2008

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

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

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

(Circulated by the authority of the Attorney-General, the Honourable Robert McClelland MP)
SAME-SEX RELATIONSHIPS (EQUAL TREATMENT IN COMMONWEALTH LAWS — SUPERANNUATION) BILL 2008

GENERAL OUTLINE

1 The purpose of the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Bill 2008 (the Superannuation Bill) is to eliminate discrimination against same-sex couples and the children of same-sex relationships in Commonwealth Acts that provide for reversionary superannuation benefits upon the death of a scheme member, and in related taxation treatment of superannuation benefits.

2 The Government amendments proposed to the Superannuation Bill will:

- replace the concept of child as a ‘product of a relationship’ with ‘child of a person within the meaning of the Family Law Act 1975’ (see Subdivision D of Division 1 of Part VII of the Family Law Act, as proposed to be amended by Government Amendments tabled on 18 September 2008 for the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 (Family Law Amendment Bill))

- use the phrase ‘husband or wife or partner’ instead of ‘partner’

- use the phrase ‘marital or couple relationship’ instead of ‘couple relationship’ to ensure that the term ‘marital relationship’ is preserved in Acts where that term appears

- incorporate into the Superannuation Bill additional concepts and drafting included in the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 (the General Law Reform Bill) in order to maintain consistency in Commonwealth laws

- move the definition of ‘de facto partner’ proposed to be inserted in the Acts Interpretation Act 1901 (currently in Item 1 of Schedule 2 to the General Law Reform Bill), into the Superannuation Bill.

- remove references to the regulations made to facilitate recognition of registered relationships under the Judges’ Pensions Act 1968 and replace them with references to regulations made for this purpose under the Acts Interpretation Act.

- use the General Law Reform Bill’s non-discriminatory definition of ‘stepchild’, definition of ‘relative’ and tracing rule to recognise family relationships, and

- introduce application provisions in the Superannuation Bill, which are required as a consequence of the delay in the passage of the Superannuation Bill.

3 Acts affected by the proposed amendments to the Superannuation Bill are:

- Acts Interpretation Act 1901
- Defence Force Retirement and Death Benefits Act 1973
- Federal Magistrates Act 1999
- Governor-General Act 1974
- Judges’ Pensions Act 1968
- Law Officers Act 1964
- Parliamentary Contributory Superannuation Act 1948
- 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
- Superannuation Act 1922
- Superannuation Act 1976

Financial Impact Statement

4 There is estimated to be an ongoing financial impact for these measures.
Regulation Impact Statement

5 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.

Key concepts and definitions

Child

6 In order to recognise children of same-sex couples, the Superannuation Bill expands the classes of children that may be taken to be the child of a couple. The Superannuation Bill provides that for the purposes of the Acts or provision of Acts amended a child would be considered to be a person’s child where that child was the ‘product of the relationship’ the person has or had as a couple with another person. This was intended to ensure that children of same-sex couples were recognised for the purposes of Commonwealth superannuation legislation. A number of submissions to the Senate Standing Committee on Legal and Constitutional Affairs’ inquiry into the Superannuation Bill raised concerns about this definition.

7 Since the introduction of the Superannuation Bill the Government has circulated proposed amendments to the Family Law Amendment Bill, which amends the Family Law Act. The proposed amendments to the Family Law Amendment Bill are intended to implement the bipartisan recommendation made by the Senate Standing Committee on Legal and Constitutional Affairs that the definition of ‘child of the de facto relationship’ and the parenting presumptions in section 60H of the Family Law Act be amended to allow children of same-sex relationships to be recognised as a child of the relationship for the purposes of the entire Family Law Act. The classes of children falling within the amended provisions of the Family Law Act are substantially equivalent to the classes of children that the Government intended to cover with the ‘product of a relationship’ definition in the Superannuation Bill.

8 The definition of child in these amendments to the Superannuation Bill therefore relies on the expanded meaning of child in the Family Law Act which will result from the amendments made by the Family Law Amendment Bill to Part VII of that Act. The meaning of ‘child’ in the Family Law Act will include children:

- born to a woman as the result of an artificial conception procedure while that woman was married to, or was a de facto partner of another person (whether of the same or opposite sex), and

- who are children of a person because of an order of a State or Territory court made under a State or Territory law prescribed for the purposes of section 60HB of the Family Law Act, giving effect to a surrogacy agreement.

9 This will ensure that the children of same-sex couples are recognised consistently across Commonwealth laws and responds to concerns raised in relation to the ‘product of the relationship’ definition of child contained in the Superannuation Bill.

10 In order to incorporate the Family Law Act concept of ‘child’, these amendments replace the ‘product of the relationship’ definition wherever it occurs with a reference to a child ‘within the meaning of the Family Law Act 1975’. The Government intends that this phrase should be interpreted to refer to all children who come within the meaning of ‘child’ in the Family Law Act,
notwithstanding the fact that certain provisions of the Family Law Act do not apply in all States. In particular these definitions will extend to children in Western Australia despite the fact that subsection 69ZE(2) of the Family Law Act provides that Part VII of that Act does not apply in that State.

**Marital and couple relationship**

11 The Superannuation Bill intends to ensure that for the purposes of the payment of death benefits the definition of a relationship includes a same-sex relationship as well as an opposite-sex relationship. In order to achieve this, the Superannuation Bill replaces the term ‘marital relationship’ with the term ‘couple relationship’ and the phrase ‘husband or wife’ with the term ‘partner’ in a number of Commonwealth superannuation laws.

12 While the inclusion of same-sex relationships within this definition was not intended to change the treatment of married or opposite-sex couples, this approach has been criticised in evidence given to the Senate Legal and Constitutional Affairs Committee’s inquiry into the Superannuation Bill. These amendments address this issue by replacing the term ‘couple relationship’ with the phrase ‘marital or couple relationship’. Using the phrase ‘marital or couple relationship’ gives effect to the underlying intention of removing same-sex discrimination while clarifying that it does not change or re-define any other indicia of a relationship. These amendments reinstate the term ‘marital’ in the relevant Acts, while ensuring that married and de facto couples will receive equal treatment.

13 Amendments to the term ‘husband or wife’ were necessary because the ordinary meaning of ‘husband or wife’ may not extend to a person’s same-sex partner. The Superannuation Bill therefore amends this term to ‘partner’. In order to preserve references to married relationships, amendments will modify the approach taken in the Superannuation Bill by retaining the words ‘husband or wife’, and inserting the words ‘or partner’ after ‘husband or wife’. ‘Partner’ is defined as a person with whom a person had a relationship as a couple, whether of the same or opposite sex. This will ensure that the term ‘husband or wife’ is retained while making it clear that same-sex couples can be recognised under these provisions.

**De facto partner**

14 The Superannuation Bill enables a relationship registered under prescribed State laws to be evidence of the existence of a same-sex relationship when considering who may be entitled to a death or pension benefit. The Superannuation Bill inserts a regulation-making provision in the Judges’ Pensions Act 1968 to facilitate recognition of State and Territory schemes. It was intended that regulations made under this provision would prescribe which State and Territory relationship registers and types of relationships would be recognised for the purposes of Commonwealth laws.

15 This approach has been overtaken by the approach in the General Law Reform Bill which includes a definition of ‘de facto partner’ in the Acts Interpretation Act. This definition of ‘de facto partner’ encompasses members of both same-sex and opposite-sex de facto relationships.

16 In order to avoid making two sets of regulations when the same relationships in the same States and Territories are intended to be prescribed, the amendments to the Superannuation Bill will bring the insertion of the Acts Interpretation Act definition of ‘de facto partner’ into the Superannuation Bill and will omit the insertion of the definition in the Judges Pensions Act. This will ensure that the Acts Interpretation Act definition is in place for this purpose when the Superannuation Bill commences.
De facto partners

17 Section 22A of the Acts Interpretation Act will require that an Act or a provision of an Act may specify that the definition in the Acts Interpretation Act applies to that Act or that provision. This approach is a departure from the usual approach in the Acts Interpretation Act which is for words to be defined to have a meaning ‘unless the contrary intention appears’. This means that the application of the definition of ‘de facto partner’ in the Acts Interpretation Act will have no effect unless it is ‘triggered’ by express provisions in the substantive Act. This approach avoids any possibility of unintended consequences in other legislation.

18 Section 22A will prescribe two different circumstances in which a person will be considered to be the de facto partner of another person. Paragraph 22A(a) of the Acts Interpretation Act will provide that a person is a de facto partner of another person if the person is in a ‘registered relationship’ with another person under section 22B of the Acts Interpretation Act. Paragraph 22A(b) of the Acts Interpretation Act will provide that a person is a de facto partner of another person if the person is in a ‘de facto relationship’ with that person under section 22C of the Acts Interpretation Act. The definition of ‘de facto partner’ is gender neutral and applies to both same-sex and opposite-sex couples.

Registered relationships

19 Under section 22B of the Acts Interpretation Act, a person will be considered to be in a registered relationship with another person for the purposes of paragraph 22A(a) of the Acts Interpretation Act if the relationship is registered under a prescribed law of a State or Territory as a prescribed kind of relationship. This will only apply to relationships that are registered under State or Territory laws that are prescribed for the purposes of the Acts Interpretation Act and are of a kind that has been prescribed. For example, provisions of State and Territory laws that provide for registration of ‘caring’ or ‘interdependent’ relationships will not be prescribed as kinds of relationships that will be taken to be a registered relationship for the purposes of the Acts Interpretation Act.

20 The types of relationships that will be prescribed under section 22B of the Acts Interpretation Act are relationships that can be registered under some State and Territory laws that provide for registration of certain relationships. Only State and Territory laws or provisions of laws that provide for registration of relationships—same-sex or opposite-sex—will be prescribed.

De facto relationships

21 Section 22C of the Acts Interpretation Act will provide that, for the purposes of paragraph 22A(b) of the Acts Interpretation Act, a person is in a de facto relationship with another person if the members of the couple are not legally married, are not related by family and have a relationship as a couple living together on a genuine domestic basis.

22 Subsection 22C(2) of the Acts Interpretation Act will provide that all the circumstances of the relationship between the persons are to be taken into account when determining whether two persons have a relationship as a couple for the purposes of paragraph 22C(1)(c) of the Acts Interpretation Act, including any or all of the following relevant factors:

- the duration of the relationship
- the nature and extent of their common residence
- whether a sexual relationship exists
- the degree of financial dependence or interdependence, and any arrangements for financial support, between them
- the ownership, use and acquisition of their property
- the degree of mutual commitment to a shared life
- the care and support of children, and
- the reputation and public aspects of the relationship.

23 Subsection 22C(3) of the Acts Interpretation Act will clarify that no particular finding in relation to any circumstance used in subsection 22C(2) of the Acts Interpretation Act is to be regarded as necessary in deciding whether the persons have a de facto relationship. For example, the fact that a couple do not have children is not a determinative factor when determining whether they are in a de facto relationship. In the same way a lack of a sexual relationship will not exclude the couple from being in a de facto relationship.

24 Subsection 22C(4) of the Acts Interpretation Act will provide that persons are to be taken to be living together on a genuine domestic basis if they are not in fact living together on a genuine domestic basis only because of:
- a temporary absence from each other (e.g., due to work commitments), or
- illness or infirmity of either or both of them (e.g., one partner living in a nursing home).

25 Subsection 22C(5) of the Acts Interpretation Act will clarify that a de facto relationship can exist even if one person in the relationship is legally married to another person, in a registered relationship with another person, or in another de facto relationship. This reflects current laws which allow a person to be in a de facto relationship with a person even if they are married to another person.

26 Subsection 22C(6) of the Acts Interpretation Act will provide that for the purposes of paragraph 22C(1)(b), two persons are to be considered to be related by family if:
- one is the child (including an adopted child) of the other
- one is another descendant of the other (even if the relationship between them is traced through an adoptive parent), or
- they have a parent in common (who may be an adoptive parent of either or both of them).

27 For the purposes of determining if two persons are related by family, the fact that adoption has been declared void or has ceased to have effect is to be disregarded. This means that if a person has previously been adopted and that adoption has been declared void or has ceased to take effect, the fact of adoption is still to be taken into account when determining whether that person and another person are related by family.

**Stepchild**

28 The ordinary meaning of ‘stepchild’ is a ‘child of a husband or wife by a former union’. As same-sex couples cannot marry, the child of one member of the couple by a former relationship cannot be considered to be the other member of the couple’s stepchild. This is also the case for children of opposite-sex de facto partners by a former relationship.
29 Amendments to recognise children of an opposite-sex or same-sex de facto partner by a former relationship are included in the General Law Reform Bill wherever recognition was already given to stepchildren. The amendments to the Superannuation Bill will use this approach from the General Law Reform Bill to recognise the children of a de facto partner by a former relationship in the following Acts:

- Superannuation Act 1976
- Defence Force Retirement and Death Benefits Act
- Retirement Savings Accounts Act, and
- Superannuation Industry (Supervision) Act.

30 In the Defence Force Retirement and Death Benefits Act and Superannuation Act 1976, recognition of children of a person’s de facto partner will be achieved by definitions of ‘stepchild’ and ‘child’ respectively which include a child who would be the stepchild of a person who is the de facto partner of a parent of the child, except that the person and the parent are not legally married. It is not necessary to establish that the person and the parent are capable of being legally married for this purpose.

31 In the Retirement Savings Accounts Act and the Superannuation Industry (Supervision) Act, children of a person’s spouse are covered by the insertion of a new paragraph into these Acts’ definition of ‘child’ to provide that ‘child’ includes ‘a child of the person’s spouse’. The amendments to the Superannuation Bill will define ‘spouse’ to include a person with whom another person is in a de facto relationship or a registered relationship. These amendments are consistent with the approach to the recognition of children in these circumstances in the amendments to the definition of ‘child’ in subsection 995-1(1) of the Income Tax Assessment Act which will be made by the General Law Reform Bill.

32 These definitions are inclusive and do not limit who is a stepchild for the purposes of the relevant Act.

Recognition of family relationships

33 Where terms such as ‘relative’ or other family relationships such as ‘brother’, ‘aunt’, and ‘grandparents’ are provided for in an Act, a tracing rule has been developed that will allow relationships referred to in the Acts to include relationships that are traced through the child-parent relationship. Examples 1 and 2 below outline circumstances where the tracing rule can be used to determine a relationship.

Example 1

J is in a de facto relationship 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. Later, J and S decide to have another child – S will again undergo an artificial conception procedure using donated gametes, but from a different source. The procedure takes place and S gives birth to T. Both procedures comply with the requirements of section 60H of the Family Law Act, and J and S are therefore both the parents of each of the children. Whilst T is the child of J and S, he is not the biological sibling of H.

34 The use of the tracing rule in this instance will allow T to be considered to be H’s brother because the relationship is traced through the child–parent relationship that each child has with J.
and S. This will continue to be the case even if the relationship between J and S were to break down at a later time. Without the tracing rule, T will only be considered to be H’s half brother.

Example 2

J is in a de facto relationship with S. S has a brother T. During the relationship, J and S decide that J will undergo an artificial conception procedure using donated gametes. The procedure, which complies with the requirements of section 60H of the Family Law Act, takes place and J gives birth to H.

T will be considered to be H’s uncle in this instance because the relationship is traced through the child-parent relationship which arises because of section 60H of the Family Law Act. This will continue to be the case even if the relationship between J and S were to break down at a later time. Without the tracing rule, T will have no familial link to H and would not be considered to be T’s uncle.
NOTES ON AMENDMENTS

Amendment 1

36 This amendment inserts Table Item 3A into Clause 2 of the Superannuation Bill. Table Item 3A provides that Part 3 of Schedule 2 to the Superannuation Bill commences on the day on which the Bill receives Royal Assent. Part 3 is inserted by these Parliamentary amendments and provides a power for the Governor-General to make regulations prescribing matters of a transitional nature relating to amendments made by the Bill. Because this power deals with transitional provisions it is desirable for it to commence as soon as possible.

37 Other amendments to Clause 2 of the Superannuation Bill are made as a consequence of the insertion of Table Item 3A.
Amendment 2

38 This amendment inserts Table Item 4A into Clause 2 of the Superannuation Bill. Table Item 4A provides that Part 3 of Schedule 4 to the Superannuation Bill commences on the day on which this Act receives the Royal Assent. Part 3 is inserted by these Parliamentary amendments and provides application provisions to allow the amendments to the concept of ‘child’ in the Family Law Act which will be made by the Family Law Amendment Bill and supporting regulations to apply from 1 July 2008.

39 Table Item 4 of Clause 2 of the Superannuation Bill is amended as a consequence of the insertion of Table Item 4A.
Amendment 3

Schedule 1—Finance and Deregulation amendments

40 Amendment 3 omits previous Schedule 1 to the Superannuation Bill (Finance and Deregulation amendments) and replaces it with a new Schedule 1. These amendments relate to the Parliamentary Contributory Superannuation Act 1948, the Superannuation Act 1922 and the Superannuation Act 1976. The amendments effected by the insertion of the new Schedule 1 are described below.

Items 1, 2, 5, 8, 11, 12, 13, 19, 20, 21, 25, 28, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48, 49 and 51

41 These items reflect the decision to refer to a ‘marital or couple relationship’ rather than a ‘couple relationship’. The use of the term ‘marital or couple relationship’ is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

Items 6, 7, 26 and 27

42 These items adopt the term ‘husband or wife or partner’, as described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

Items 9 and 29

43 These items replace references to regulations made under the Judges’ Pensions Act to prescribe which registers and relationships will be recognised with references to regulations made under the Acts Interpretation Act for that purpose as a consequence of the insertion of a definition of ‘de facto partner’ into the Acts Interpretation Act. The definition of ‘de facto partner’ is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

Items 10, 12, 13, 14, 18, 30, 42 and 47

44 These items remove references to the ‘product of the relationship’ definition of child and instead refer to a child within the meaning of the Family Law Act. This change in approach to the definition of ‘child’ is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

45 Items 5, 14, 16, 26, 46, 52 of Schedule 1 to the Superannuation Bill as introduced are no longer required as a consequence of the new approach to the definition of child, and do not have equivalents in the amended Schedule 1.

Item 24

46 This item will insert a definition of ‘stepchild’ into subsection 3(1) of the Superannuation Act 1976. This will extend the range of persons who can be considered to be a person’s stepchild in the Superannuation Act 1976 to include someone who would be considered the stepchild of a person but for the fact that the person and the other member of a de facto relationship are not married. A description of the key definition of a ‘stepchild’ can be found in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.
Items 3, 4, 15, 16, 17, 22, 23, 50 and 52

47 The amendments made by these items are the same in substance as the amendments contained in Schedule 1 to the Superannuation Bill as introduced.
Amendment 4

Schedule 2—Attorney-General’s amendments

48 Amendment 4 omits previous Schedule 2 (Attorney-General’s amendments) and replaces it with a new Schedule 2. These amendments relate to the Acts Interpretation Act 1901, the Federal Magistrates Act 1999, the Judges’ Pensions Act 1968 and the Law Officers Act 1964. The amendments effected by the insertion of the new Schedule 2 (Attorney-General’s amendments) are described below.

Item 1

49 This item inserts new sections 22A, 22B and 22C into the Acts Interpretation Act. Section 22A introduces the key definition of ‘de facto partner’ which refers to the associated definitions of ‘registered relationships’ (defined by section 22B) and ‘de facto relationships’ (defined by section 22C). The definition of ‘de facto partner’ is described in the Key Concepts and Definitions Section of this Supplementary Explanatory Memorandum.

Items 2, 5, 6, 8, 13, 15, 19, 21, 24 and 25

50 These items reflect the decision to refer to a ‘marital or couple relationship’ rather than a ‘couple relationship’. The use of the term ‘marital or couple relationship’ is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

Items 7 and 20

51 These items adopt the term ‘husband or wife or partner’, as described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

Items 9 and 22

52 These items replace references to regulations made under the Judges’ Pensions Act to prescribe which registers and relationships will be recognised with references to regulations made under the Acts Interpretation Act for that purpose as a consequence of the insertion of a definition of ‘de facto partner’ into the Acts Interpretation Act. The definition of ‘de facto partner’ is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

Items 10, 11, 13, 18 and 23

53 These items remove references to the ‘product of the relationship’ definition of child and instead refer to a child within the meaning of the Family Law Act. This change in approach to the definition of ‘child’ is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

54 Items 1, 5, 19, 20 and 29 of Schedule 2 to the Superannuation Bill as introduced are no longer required as a consequence of the amendments to adopt the new approach to the definition of child, and do not have equivalents in the amended Schedule 2.
**Item 29**

55 This item inserts a power for the Governor-General to make regulations of a transitional nature that relate to amendments made by this Schedule or any other Schedule to the Act.

**Items 3, 4, 12, 14, 16, 17, 26, 27 and 28**

56 The amendments made by these items are the same in substance as the amendments contained in Schedule 2 to the Superannuation Bill as introduced.
Amendment 5

Schedule 3—Defence amendments

57 Amendment 5 replaces Items 1 to 17 of previous Schedule 3 to the Superannuation Bill (Defence amendments). These amendments relate to the Defence Force Retirement and Death Benefits Act 1973. Amendment 5 does not affect Items 18 to 27 of previous Schedule 3. The amendments effected by the insertion of the new Schedule 3 as it applies to Items 1 to 17 are described below.

Items 5, 9, 12, 15 and 16

58 These items reflect the decision to refer to a ‘marital or couple relationship’ rather than a ‘couple relationship’. The use of the term ‘marital or couple relationship’ is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

Items 10 and 11

59 These items adopt the term ‘husband or wife or partner’, as described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

Item 13

60 This item replaces a reference to regulations made under the Judges’ Pensions Act to prescribe which registers and relationships will be recognised with a reference to regulations made under the Acts Interpretation Act for that purpose as a consequence of the insertion of a definition of ‘de facto partner’ into the Acts Interpretation Act. The definition of ‘de facto partner’ is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

Items 2, 3 and 14

61 These items remove references to the ‘product of the relationship’ definition of child and instead refer to a child within the meaning of the Family Law Act. This change in approach to the definition of ‘child’ is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

Item 2

62 Item 2 also provides that a ‘child’ for the purposes of the Defence Force Retirement and Death Benefits Act includes a ‘stepchild’. This will extend the range of persons who can be considered to be a person’s child in the Defence Force Retirement and Death Benefits Act to include someone who would be considered the stepchild of a person but for the fact that the person and the other member of a de facto relationship are not married. A description of the key definition of a ‘stepchild’ can be found in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

Items 1, 4, 6, 7 and 8

63 The amendments made by these items are the same in substance as the amendments contained in Schedule 3 to the Superannuation Bill as introduced.
Amendment 6

Schedule 4—Treasury amendments

64 Amendment 6 omits previous Schedule 4 (Treasury amendments) and replaces it with a new Schedule 4. These amendments relate to the Retirement Savings Accounts Act 1997 (the RSA Act), the Small Superannuation Accounts Act 1995, the Superannuation (Government Co-contribution for Lao Income Earners) Act 2003, the Superannuation Industry (Supervision) Act 1993 (the SIS Act), and the Income Tax (Transitional Provisions) Act 1997. The amendments effected by the insertion of the new Schedule 4 (Treasury amendments) are described below.

Items 1, 4, 6, 10

65 These items harmonise the approach to the definition of ‘spouse’ in the Superannuation Bill with the General Law Reform Bill.

66 Items 1, 4, 6 and 10 will repeal the definitions of ‘spouse’ in relevant Acts to be amended and substitute a new definition. The new definition expands the ordinary meaning of ‘spouse’ in the amended Acts to include:

- another person (whether of the same sex or a different sex) with whom the person is in a relationship that is registered under a law of a State or Territory prescribed for the purposes of section 22B of the Acts Interpretation Act as a kind of a relationship prescribed for the purposes of that section, and

- another person who, although not legally married to the person, lives with the person on a genuine domestic basis in a relationship as a couple.

67 This definition will extend to married couples, and to same-sex and opposite-sex de facto couples. The amendment will recognise registration of a relationship with a State or Territory relationship register as conclusive proof of the existence of the relationship, and is similar to the new definition of ‘spouse’ which will be inserted into section 995-1(1) of the Income Tax Assessment Act 1997 by the General Law Reform Bill. This definition will incorporate elements of the Acts Interpretation Act definition of ‘de facto partner’, which is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

Items 1 and 8

68 These items remove references to the ‘product of the relationship’ definition of child and instead refer to a child with in the meaning of the Family Law Act. This change in approach to the definition of ‘child’ is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

69 The amended definition of ‘child’ in these items will also extend the definition of ‘child’ to include ‘a child of the person’s spouse’ in order to recognise stepchildren in these Acts. The amendments that will be made by the Superannuation Bill will define ‘spouse’ to include a person with whom another person is in a de facto relationship or a registered relationship. These amendments are consistent with the approach to the recognition of children in these circumstances in the amendments to the definition of ‘child’ in subsection 995-1(1) of the Income Tax Assessment Act which will be made by the General Law Reform Bill. The approaches to recognition of
‘stepchildren’ in these amendments are described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

70 Item 11 of Schedule 4 to the Superannuation Bill as introduced is no longer required as a consequence of the new approach to the definition of child, and does not have an equivalent in the amended Schedule 4.

Items 9, 11, 12, 13, 14, 15

71 These items will insert the new approach to recognition of family relationships developed for the General Law Reform Bill into the SIS Act. Definitions of ‘relative’ and a tracing rule (as described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum) are inserted to ensure that relationships traced through the definition of ‘child’ are recognised.

72 Item 9 will insert a definition of ‘relative’ into subsection 10(1) of the SIS Act. This definition of ‘relative’ provides that a relative of an individual means the following:
- a parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of the superannuation member, or of his or her spouse, and
- a spouse of the individual or of any of the individual referred to in paragraph (a).

73 Item 11 will insert a new subsection 10(5) at the end of section 10 of the SIS Act. This new subsection will provide a tracing rule in order to recognise certain family relationships. The subsection will provide that if one individual is the child of another individual because of the definition of ‘child’ in subsection 10(1), relationships traced to, from or through that individual are to be determined in the same way as if the individual were the natural child of the other individual. This is consistent with the approach adopted in the General Law Reform Bill.

74 Item 12 will amend subsection 17A(9) of the SIS Act, which defines ‘relative’ for the purposes of section 17A of that Act. Item 12 will repeal paragraphs (b) and (c) of subsection 17A and substitute a new paragraph (b). Subsection 17A(9) as amended by Item 12 will provide that in section 17 of the SIS Act a relative in relation to a person means:
- a parent, child, grandparent, grandchild, sibling, aunt, uncle, great-aunt, great-uncle, niece, nephew, first cousin or second cousin of the individual or of his or her spouse or former spouse; or
- a spouse or former spouse of the individual, or of an individual referred to in paragraph (a).

75 Item 13 will insert a new subsection 17A(9A) into the SIS Act. This new subsection will provide a tracing rule in order to recognise certain family relationships. The subsection will provide that if one individual is the child of another individual because of the definition of ‘child’ in subsection 17A(9), relationships traced to, from or through that individual are to be determined in the same way as if the individual were the natural child of the other individual. This is consistent with the approach adopted in the General Law Reform Bill.

76 Items 14 and 15 will repeal, respectively, subsection 65(6) of the SIS Act and the definition of ‘relative’ provided in 70E(4) of that Act as a consequence of the insertion of a general definition of ‘relative’ for the SIS Act by Item 11.
Item 16

77 This item will insert application provisions in relation to the amendments to the SIS Act.

78 Subitem (1) of the application provision provides that amendments to the SIS Act made by Schedule 4 are to apply to the 2008–09 year of income and later years, subject to subitems (2) and (3).

79 Subitem (2) of the application provision relates to amendments to section 65 of the SIS Act. Section 65 broadly prohibits a trustee of a regulated superannuation fund, including a self managed superannuation fund, from lending money to, or providing financial assistance using fund resources to, a fund member or to a member’s spouse or relatives.

80 Similarly, subitem (3) relates to amendments to section 66 of the SIS Act. This section broadly prohibits a regulated superannuation fund, including a self managed superannuation fund, from acquiring certain assets from the fund’s members, their spouses or their relatives. Sections 65 and 66 are generally known as investment rules.

81 For example, a trustee of a self managed superannuation fund may currently enter into a transaction with a same-sex spouse of a fund member or the spouse’s relatives, and not contravene the investment rules, because neither the member’s same-sex spouse nor the spouse’s relatives are considered to be the member’s spouse or relative.

82 The amendments to the SIS Act made by Schedule 4 have the effect that the same-sex spouse of a fund member and the spouse’s relatives are recognised as the member’s spouse and relatives.

83 The application provisions will ensure that a trustee of a regulated superannuation fund who entered into a transaction with a same-sex spouse of a fund member or with the spouse’s relative before Royal Assent, will not be adversely affected under section 65 or 66 of the SIS Act by the amended definitions of ‘spouse’ and ‘relative’. Such transactions entered into before Royal Assent (including after the commencement of the 2008-09 income year) will not be considered to be contraventions of section 65 or 66 of the SIS Act.

84 Transactions entered into on or after Royal Assent in breach of section 65 or 66 of the SIS Act will be considered to be contraventions of the SIS Act.

Item 17

85 This item inserts a transitional provision in relation to Part 8 of the SIS Act

86 Part 8 of the SIS Act deals with in-house assets of regulated superannuation funds. An in-house asset is broadly a loan to, an investment in, or a lease to a Part 8 associate of the fund. A Part 8 associate includes members of a self managed superannuation fund and their spouses and relatives. Part 8 of the SIS Act limits the fund’s in-house assets to a maximum of 5 per cent of the market value of the fund’s total assets.

87 Currently, a trustee of a regulated superannuation fund may make a loan to, an investment in, or lease a fund asset to, a same-sex spouse of a fund member or the spouse’s relative, and not contravene the in-house asset rules, because neither the member’s same-sex spouse nor the spouse’s relatives are considered to be Part 8 associates.
88 The amendments to the SIS Act made by Schedule 4 have the effect that a same-sex spouse of a fund member and the spouse’s relatives are recognised as Part 8 associates.

89 Subitem (1) of the transitional provision provides that:
   - where a loan or an investment was made, a contract entered into, or an asset became subject to a lease arrangement, before Royal Assent; and
   - apart from this item, the asset would be an in-house asset of the fund after Royal Assent, only because of the amendments made by Schedule 4; then
   - the asset is not considered to be an in-house asset of the fund.

90 Subitem (2) of the transitional provision provides that where a lease or lease arrangement in respect of a fund asset was entered into before Royal Assent, but came into force on or after Royal Assent, the asset is considered to have become subject to the lease or lease arrangement before Royal Assent.

91 The intention of the transitional provision is to ensure that a trustee of a regulated superannuation fund who made a loan to, an investment in, or leased a fund asset to, a Part 8 associate before Royal Assent is not adversely affected by the amended definitions of ‘spouse’ and ‘relative’. Such transactions entered into before Royal Assent will not be considered to be a contravention of the in-house asset rules of the SIS Act.

92 Transactions under a contract entered into before Royal Assent, but which came into force after Royal Assent, will also not be considered to be a contravention of the in-house rules of the SIS Act.

**Item 20**

93 This item inserts an application provision relating to the commencement of amendments to the Family Law Act being made by the Family Law Amendment Bill. This will allow the new definitions in the Family Law Act to apply for the purposes of amendments made by this Schedule which refer to the Family Law Act.

94 Paragraph (a) provides that the amendments made to the definition of a child are taken to commence on 1 July 2008.

95 Paragraph (b) provides that regulations made regarding a child born to a woman as a result of an artificial conception procedure are taken to commence on 1 July 2008.

96 Paragraph (c) provides that regulations made regarding a child born under surrogacy arrangements are taken to commence on 1 July 2008.

97 The effect of this application provision is to align the commencement dates of Family Law Amendment Bill and its regulations with the commencement dates of this Schedule, and ensure that a child of a person will not be adversely affected by the delayed commencement of that Act or the regulations.
**Items 2, 3, 5, 7, 18, 19**

98   The amendments made by these items are the same in substance as the amendments contained in Schedule 4 to the Superannuation Bill as introduced.
Amendment 7

Schedule 5—Prime Minister and Cabinet amendments

99 Amendment 7 omits previous Schedule 5 to the Superannuation Bill (Prime Minister and Cabinet amendments) and replaces it with a new Schedule 5. These amendments relate to the *Governor-General Act 1974*. The amendments effected by the insertion of the new Schedule 5 are described below.

**Items 1, 3 and 8**

100 These items reflect the decision to refer to a ‘marital or couple relationship’ rather than a ‘couple relationship’. The use of the term ‘marital or couple relationship’ is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

**Item 4**

101 This item adopts the term ‘husband or wife or partner’, as described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

**Item 5**

102 This item replaces a reference to regulations made under the Judges’ Pensions Act to prescribe which registers and relationships will be recognised with a reference to regulations made under the Acts Interpretation Act for that purpose as a consequence of the insertion of a definition of ‘de facto partner’ into the Acts Interpretation Act. The definition of ‘de facto partner’ is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

**Item 6 and 7**

103 Item 6 removes a reference to the ‘product of the relationship’ definition of child and instead refer a child within the meaning of the Family Law Act. This change in approach to the definition of ‘child’ is described in the Key Concepts and Definitions section of this Supplementary Explanatory Memorandum.

104 Item 7 removes a reference to the ‘product of the relationship’ but ensures that a partner of a person can be of the same or opposite sex.

**Items 2 and 9**

105 The amendments made by these items are the same in substance as the amendments contained in Schedule 5 to the Superannuation Bill as introduced.