

1992

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COMMONWEALTH SUPERANNUATION SCHEMES AMENDMENT BILL 1992

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
the Honourable Michael Duffy, M.P.)



## COMMONWEALTH SUPERANNUATION SCHEMES AMENDMENT BILL 1992

### GENERAL OUTLINE

This Bill makes amendments to superannuation legislation to remove discrimination on the ground of marital status.

The amendments to be made by the Bill will define "spouse" for the purposes of superannuation benefits payable under the amended legislation in a way which does not discriminate between legally married and de facto spouses. The key concept will be that the persons were living together as husband and wife in a permanent and bona fide domestic relationship, whether or not they were legally married to each other. The Bill will provide a number of criteria to establish that such a relationship exists.

The Bill will also amend a number of provisions which discriminate between nuptial and ex-nuptial children.

The Bill will also amend the Judges' Pensions Act 1968 to define the eligibility of children to pensions under the Act so that the children who will be eligible for a pension are children of a Judge or retired Judge or children who are in a dependent relationship with a Judge or retired Judge.

### FINANCIAL STATEMENT

The changes will result in some additional costs to Commonwealth superannuation schemes in some situations. These will chiefly be where, in future, de facto spouses of deceased scheme members or pensioners are able to establish the existence of a bona fide domestic relationship where that relationship does not meet the existing eligibility criteria for payment of reversionary benefits. However, because most schemes already recognise spouses, including de facto spouses where the relationship has existed for some years or where there is financial dependency, the additional costs would be very small. There is insufficient data on the incidence, rate of formation, duration of, or extent of financial dependency in de facto relationships among members of existing Commonwealth schemes to enable the additional cost or Budgetary effect to be estimated with any certainty. Any additional costs would be offset by social security and taxation clawbacks.

## NOTES ON CLAUSES

### Clause 1 – Short title

1. This clause provides for the legislation to be known as the Commonwealth Superannuation Schemes Amendment Act 1992.

### Clause 2 – Commencement

2. This clause provides for the commencement of the legislation on 25 June 1993. That is the date on which the amendments to the superannuation provisions of the Sex Discrimination Act 1984 which were made in 1991 will come into effect. As this legislation is being enacted in order to bring Commonwealth legislative superannuation schemes into line with the amended Sex Discrimination Act, these amendments are to commence on the same date.

### Clause 3 – Amendments of Acts

3. This Clause provides that the Acts specified in the Schedule are to be amended as set out in the Schedule.

### Clause 4 – Application and saving– Defence Force Retirement and Death Benefits Act 1973

4. This clause provides that the amendments made to the Defence Force Retirement and Death Benefits Act 1973 by this Act only apply in respect of benefits payable as a result of the death of a member or pensioner on or after 25 June 1993.
5. It also provides that the existing Defence Force Retirement and Death Benefits Act 1973 continues to apply in respect of benefits payable under that Act as a result of the death of a member or pensioner before 25 June 1993.

### Clause 5 - Application and saving –Governor-General Act 1974

6. This clause provides that the amendments made to the Governor-General Act 1974 by this Act only apply in respect of benefits payable as a result of the death of a current or past office-holder on or after 25 June 1993.
7. It also provides that the existing Governor-General Act 1974 continues to apply in respect of benefits payable under that Act as a result of the death of a current or past office-holder before 25 June 1993.

### Clause 6 – Application and saving – Judges' Pensions Act 1968

8. This clause provides that the amendments made to the Judges' Pensions Act 1968 by this Act only apply in respect of benefits payable as a result of the death of a current or past office-holder on or after 25 June 1993.
9. It also provides that the existing Judges' Pensions Act 1968 continues to apply in respect of benefits payable under that Act as a result of the death of a current or past office-holder before 25 June 1993.

### Clause 7 - Application and saving - Parliamentary and Judicial Retiring Allowances Act 1973

10. This clause provides that the amendments made to the Parliamentary and Judicial Retiring Allowances Act 1973 by this Act only apply in respect of benefits payable as a result of the death of an office-holder on or after 25 June 1993.

11. It also provides that the existing Parliamentary and Judicial Retiring Allowances Act 1973 continues to apply in respect of benefits payable under that Act as a result of the death of an office-holder before 25 June 1993.

**Clause 8 - Application and saving - Parliamentary Contributory Superannuation Act 1948**

12. This clause provides that the amendments made to the Parliamentary Contributory Superannuation Act 1948 by this Act only apply in respect of benefits payable as a result of the death, on or after 25 June 1993, of a person entitled to a parliamentary allowance or retiring allowance .
13. It also provides for the continued application of the existing Parliamentary Contributory Superannuation Act 1948 in respect of benefits payable under that Act as a result of the death, before 25 June 1993, of a person entitled to a parliamentary allowance or retiring allowance .

**Clause 9 - Application - Superannuation Act 1922**

14. This clause provides that section 48ABA, which is inserted in the Superannuation Act 1922 by this Act, applies in relation to pension payable in respect of a contributor or pensioner only if the contributor or pensioner dies on or after 25 June 1993.

**Clause 10 - Application and saving - Superannuation Act 1976**

15. This clause provides for the application of the amendments made to the Superannuation Act 1976 by this Act only in respect of benefits payable as a result of the death of an eligible employee or a retirement pensioner on or after 25 June 1993.
16. It also provides for the continued application of the existing Superannuation Act 1976 in respect of benefits payable under that Act as a result of the death of an eligible employee or a retirement pensioner before 25 June 1993.

SCHEDULE  
AMENDMENTS OF ACTS

**DEFENCE FORCE RETIREMENT AND DEATH BENEFITS ACT 1973**

The amendment of paragraph 3(1)(a) will include an ex-nuptial child of a member in the definition of child entitled to an automatic reversionary benefit, that is a benefit payable on a person's death.

The amendments of paragraph 3(1)(b) will provide that the ex-nuptial child of a spouse to whom the definition of child does not apply will be required to prove dependence upon the member at date of death.

Subsection 3(1) will also be amended to remove the gender-specific definitions of "widow" and "widow's pension" and to insert a new reference to "spouse's pension". 'Spouse' will be defined elsewhere in the Act (see new section 6B).

Subsection 3(4) is omitted to remove the definition of "widower".

New subsection 6A(1) will provide that a person had a marital relationship with another person at a particular time if the person ordinarily lived with the other person as that other person's husband or wife on a permanent and bona fide domestic basis at that time.

New subsection 6A(2) will require one of two tests to be met to establish that a person ordinarily lived with another person on a permanent and bona fide domestic basis at a particular time, either:

- (a) that the person had lived with the other person as that other person's husband or wife for a continuous period of at least 3 years up to that time; or
- (b) where the person had lived with the other person as that other person's husband or wife for a continuous period of less than 3 years at that time, that the Defence Force Retirement and Death Benefits Authority is of the opinion, having regard to any relevant evidence, that the person ordinarily lived with the other person on a permanent and bona fide domestic basis at that time.

The persons may be living together as husband and wife on a permanent and bona fide domestic basis whether they are legally married to each other or not.

New subsection 6A(3) will clarify that a marital relationship is taken to have commenced when the couple commenced to live together continuously as husband and wife. The provisions will ensure that, for relationships which commence after retirement and age 60, the five year duration test required by new subparagraph 6B(2)(b)(iii) is measured from the date on which the relationship commenced rather than from the date on which one of the tests in new subsection 6A(2) is met.

New subsection 6A(4) will provide that relevant evidence for arriving at an opinion that a person in a relationship of less than 3 years duration ordinarily lived with the other person on a permanent and bona fide domestic basis could include evidence establishing that:

- (a) the person was wholly or substantially dependent on the other person;
- (b) the persons were legally married to each other;

- (c) the persons had a child born of the relationship between them or who was adopted by them during their relationship; or
- (d) the persons jointly owned a home which was their usual residence.

The Authority will not be limited to these forms of evidence. New subsection 6A(4) will allow the Authority to take into account any other evidence that the Authority considers to be relevant to reach an opinion that the person ordinarily lived with the other person as that other person's husband or wife on a permanent and bona fide domestic basis.

New subsection 6A(5) will provide a means to allow for temporary absences, such as when the persons are separated by a member's posting or absences resulting from illness or infirmity. The subsection will allow persons who are not living together in such circumstances to be treated as if they were living together for the purposes of the definition of "marital relationship", where the Authority is satisfied that the persons would otherwise have been living together.

New section 6B will define "spouse" without discrimination on the basis of marital status. The new definition will not omit any classes of person covered by the existing definition but may extend to additional classes of persons.

New subsection 6B(1) will provide that, for the purpose of this section, a deceased person is a person who, at the date of death, was a contributing member of the Defence Force Retirement and Death Benefits Scheme, or a member in receipt of an age or invalidity pension benefit from the Scheme or a person who had entered public employment and who had preserved his or her benefit in the Scheme until she or he completed a total of 20 years of combined Defence Force and public employment.

New subsections 6B(2) and 6B(3) will define the meaning of a "spouse who survives a deceased person".

A spouse who survives a deceased person will be defined in new subsection 6B(2) to be a person who had a marital relationship with the deceased person at the time of death. Where the deceased person was a member in receipt of an age or invalidity pension from the Defence Force Retirement and Death Benefits Scheme at the time of death, the marital relationship must either have commenced before the deceased person became a recipient member or reached age 60, or otherwise the marital relationship must have continued for at least five years up to the time of death.

New subsection 6B(3) will provide for the circumstances in which a separated spouse can be treated as a spouse for the purposes of the Act. It will provide that a person is a spouse who survives a deceased person if:

- (a) the person had previously had a marital relationship with the deceased person but had permanently separated from the deceased person ;
- (b) the person was legally married to the deceased person when the deceased person died; and
- (c) the Authority is of the opinion that the person was wholly or substantially dependent on the deceased person when the deceased person died.

New paragraph 6B(3)(c) will apply an additional qualification that the marital relationship, though not necessarily the legal marriage, must have been of at least 5 years duration if the relationship commenced after the recipient member became a recipient member and after the recipient member reached age 60.

The amendments of Division 1 of Part VI (heading), section 38, subsection 39(1), subsection 39(2), section 40, paragraph 41A(1)(a), subparagraph 41A(1)(1A), subsection 43A(5) and section 44 will replace or redefine gender-specific language, such as "widow" and "widower", in keeping with the introduction of the new concept of "spouse".

At present section 41 provides for an unequal allocation between spouses, with a five-eighths portion to a legally married spouse and a three-eighths portion to a de facto spouse. The amendment of section 41 will provide that where spouse's pension is paid to more than one spouse, the pension is to be allocated on a needs basis with the proviso that each spouse receives a minimum allocation of three-eighths of the rate at which the relevant pension would have been payable to the deceased member. The aggregate rate of pension must not exceed 100% of the rate of the relevant pension that would have been payable to the deceased member.

The amendments of subparagraphs 41A(1)(a)(i) and (ii) will preserve the rights of a spouse of a deceased member who may convert a portion of his or her pension to a lump sum.

## GOVERNOR-GENERAL ACT 1974

The title of the Governor-General Act will be amended by substituting reference to "widows or widowers" with "spouses".

New subsection 2A(2) will describe the Commissioner for Superannuation, for the purpose of references elsewhere in the Act to the Commissioner, as the person responsible for making decisions in relation to payment of allowances to spouses.

New subsection 2B(1) will define a deceased person to be a person who, at the time of death, either was the Governor-General or had been the Governor-General at any time after the commencement of this legislation on 25 June 1993.

New subsection 2B(2) will define "marital relationship". It will provide that a person had a marital relationship with a deceased person at a particular time if the person ordinarily lived with the deceased person as the deceased person's husband or wife on a permanent and bona fide domestic basis at that time.

New subsection 2B(3) will require one of two tests to be met to establish that a person ordinarily lived with another person on a permanent and bona fide domestic basis at a particular time, either:

- (a) that the person had lived with the other person as that other person's husband or wife for a continuous period of at least 3 years up to that time; or
- (b) where the person had lived with the other person as that other person's husband or wife for a continuous period of less than 3 years at that time, that the Commissioner for Superannuation is of the opinion, having regard to any relevant evidence, that the person ordinarily lived with the other person on a permanent and bona fide domestic basis at that time.

The persons may be living together as husband and wife on a permanent and bona fide domestic basis whether they are legally married to each other or not.

New subsection 2B(4) will provide that relevant evidence for arriving at an opinion that a person in a relationship of less than 3 years duration ordinarily lived with the other person as the other person's husband or wife on a permanent and bona fide domestic basis could include evidence establishing that:

- (a) the person was wholly or substantially dependent on the other person;
- (b) the persons were legally married to each other;
- (c) the persons had a child born of the relationship between them or who was adopted by them during their relationship; or
- (d) the persons jointly owned a home which was their usual residence.

The Commissioner for Superannuation will not be limited to these forms of evidence. New subsection 2B(4) will allow the Commissioner for Superannuation to take into account any other evidence that he considers to be relevant to reach an opinion that the person ordinarily lived with the other person as that other person's husband or wife on a permanent and bona fide domestic basis.

New subsection 2B(5) will provide a means to allow for temporary absences, such as when the persons are separated by work commitments or absences resulting from illness or infirmity. The subsection will allow persons who are not living together in such circumstances to be treated as if they were living together for the purposes of the definition of "marital relationship", where the Commissioner for Superannuation is satisfied that the persons would otherwise have been living together.

New section 2C will define the meaning of the word 'spouse'.

A spouse of a deceased person will be defined in new subsection 2C(a) to be a person who had a marital relationship with the deceased person when the deceased person died.

New subsection 2C(b) will provide for the circumstances in which a separated spouse can be treated as a spouse for the purposes of the Act. It will provide that a person is a spouse who survives a deceased person if:

- (a) the person had previously had a marital relationship with the deceased person but had permanently separated from the deceased person ;
- (b) the person was legally married to the deceased person when the deceased person died; and
- (c) the Commissioner for Superannuation is of the opinion that the person was wholly or substantially dependent on the deceased person when the deceased person died.

Existing subsection 4(2), which is subject to the provisions of the existing subsection 4(4), will also now become subject to new section 4A which provides for allowances payable where there is more than one spouse. Subsection 4(2) will also now omit reference to "widow" or "widower" and substitutes the term "spouse".

Existing paragraph 4(3)(b) will now omit reference to "widow" or "widower" and substitute "spouse".

New subsection 4A(1) will assign responsibility to the Commissioner for Superannuation to allocate any allowances to spouses where the Governor-General dies leaving more than one spouse.

New subsection 4A(2) will provide that an allowance is payable to each spouse only in accordance with the allocation determined under new subsection 4A(3).

New subsection 4A(3) will set out the conditions under which the Commissioner for Superannuation will allocate the allowance. It will specify that the Commissioner for Superannuation must:



- (a) have regard to the respective needs of each of the spouses; and
- (b) ensure that the aggregate of the rates of allowance applicable to each of the spouses will not exceed 100% of the rate of allowance that would have been applicable to the deceased person under paragraph 4(3)(a); and
- (c) ensure that the rate of allowance applicable to each spouse will not exceed the rate specified in paragraph 4(3)(b).

New section 4B will provide for application to be made to the Administrative Appeals Tribunal for the review of a decision of the Commissioner for Superannuation made under:

- (a) new paragraph 2B(3)(b) in relation to acknowledgment of a marital relationship having existed;
- (b) new subsection 2B(5) in relation to being satisfied that a person is taken to have been living with the deceased person;
- (c) new sub-paragraph 2C(b)(iii) in relation to dependence; and
- (d) new section 4A in relation to the allocation of allowance between multiple spouses.

#### JUDGES' PENSIONS ACT 1968

The amendment of subsection 4(1) will repeal the definitions of "child" and "eligible child" and insert the following definitions:

"Child" will mean a child or adopted child who is under the age of 16 years, or who is over 16 years but under 25 years and is studying full-time at a school, college or university. This definition combines the previous definition of "child" and "eligible child".

"Child of a marital relationship" will mean a child born of a marital relationship or a child adopted by the persons in that relationship during the relationship.

A reference to "eligible child" will refer to the definition of the term contained in new section 4AA.

Subsection 4(2) of the Act, which provided that a child adopted by a Judge's widow or widower after his or her remarriage is not eligible for a pension under the Act, will be repealed. New provisions, referred to below, will now deal with the eligibility for a pension of adopted and natural children of a Judge or retired Judge.

New section 4AA will define those eligible children in relation to whom a pension may be paid. An eligible child will be:

- (a) a child of the Judge or retired Judge; or
- (b) a child who, in the Attorney-General's opinion -
  - was, at the time of death of the Judge or retired Judge, wholly or substantially dependent on the Judge or retired Judge; or
  - would have been, but for the death of the Judge or retired Judge, wholly or substantially dependent on the Judge or retired Judge.

This amendment will reduce the coverage of the current Act by excluding as possible beneficiaries a child of a spouse or a former spouse of a Judge or retired Judge where the child has no dependent relationship with the Judge or retired Judge.

New subsection 4AB(1) will provide that a person had a marital relationship with another person at a particular time if the person ordinarily lived with the other person as that other person's husband or wife on a permanent and bona fide domestic basis at that time.

New subsection 4AB(2) will require one of two tests to be met to establish that a person ordinarily lived with another person on a permanent and bona fide domestic basis at a particular time, either:

- (a) that the person had lived with the other person as that other person's husband or wife for a continuous period of at least 3 years up to that time; or
- (b) where the person had lived with the other person as that other person's husband or wife for a continuous period of less than 3 years at that time, that the Attorney-General is of the opinion, having regard to any relevant evidence, that the person ordinarily lived with the other person on a permanent and bona fide domestic basis.

The persons may be living together as husband and wife on a permanent and bona fide domestic basis whether they are legally married to each other or not.

New subsection 4AB(3) will clarify that a marital relationship is taken to have commenced when the couple commenced to live together continuously as husband and wife. The provision will ensure that, for relationships which commence after retirement and age 60, the five year duration test required by new subparagraph 4AC(2)(b)(iii) applies from the date on which the relationship commenced rather than from the date on which one of the tests in new subsection 4AB(2) is met.

New subsection 4AB(4) will provide that relevant evidence for arriving at an opinion that a person in a relationship of less than 3 years duration ordinarily lived with the other person on a permanent and bona fide domestic basis could include evidence establishing that:

- (a) the person was wholly or substantially dependent on the other person;
- (b) the persons were legally married to each other;
- (c) the persons had a child born of the relationship between them or who was adopted by them during their relationship; or
- (d) the persons jointly owned a home which was their usual residence.

The Attorney-General will not be limited to these forms of evidence. New subsection 4AB(4) will allow the Attorney-General to take into account any other evidence that he considers to be relevant to reach an opinion that the person ordinarily lived with the other person as that other person's husband or wife on a permanent and bona fide domestic basis.

New subsection 4AB(5) will provide a means to allow for temporary absences, such as when the persons are separated by work commitments or absences resulting from illness or infirmity. The subsection will allow persons who are not living together in such circumstances to be treated as if they were living together for the purposes of the definition of "marital relationship", where the Attorney-General is satisfied that the persons would otherwise have been living together.

New section 4AC will define "spouse" without discrimination on the basis of marital status.

New subsection 4AC(1) will provide that, for the purposes of this section, a deceased Judge is a person who has died and who, at the date of death, was a Judge or retired Judge.

New subsections 4AC(2) and 4AC(3) will define a 'spouse who survives a deceased Judge'. A spouse who survives a deceased Judge will be defined in new subsection 4AC(2) to be a person who had a marital relationship with the deceased Judge at the time of death. Where the deceased Judge was a retired Judge at the time of death, the marital relationship must either have commenced before the Judge became a retired Judge or before the Judge reached age 60, or otherwise the marital relationship must have continued for at least five years up to the time of death.

New subsection 4AC(3) will provide for the circumstances in which a separated spouse can be treated as a spouse for the purposes of the Act. It will provide that a person is a spouse who survives a deceased Judge if:

- (a) the person had previously had a marital relationship with the deceased Judge but had permanently separated from the deceased Judge ;
- (b) the person was legally married to the deceased Judge when the deceased Judge died; and
- (c) the Attorney-General is of the opinion that the person was wholly or substantially dependent on the deceased Judge when the deceased Judge died.

New paragraph 4AC(3)(c) will apply an additional qualification that the marital relationship, though not necessarily the legal marriage, must have been of at least 5 years duration if the relationship commenced after the Judge became a retired Judge and after the Judge reached age 60.

Subsection 7(1) will be amended by substituting "spouse" for any references to "widow or widower".

Subsection 8(1), which states the rate at which a pension is payable to a surviving spouse of a retired Judge, will be amended by substituting "if a retired Judge dies leaving a spouse" for that part of the section that sets out the eligibility of a spouse of a deceased retired Judge to a pension because the eligibility conditions will now be contained in section 4AC(2)(b). The section will also be amended by substituting "spouse" for those references to "widow or widower".

Subsections 9(1), 10(1) and 11(1) will be amended consistently with the new definition of "eligible child" in new section 4AA and the consequent exclusion from pension entitlement of a child of a spouse of a Judge or retired Judge where the child has no dependent relationship with the Judge or retired Judge.

Subsections 10(2), 11(3) and 12(3) will be replaced. New subsections 10(2), 11(3) and 12(3) will provide that where a retired Judge enters into a marital relationship after retirement, after age 60 and less than five years before the retired Judge's death, a pension is not, on the retired Judge's death or, under subsection 11(3), on the death of the person with whom the retired Judge had that relationship, payable in respect of a child of that marital relationship. The new subsections have a similar effect to the current subsections without discriminating on the basis of marital status.

Subsection 12(1) will be amended by omitting "or of a person (whether deceased or not) who was at any time the wife or husband of the Judge or retired Judge". This amendment is consistent with the new definition of "eligible child" in new section 4AA and the consequent exclusion from pension entitlement of a child of a former spouse of a Judge or retired Judge where the child has no dependent relationship with the Judge or retired Judge.

Subsections 9(1), 10(1), 11(1), 12(1), 15(1) and 15(2) will be amended by substituting "spouse" for any references to "widow or widower".

New subsection 15A(1) will provide that where a Judge or retired Judge dies leaving more than one spouse, the Attorney-General must allocate any pension payable in respect of a deceased Judge or retired Judge among the spouses.

New subsection 15A(2) will provide that the Attorney-General in making any allocation must take into account the respective needs of the spouses and any eligible children.

New subsection 15A(3) will provide that a pension will be payable in accordance with that allocation.

New subsection 15A(4) will provide that the rate of pension payable to a spouse under the allocation must not exceed the rate of pension that would have been payable if there was only one spouse entitled to receive a pension under the Act.

New subsection 15A(5) will provide that the maximum aggregate amount that may be shared by two or more spouses is the rate of a Judge's or retired Judge's pension.

New subsection 15A(6) will provide that for the purposes of this section, "relevant pension" in relation to a retired Judge who has died, is the pension that would have been payable to the retired Judge if he or she had not died.

Section 17A, which lists the decisions which are subject to review by the Administrative Appeals Tribunal, will be amended to provide, in addition to the matters that are already reviewable, for the review of the following decisions of the Attorney-General:

- a decision whether a child was wholly or substantially dependent on a Judge or retired Judge at the time of death or would have been wholly or substantially dependent on a Judge or retired Judge but for the death (paragraph 4AA(b));

- a decision whether a person ordinarily lived with the other person on a permanent and bona fide domestic basis (paragraph 4AB(2)(b));

- a decision whether persons ordinarily living together but for a temporary absence or an absence resulting from circumstances such as illness or infirmity (subsection 4AB(5));

- a decision whether a person, who was legally married to the deceased Judge at the time of death but was separated from the Judge, was wholly or substantially dependent on the deceased Judge (paragraph 4AC(3)(d));

- a decision as to the allocation of any pension payable in respect of the death of a Judge or retired Judge where there is more than one spouse (subsection 15A(1)).

## PARLIAMENTARY AND JUDICIAL RETIRING ALLOWANCES ACT 1973

The Parliamentary Contributory Superannuation Act 1948 ("the 1948 Act") was amended by the Parliamentary and Judicial Retiring Allowances Act 1973. Part VA of the 1948 Act, which provided for additional entitlements to former Ministers and office-holders who retired from the Parliament during the period 1964 to 1973, was repealed. However, section 22A and sections 22G to 22P continue to apply to and in respect of persons who were Ministers or office-holders immediately before the commencement of the Parliamentary and Judicial Retiring Allowances Act or who had previously been office-holders.

New sub-section 22(2A) provides a Schedule of modifications to the continuing operation of Part VA of the 1948 Act.

#### Schedule: Modifications of Applied Provisions of the Principal Act

The amendments of subsections 22K(2), 22K(3), 22K(4), and 22M(3) will replace gender-specific terminology and will provide for reversionary benefits in respect of former Ministers and office holders on the same basis as other reversionary benefits payable under the 1948 Act (as amended by this Act).

The amendment of subsection 22K(2) and 22K(4) will also remove provisions for the cessation of benefits on re-marriage of a spouse.

The amendments of subsection 22K(3) will also permit the payment of a reversionary benefit to the spouse of a relevant female Minister or office holder.

#### PARLIAMENTARY CONTRIBUTORY SUPERANNUATION ACT 1948

The amendment of subsection 4(1) will insert a new definition of "former spouse". The new definition will be applicable in the context of benefits to eligible children in section 19AA.

New subsection 4B(1) will provide that a person has a marital relationship with another person at a particular time if the person ordinarily lived with the other person as that other person's husband or wife on a permanent and bona fide domestic basis at that time.

New subsection 4B(2) will require one of two tests to be met for establishing that a person ordinarily lived with another person on a permanent and bona fide domestic basis at a particular time, either:

- (a) that the person had lived with the other person as that other person's husband or wife for a continuous period of at least 3 years up to that time; or
- (b) where the person had lived with the other person as that other person's husband or wife for a continuous period of less than 3 years at that time, that the Parliamentary Retiring Allowances Trust is of the opinion, having regard to any relevant evidence, that the person ordinarily lived with the other person on a permanent and bona fide domestic basis.

The persons may be living together as husband and wife on a permanent and bona fide domestic basis whether they are legally married to each other or not.

New subsection 4B(3) will clarify that a marital relationship is taken to have commenced when the couple commenced to live together continuously as husband and wife. The provision ensures that, for relationships which commence after retirement and age 60, the five year duration test required by new subparagraph 4C(2)(b)(iii) applies from the date on which the relationship commenced rather than from the date on which one of the tests in new subsection 4B(2) is met.

New subsection 4B(4) will provide that relevant evidence for arriving at an opinion that a person in a relationship of less than 3 years duration ordinarily lived with the other person on a permanent and bona fide domestic basis could include evidence establishing that:

- (a) the person was wholly or substantially dependent on the other person;
- (b) the persons were legally married to each other;

- (c) ~~the persons had a child born of the relationship between them or who was adopted by them during the relationship; or~~
- (d) ~~the persons jointly owned a home which was their usual residence.~~

The Trust will not be limited to these forms of evidence. New subsection 4B(4) will allow the Trust to take into account any other evidence that the Trust considers to be relevant to reach an opinion that the person ordinarily lived with the other person as that other person's husband or wife on a permanent and bona fide domestic basis.

New subsection 4B(5) will provide a means to allow for temporary absences, such as when the persons are separated by work commitments or absences resulting from illness or infirmity. The subsection will allow persons who are not living together in such circumstances to be treated as if they were living together for the purposes of the definition of "marital relationship", where the Trust is satisfied that the persons would otherwise have been living together.

New section 4C will provide a new definition of spouse which does not discriminate on the basis of marital status.

New subsection 4C(1) will provide that, for the purposes of the section, a deceased person is a person who was, at the date of his or her death, a member of the Parliament (a person entitled to a parliamentary allowance) or a retired member (a person entitled to a retiring allowance).

New subsections 4C(2) and 4C(3) will define the meaning of a "spouse who survives a deceased person".

A spouse who survives a deceased person will be defined in new subsection 4C(2) to be a person who had a marital relationship with the deceased person at the time of death. Where the deceased person was a retired member at the time of death, the marital relationship must either have commenced before the retired member became a retired member or before the retired member reached age 60, or otherwise the marital relationship must have continued for at least five years up to the time of death.

New subsection 4C(3) will provide for the circumstances in which a separated spouse can be treated as a spouse for the purposes of the 1948 Act. It will provide that a person is a spouse who survives a deceased person if:

- (a) ~~the person had previously had a marital relationship with the deceased person but had permanently separated from the deceased person ;~~
- (b) ~~the person was legally married to the deceased person when the deceased person died; and~~
- (c) ~~the Trust is of the opinion that the person was wholly or substantially dependent on the deceased person when the deceased person died.~~

New paragraph 4C(3)(c) will apply an additional qualification that the marital relationship, though not necessarily the legal marriage, must have been of at least 5 years duration if the relationship commenced after the retired member became a retired member and after the retired member reached age 60.

The amendments of subsections 19AA(3), 19AA(4), 19AA(5), 19AB(1), 19AB(2), 19A(2), 19A(6), and 20(4) will replace gender-specific terminology and incorporate the new concepts of "spouse" and "deceased person".

The amendment of subsection 19(2) will provide for payment of lifetime reversionary benefits to surviving spouses.

The provision of reversionary benefits under subsection 19(2) will be qualified by:

subsection 4C(2) in respect of post-retirement relationships commenced after age 60, by the incorporation of a five year test; and

section 21AA which gives the Trust a discretion to apportion the reversionary benefit between a number of spouses and/or eligible children.

Subsection 19(7) will be omitted as its effects will be subsumed by the new subsection 4C(2).

The amendment of subsection 19AA(2) will provide a new benefit (the amount to be determined by the Parliamentary Retiring Allowances Trust) for an eligible child where there is a surviving spouse, who is entitled to a reversionary benefit, and who is not a natural or adoptive parent of that child.

Subsection 19AA(2B) ensures that an eligible child born to, or adopted by, a retired member after age 60 and after the marital relationship had lasted 5 years is entitled to a reversionary benefit. The amendment will remove discriminatory references to marriages from the subsection.

The amendment of subsection 19AA (3A), which provides that a child born or adopted after the death of the former member may be excluded from receiving a benefit, replaces gender-specific terminology and incorporates the new concepts of "spouse" and "deceased person".

Subsection 19AA(4A) is omitted as it is no longer relevant. The persons that it described will in future be covered by the concepts of "spouse" and "deceased person".

The amendment of subsection 19AA(5) incorporates the concept of "deceased person".

The amendment of subsection 19A(2), in addition to incorporating gender-neutral terminology, will delete the existing provision that operates to cease payment of benefits on re-marriage to the surviving spouse of a former Prime Minister who had held office on or before 12 June 1978.

New section 21AA will have the effect of providing for the apportionment of reversionary benefits among multiple spouses and eligible children where appropriate. The new section will incorporate the new concept of marital relationship which will include both de facto and legal marriages. Multiple spouses and/or eligible child(ren) of a deceased member or pensioner could be entitled to benefits in the future. The new section will give the Trust the discretion to determine the allocation of benefits between parties having regard to the respective needs of the spouse/s and eligible child(ren). The new section will also provide that the total of benefits allocated to all beneficiaries cannot be greater than the reversionary benefit payable if there had been only one surviving spouse.

## SUPERANNUATION ACT 1922

The Superannuation Act 1922 (the 1922 Act) provides for an occupational superannuation scheme for Commonwealth employees. The scheme has been closed since 1 July 1976 and was replaced by the scheme under the Superannuation Act 1976 (the 1976 Act).

The 1922 Act has been retained to provide for the payment of benefits to or in respect of contributors or pensioners who died or retired before that date.

The 1922 Act provides for reversionary benefits to be paid to the widow or widower of a deceased contributor or pensioner in certain circumstances. However, a special grant of pension may be made to a person who would be a spouse of a deceased contributor or pensioner if the provisions of the 1976 Act applied instead of the more limited provisions of the 1922 Act.

New subsection 48AB(3AA) will ensure that the amendments made to the 1976 Act by the Commonwealth Superannuation Schemes Amendment Act 1992 are not to be taken into account in the consideration of whether a special grant of pension should be made under section 48AB in respect of a pensioner or contributor who dies before 25 June 1993.

New subsection 48AB(3AA) will also preserve the continued application of the existing 1922 Act and the 1976 Act in relation to the special grant of pensions under section 48AB in respect of a pensioner or a contributor who dies before 25 June 1993.

The amendment of subsection 48AB(4) will limit the application of that sub-section to pensions granted in respect of a pensioner who dies before 25 June 1993. Subsection 48AB(4) provides that a special grant of pension is not to affect the entitlement of a widow, widower, child or orphan who is automatically entitled to a pension in respect of a deceased contributor or pensioner.

Where a pensioner dies on or after 25 June 1993, the new section 48ABA will provide for the Commissioner for Superannuation to allocate all the pensions payable in respect of a deceased pensioner amongst the spouses and eligible children of that pensioner on the basis of their respective needs. This will remove the discrimination in favour of eligible widows and widowers (irrespective of whether they were living with the deceased person) currently included in subsection 48AB(4).

In recognition that the entitlement of certain persons to reversionary benefits under the 1922 Act on the death of a pensioner arises from the provisions of the 1976 Act, the terms "eligible child" and "spouse" will be defined for the purposes of the new section 48ABA to include persons who would satisfy those definitions in the 1976 Act, if the pensioner had been a retirement pensioner for the purposes of that Act (new subsection 48ABA(1)).

New subsection 48ABA(2) will provide that where a pensioner is survived by more than one spouse who is entitled to a pension under the 1922 Act in respect of that pensioner (including any pension in respect of an eligible child) those pensions, and any pension that is also payable to an orphan under section 48 of the 1922 Act, are to be payable only in accordance with the arrangements included in the new section 48ABA.

New subsection 48ABA(3) will provide that the Commissioner for Superannuation is to allocate the total amount of the pensions amongst the persons entitled to those pensions after having regard to their respective needs (including those of any eligible children) and any other matters the Commissioner considers relevant. New subsection 48ABA(8) will allow the Commissioner to vary the allocation from time to time.

New subsections 48ABA(4), (5) and (6) will provide that the Commissioner may not allocate more than a specified maximum amount of pension to each spouse and to each eligible child not in the custody, care and control of a spouse. The maximum amounts mentioned in those subsections reflect the usual level of pension available to a spouse or an orphan under the 1922 Act.

The maximum amount allocated to a spouse will be lower if the deceased pensioner had elected, under section 26 of the 1922 Act, to contribute for a lower rate of spouse's pension.

The new subsection 48ABA(7) will require the Commissioner to determine that part of the pensions being allocated which is attributable to each eligible child. This will assist the



Commissioner to establish any amount to be paid to a guardian of a child or otherwise expended for the benefit of a child in accordance with subsection 58(2) of the 1922 Act.

#### SUPERANNUATION ACT 1976

The amendment of subsection 3(1) will provide for the current definition of spouse to be omitted. For the purposes of the Act, "spouse" will have the meaning given by new section 8B.

Subsection 3(2) of the Act is repealed and will be replaced by new subsection 8A(5).

New subsection 8A(1) will provide that a person had a marital relationship with another person at a particular time if the person ordinarily lived with the other person as that other person's husband or wife on a permanent and bona fide domestic basis at that time.

New subsection 8A(2) will require one of two tests to be met to establish that a person ordinarily lived with another person on a permanent and bona fide domestic basis at a particular time, either:

- (a) that the person had lived with the other person as that other person's husband or wife for a continuous period of at least 3 years up to that time; or
- (b) where the person had lived with the other person as that other person's husband or wife for a continuous period of less than 3 years at that time, that the Commissioner for Superannuation is of the opinion, having regard to any relevant evidence, that the person ordinarily lived with the other person on a permanent and bona fide domestic basis at that time.

The persons may be living together as husband and wife on a permanent and bona fide domestic basis whether they are legally married to each other or not.

New subsection 8A(3) will clarify that a marital relationship is taken to have commenced when the couple commenced to live together continuously as husband and wife. The provisions will ensure that, for relationships which commence after retirement and age 60, the five year duration test required by new subparagraph 8B(2)(b)(iii) applies from the date on which the relationship commenced rather than from the date on which one of the tests in new subsection 8A(2) is met.

New subsection 8A(4) will provide that relevant evidence for arriving at an opinion that a person in a relationship of less than 3 years duration ordinarily lived with the other person on a permanent and bona fide domestic basis could include evidence establishing that:

- (a) the person was wholly or substantially dependent on the other person;
- (b) the persons were legally married to each other;
- (c) the persons had a child born of the relationship between them or who was adopted by them during the relationship; or
- (d) the persons jointly owned a home which was their usual residence.

The Commissioner will not be limited to these forms of evidence. New subsection 8A(4) will allow the Commissioner to take into account any other evidence that the Commissioner considers to be relevant to reach an opinion that the person ordinarily lived with the other person as that other person's husband or wife on a permanent and bona fide domestic basis.

New subsection 8A(5) will provide a means to allow for temporary absences, such as when the persons are separated by work commitments or absences resulting from illness or

infirmity. The subsection will allow persons who are not living together in such circumstances to be treated as if they were living together for the purposes of the definition of "marital relationship", where the Commissioner is satisfied that the persons would otherwise have been living together.

New section 8B will define "spouse" without discrimination on the basis of marital status. The new definition will not omit any classes of person covered by the existing definition but may extend to additional classes of persons.

New subsection 8B(1) will provide that, for the purposes of this section, a deceased person is a person who, at the date of death, was an eligible employee (ie a member of the scheme) or a person who was a retirement pensioner (ie a person in receipt of a pension under the scheme or who is entitled to a pension but has elected to defer receipt of the pension). (A person with a deferred benefit is taken to be an eligible employee for the purpose of determining eligibility for benefits.)

New subsections 8B(2) and 8B(3) will define the meaning of a "spouse who survives a deceased person".

A spouse who survives a deceased person will be defined in new subsection 8B(2) to be a person who had a marital relationship with the deceased person at the time of death. Where the deceased person was a retirement pensioner at the time of death, the marital relationship must either have commenced before the deceased person became a retirement pensioner or before the deceased person reached age 60, or otherwise the marital relationship must have continued for at least five years up to the time of death.

New subsection 8B(3) will provide for the circumstances in which a separated spouse can be treated as a spouse for the purposes of the Act. It will provide that a person is a spouse who survives a deceased person if:

- (a) the person had previously had a marital relationship with the deceased person but had permanently separated from the deceased person ;
- (b) the person was legally married to the deceased person when the deceased person died; and
- (c) the Commissioner is of the opinion that the person was wholly or substantially dependent on the deceased person when the deceased person died.

New paragraph 8B(3)(c) will apply an additional qualification that the marital relationship, though not necessarily the legal marriage, must have been of at least 5 years duration if the relationship commenced after the retirement pensioner became a retirement pensioner and after the retirement pensioner reached age 60.

New subsection 8B(3) will continue the arrangements included in the Act for the entitlement of certain separated spouses to a spouse's benefit.

Section 9, which provides that certain children of a retirement pensioner are not eligible children or partially dependent children, will be repealed and replaced. This amendment will reflect the removal of discrimination against certain ex-nuptial children as a result of the revised definition of spouse included in the new section 8B and will provide for more equitable treatment of persons who become children of a retirement pensioner after the pensioner's retirement and after the pensioner reaches age 60.

The amended section 9 will provide that a person who becomes a child of a retirement pensioner after the pensioner became a retirement pensioner and after the pensioner reaches age 60 is taken to be an eligible child or a partially dependent child only if the person is a child of the pensioner described in new subsections 9(2) and (3).

New subsection 9(2) will describe:

- (a) a child born of a marital relationship between the pensioner and another person;
- (b) a person who became a stepchild of the pensioner as a result of a marital relationship;
- (c) a child of a person with whom the pensioner had a marital relationship;

where: :

- (i) the relationship began before the pensioner became a retirement pensioner; or
- (ii) the relationship began before the pensioner reached age 60; or
- (iii) if (i) or (ii) do not apply, the relationship commenced at least 5 years before the pensioner's death.

New subsection 9(3) will describe a person who had been an adopted child, foster child or ward of the retirement pensioner for a period of at least 5 years before the pensioner's death.

#### NOTES ABOUT SECTION HEADINGS

The notes alter section headings in the Defence Force Retirement and Death Benefits Act 1973, the Judges' Pensions Act 1968, and the Parliamentary Contributory Superannuation Act 1948, by substituting "spouse" for references to "widow" or "widower".









