amendments to superannuation law applying from 2008-09. The removal of same-sex discrimination in tax law more generally is intended to apply for the 2009–10 income year and later years under the phased-in introduction of the relevant legislation to remove discrimination against same-sex couples.

## **Schedule 5—Prime Minister and Cabinet amendments**

281 This Schedule contains amendments to the *Governor-General Act 1974* (the GG Act) which makes provision for the salary of the Governor-General and the payment of allowances to persons who have held the office of Governor-General and their spouses.

282 Currently, where a person who is Governor-General dies, or a person who held the office of Governor-General dies, an allowance is payable to the spouse of the person. The allowance is available only to a married or opposite-sex de facto spouse of a deceased person. The eligibility of a spouse to an allowance depends in part on whether the person is in a marital relationship with the Governor-General or former Governor-General at the time of the Governor-General's or former Governor-General's death. Under the Act, children are not recognised for eligibility purposes and are not themselves entitled to any allowance.

283 These amendments will make an allowance arising from the death of a scheme member available to an eligible same-sex partner of the Governor-General or former Governor-General.

284 From the commencement of these amendments, eligibility for a spouse's entitlement will be linked to whether a person was in a couple relationship with a Governor-General or former Governor-General at the time of their death. A couple relationship will extend to relationships between persons of the same sex in specified circumstances as well as those relationships previously referred to as marital relationships.

### ***Item 1***

285 This item inserts a signpost to the definition of the term '*couple relationship*' in section 2B of the GG Act.

### ***Item 2***

286 This item inserts a signpost to the definition of the term '*spouse*' in section 2C of the GG Act.

### ***Items 3 and 4***

287 Sections 2B and 2C of the GG Act set out the requirements for a person to be considered to be a spouse for the payment of an allowance. A person can be considered to be a spouse if the person had a marital relationship with the Governor-General at a particular time as defined in subsection 2B(2) of the GG Act. An element of having a marital relationship is that the person ordinarily lived with another person as that other person's husband or wife. This means that currently only a married or opposite-sex de facto spouse of a deceased Governor-General or former Governor-General can be considered to have had a marital relationship with the Governor-General or former Governor-General and therefore be eligible for an allowance as a spouse.

288 The amendments made by item 3 and item 4 will extend the entitlement to an allowance to persons of the same sex as the Governor-General. This is achieved by replacing the term '*marital relationship*' with the term '*couple relationship*' and replacing the phrase '*husband or wife*' with the term '*partner*'.

289 Item 3 replaces the term '*marital relationship*' with the term '*couple relationship*' in subsection 2B(2) of the GG Act. The heading to section 2B is also replaced with a new heading that refers to a '*couple relationship*'.

290 Item 4 replaces the phrase '*husband or wife*' with the term '*partner*' in subsections 2B(2) and (3). The term '*partner*' is defined in subsection 2B(6) of the GG Act (see item 7).

### ***Item 5 and 6***

291 Subsection 2B(4) of the GG Act outlines some circumstances which may be relevant for arriving at an opinion that a person had a *couple relationship* with the other person as their husband or wife on a permanent and *bona fide* domestic basis. The circumstances listed are not intended as an exhaustive list but cover some of the more common circumstances, such as where the couple are married or have a child or jointly own their home.

292 This item inserts paragraph 2B(4)(c)(iii) into the GG Act, which extends the existing concept of who can be considered to be a spouse for the payment of an allowance to cover persons in same-sex relationships.

293 Relevant evidence will now include whether:

- the persons' relationship is registered under a State or Territory law prescribed for the purposes of paragraph 4AB(4)(ba) of the *Judges' Pensions Act 1968* as a kind of relationship prescribed for the purposes of that paragraph; and
- in the case of persons who are of the same sex, whether there is a child of the relationship.

294 This will assist the Commissioner for Superannuation in determining whether two persons of the same sex had a '*couple relationship*' where the relationship is less than 3 years.

295 As it is intended that the prescribed relationships and prescribed State and Territory legislation should be the same for the Commonwealth civilian and military (defined benefit) superannuation schemes, for administrative convenience they will be specified in the *Judges' Pensions Act*.

### ***Item 7***

296 This item inserts a definition of '*partner*' into subsection 2B of the GG Act. This amendment is related to the amendment being made to the GG Act by item 4. It would define the word '*partner*' to include a person in a same-sex relationship with a Governor-General or former Governor-General.

297 Item 7 also inserts a new subsection 2B(7) to provide that a child cannot be the product of the relationship between two persons, whether the persons are the same sex or different sexes, unless the child is the biological child of at least one of the persons or is born to a woman in the relationship.

***Item 8***

298 This item amends subsection 2C of the GG Act as a consequence of amendments made by item 3.

***Item 9***

299 This item provides that the amendments made to the GG Act by Schedule 5 to the Bill will only apply in relation to a person who is appointed as Governor-General on or after the commencement of Schedule 5 to the Bill.