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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS AND OTHER LEGISLATION AMENDMENT (FURTHER 2008 BUDGET AND OTHER MEASURES) BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Jenny Macklin MP)

FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS AND OTHER LEGISLATION AMENDMENT (FURTHER 2008 BUDGET AND OTHER MEASURES) BILL 2008

OUTLINE

This bill will provide for certain further Budget measures and other non-Budget measures, as described below.

Maternity immunisation allowance

The bill will make amendments for better alignment of maternity immunisation allowance with the National Immunisation Program by paying the allowance in two payments for children who meet the 18 month and four year-old immunisation requirements. It will also extend eligibility for the allowance to children adopted from outside Australia who enter Australia before turning 16 and who are immunised appropriately after arrival, and make minor modifications to the rules for determining entitlement to the allowance.

Partner service pension

Amendments to the *Veterans' Entitlements' Act 1986* will give effect to the 2008-09 Budget measure to cease eligibility for partner service pension for those partners who are separated but not divorced from their veteran spouse, and who have not reached age pension age. Further amendments will set the eligible age at 50 years for partner service pension for the partner of a veteran who is in receipt of the equivalent of or less than special rate but above general rate disability pension or who has at least 80 impairment points under the *Military Rehabilitation and Compensation Act 2004*.

Child support

The bill will make minor amendments to the child support legislation, notably to address anomalies in relation to the child support formula reforms that commenced on 1 July 2008.

Financial impact statement

Total resourcing	**2008-09**	**2009-10**	**2010-11**	**2011-12**
Maternity immunisation allowance	- $12.3 m	- $31.3 m	- $31.8 m	- $6.5 m
Partner service pension: - separated but not divorced* - eligible age * Estimate only – final costing yet to be agreed with Department of Finance and Deregulation	 - $4.0 m $0.1 m	 - $10.6 m $0.2 m	 - $12.1 m $0. 4 m	 - $13.9 m $0.5 m
Child support	nil	nil	nil	nil

FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS AND OTHER LEGISLATION AMENDMENT (FURTHER 2008 BUDGET AND OTHER MEASURES) BILL 2008

NOTES ON CLAUSES

Clause 1 sets out how the Act is to be cited, that is, the *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Further 2008 Budget and Other Measures) Act 2008*.

Clause 2 provides a table that sets out the commencement dates of the various sections in, and Schedules to, the Act.

Clause 3 provides that each Act that is specified in a Schedule is amended or repealed as set out in that Schedule.

Schedule 1 – Maternity immunisation allowance

Summary

This Schedule will make amendments for better alignment of maternity immunisation allowance (MIA) with the National Immunisation Program by paying the allowance in two payments for children who meet the 18 month and four year-old immunisation requirements. The Schedule will also extend eligibility for the allowance to children adopted from outside Australia who enter Australia before turning 16 and who are immunised appropriately after arrival, and make minor modifications to the rules for determining entitlement to the allowance.

In this Schedule, the *A New Tax System (Family Assistance) Act 1999* is referred to as 'the Family Assistance Act', and the *A New Tax System (Family Assistance) (Administration) Act 1999* as 'the Family Assistance Administration Act'.

Background

MIA in two payments

Current eligibility for MIA is limited to children up to the age of two, and, once eligibility is established, MIA is paid only once. This measure will result in two half payments of MIA being available for children up to the age of five. An additional category will allow eligibility for a payment of MIA to arise when a child is between four and five years of age. For a child who is alive four years after birth, and meets the immunisation requirements between the ages of four and five, eligibility for MIA will arise, provided the child is an FTB child of the individual claiming MIA at the date the immunisation requirements are met, and the individual is eligible for family tax benefit in respect of the child, or would be so eligible except that their rate of family tax benefit is nil.

MIA eligibility for children adopted from outside Australia

Adoption

Children born outside Australia may be adopted prior to entering Australia. Alternatively, it may happen that the adoption is not yet completed and the child arrives in Australia as part of the process of adoption. The eligibility rules for MIA for adopted children who are born outside Australia are being broadened. For eligibility for MIA to arise in respect of a child, the child must be born outside Australia, be entrusted to the care of the person adopting the child by an authorised party, and arrive in Australia (with an exception in the case of the death of a child), while under the age of 16. The adoption may occur under the law of any place.

The time at which eligibility will arise

For parity with Australian-born children, eligibility for MIA for children adopted from overseas is dealt with in two groupings, based upon whether the child arrived in Australia on or before the day of their 3rd birthday ('younger overseas adopted children'), or on any day after their 3rd birthday but before they turn 16 ('older overseas adopted children').

For current MIA, an initial timeframe of 18 months from the child's birth is allowed for the basic schedule of immunisations to be completed. For similar reasons, eligibility for MIA for the group of younger overseas adopted children cannot arise before the child reaches the age of 18 months. The immunisation requirements set out in section 6 of the Family Assistance Act may then be met at any time until the child turns four. For this group, the second period of eligibility also covering Australian-born children for a second half payment of MIA between ages four and five will apply, provided immunisation requirements are met prior to the child turning five. Death of the child up to age five will similarly be covered by the provisions also covering Australian-born children.

For older overseas adopted children, the child must meet the immunisation requirements set out in section 6 of the Family Assistance Act within the last six months of the period of two years beginning on the day of their arrival in Australia. If the child dies without meeting the immunisation requirements either prior to entering Australia but after being entrusted into the care of the person adopting the child by an authorised party, or within two years of their arrival in Australia, eligibility for MIA may arise at the date of the child's death if the other requirements are satisfied.

FTB child

In order to be eligible for MIA currently, the relevant child must be an FTB child of the individual claiming MIA. However, for older overseas adopted children (and children adopted from overseas who die prior to reaching Australia), some factors which would prevent the child being an FTB child for MIA purposes are excluded. The child may be an FTB child despite the fact they are not undertaking full-time study or have income beyond the cut-off amount for FTB purposes. The child may also be an FTB child despite the fact they or someone on their behalf is receiving social security payments or payments under a prescribed educational scheme.

Eligible for family tax benefit

In order to be eligible for MIA, the individual claiming MIA must be eligible for family tax benefit in respect of the FTB child adopted from overseas. As for current MIA, the individual will be taken to be eligible for family tax benefit in respect of the child despite the fact their rate of family tax benefit is nil.

Rate of MIA

Currently, MIA is a single payment. However, after the present amendments to MIA, half the current rate will be payable in respect of a child aged under two, or in respect of a younger overseas adopted child before age four. Additionally, the amount of MIA paid will be half the total rate of MIA where a child dies under age five, and a half amount of MIA has already been paid in respect of the child. The rate of MIA will be calculated on the date the Secretary's determination that MIA is payable is made.

An exception to the payment of only half rate applies where MIA eligibility is claimed for a child between ages four and five, and no previous half payment of MIA has been made in respect of the child. In this case, the amount of MIA is the full rate.

MIA paid in respect of an older overseas adopted child will be the full rate of MIA.

Eligibility for MIA in respect of children under age four may arise under a number of provisions. Where a half amount of MIA has been paid in respect of a child while the child is under four (whether under the domestic or overseas adoption-related eligibility provisions) no further half amount under those provisions may be paid. A further half amount may become payable under the provisions relating to children aged four or more.

Overall, no more than two half payments or one full payment of MIA may be made in respect of a child.

MIA claim periods

The periods set out in the Family Assistance Administration Act within which an effective claim for MIA may be made will generally match the period during which eligibility for the payment may be established. Claims upon the death of a child must be made by the later of two years from the date of death, or five years after the birth of the child. For a stillborn child, the existing two-year period from delivery during which a valid claim may be made is extended to five years.

<u>Date of determination of MIA claim</u>

This amendment expands the circumstances in which the determination of a claim for MIA must be delayed. The Secretary must hold a claim for determination at a later date if, at the time the claim is made, the claimant is not eligible for MIA, but the child is an FTB child of the claimant, and the claimant is eligible for family tax benefit in respect of the child, disregarding rate. (The definition of FTB child is modified for this purpose for older overseas adopted children, as set out above at 'FTB child'.)

The claim is held either until the date the claimant becomes eligible for MIA, or to the last date at which eligibility for MIA could be established, based upon the category of MIA eligibility claimed.

Transition

The new category of eligibility for MIA for children between ages four and five will be available at commencement to all children, regardless of their date of birth, provided MIA has not already been paid in respect of the child prior to commencement. MIA in respect of a child who dies aged under five will apply to deaths occurring on or after commencement.

Where a child adopted from overseas arrived in Australia on or after 1 July 2006 and before 1 January 2009, the claimant will have until 31 December 2010 to establish eligibility for, and claim, MIA, and will be entitled to be paid one full rate of MIA. Where the child dies overseas, provided the death occurred from 1 July 2006 to before 1 January 2009, and after the child had been entrusted into the care of the adoptive parent, MIA eligibility may be established and claimed up to 31 December 2010.

Where a child adopted from overseas arrived in Australia on or after 1 July 2006 and before 1 January 2009, and the child dies prior to 1 January 2011, the claimant will have up to the later of 31 December 2010 or two years from the death of the child to claim.

Where a claim for MIA in respect of a child under two was made prior to commencement but has not been determined at commencement, the determination will be made on the basis of the new provisions, including the provisions as to rate. For such claimants, a second claim for MIA in respect of the child between ages four and five is deemed to have been made on 1 January 2009, in order to allow eligibility for the full amount of MIA to be eventually established.

The amendments made by this Schedule commence on 1 January 2009.

Explanation of the changes

Amendments to the Family Assistance Act

Item 1 amends subsection 39(1) to replace three cases of eligibility for MIA with reference to seven cases. The heading to the subsection is replaced by the heading ‘Usual case’.

Item 2 inserts a new subsection 39(2A) described above under ‘MIA in two payments’, providing for the eligibility for MIA of children aged between four and five.

Item 3 substitutes ‘third’ for ‘second’ in subsection 39(3), now providing for the third category of eligibility for MIA (in relation to stillborn children).

Item 4 substitutes ‘fourth’ for ‘third’ in subsection 39(4), now providing for the fourth category of eligibility for MIA (where the child dies within two years of birth).

Item 5 substitutes a maximum age of five for age two in subsection 39(4) to extend eligibility for MIA to a child who dies under age five.

Item 6 adds to section 39 new subsections (5) to (10), described above under ‘MIA eligibility for children adopted from outside Australia’. New subsection 39(5) covers younger overseas adopted children. New subsection 39(6) covers older overseas adopted children, with eligibility established if either of new subsections 39(7) and (8) is met. Subsection 39(7) deals with eligibility of older overseas adopted children who are alive within two years of their arrival in Australia, and subsection 39(8) deals with the death of an older overseas adopted child within two years of arrival in Australia. Subsection 39(9) provides for MIA eligibility upon the death of a child overseas aged under 16, after being entrusted into the care of a person adopting the child, but prior to the child arriving in Australia. Subsection 39(10) modifies the definition of FTB child for the purposes of paragraphs 39(7)(b), (8)(a) and (b), and 9(f).

Item 7 amends section 67 to move into new subsection 67(1) the current words providing for the total rate of MIA.

Item 8 makes the amendments to section 67 described above at the heading ‘Rate of MIA’. New subsections 67(2), (3), (4) and (5) are inserted. New paragraph 67(2)(a) provides for a half rate of MIA in respect of children between ages 18 months and two years, children between ages four and five and younger overseas adopted children. New paragraph 67(2)(b) provides for a half rate of MIA in respect of the death of a child under five, where a half rate of MIA has already been determined to be paid in respect of the child either between ages 18 months and two years, or as a younger overseas adopted child.

Subsection 67(3) provides for a full rate of MIA to be payable in respect of a child between ages four and five where no previous half payment of MIA has been determined.

Subsection 67(4) limits the amount of MIA payable in respect of a child to one payment of MIA under subsection 67(1) or two half payments of MIA under subsection 67(2).

Subsection 67(5) prevents duplicate eligibility for MIA arising in relation to subsections 39(2) and (5), which both potentially cover children under age two.

Item 9 amends section 68 to extend sharing of MIA to the new categories of eligibility for MIA (apart from those dealing with the death of a child).

Amendments to the Family Assistance Administration Act

Item 10 repeals and replaces subsection 39(4) of the Family Assistance Administration Act, making the amendments described above at 'MIA claim periods'.

Item 11 repeals and replaces subsections 41(5) and (6), as described above at 'Date of determination of MIA claim'. New subsection 41(7) modifies the definition of FTB child for the purposes of section 41 for claims in relation to older overseas adopted children.

Application and transitional provisions

Items 12, 13 and 14 deal with the matters described above at 'Transition'. **Item 12** deals with transition in relation to eligibility for MIA. **Subitem 12(1)** applies the new category of eligibility for children between ages four and five to children born before commencement, provided that no determination that MIA is payable has been made in respect of the child. **Subitem 12(2)** provides that MIA eligibility in respect of the death of a child under five applies where the death occurs on or after commencement.

Subitem 12(3) applies the eligibility provisions for younger overseas adopted children and older overseas adopted children to arrivals in Australia occurring on or after 1 July 2006, regardless of when the process for adoption commenced.

Subitem 12(4) applies eligibility in respect of living younger overseas adopted children to those children who arrived between 1 July 2006 and 1 January 2009, and allows the immunisation requirements to be met up to 1 January 2011.

Subitem 12(5) expands the coverage of subsection 39(6) for transitional purposes to include the death of a younger overseas adopted child who arrived in Australia on or after 1 July 2006 but prior to 1 January 2009.

Subitems 12(6) and (7) apply eligibility for older overseas adopted children to children who arrived in Australia on or after 1 July 2006 and before 1 January 2009, provided the immunisation requirements are met before 1 January 2011, or the child dies before 1 January 2011. As a result of **subitem 12(5)** above, eligibility will also arise for the death of a younger overseas adopted child prior to 1 January 2011 who arrived between 1 July 2006 and 1 January 2009.

Subitem 12(8) applies subsection 39(9) to children adopted from overseas in respect of deaths overseas occurring on or after 1 July 2006.

Item 13 deals with transition and application of the amount of MIA payable upon eligibility being established, either by an individual claimant, or in respect of a substitute individual claimant under section 40 of the Family Assistance Act upon the death of the original claimant prior to payment of MIA. **Subitem 13(1)** applies paragraph 67(2)(a), relating to payment of a half rate of MIA in relation to a child aged between 18 months and two years, to claims made before commencement which had not been determined by the Secretary at commencement, and to claims on or after commencement.

Subitem 13(2) provides for a full rate of MIA to be paid in respect of eligibility established for live younger overseas adopted children who arrived on a day before 1 January 2009, and ensures that only one such payment of MIA may be made in respect of such a child.

Subitem 13(3) makes it clear that, where MIA was determined to be paid in respect of a child prior to commencement, no further amount is to be paid in respect of the child after commencement.

Item 14 deals with transition and application in relation to claims for MIA. **Subitem 14(1)** deems a person who has made a claim for MIA prior to commencement, which has not been determined at commencement, to have made an additional claim for MIA on 1 January 2009 in respect of the child between ages four and five.

Subitem 14(2) extends the period within which an effective claim can be made to before 1 January 2011 for overseas adopted children (whether younger or older) who arrived before 1 January 2009, or who died overseas before 1 January 2009.

Subitem 14(3) applies the changed timeframes for making an effective claim for MIA to claims made after commencement.

Subitem 14(4) applies the changed rules for deferral of determinations of claims to claims made after commencement, or claims made before commencement which have not been determined before commencement.

Schedule 2 – Partner service pension

Summary

These amendments to the *Veterans' Entitlements' Act 1986* (Veterans' Entitlements' Act) will give effect to the 2008-09 Budget measure to cease eligibility for partner service pension for those partners who are separated but not divorced from their veteran spouse, and who have not reached age pension age. Under this measure, eligibility for partner service pension will cease 12 months after separation or immediately if the veteran enters into a marriage-like relationship. (Following the enactment of the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008, references to 'marriage-like' relationship will be replaced with 'de facto' relationship.)

Also included in Schedule 2 are amendments that will set the eligible age at 50 years for partner service pension for the partner of a veteran who is in receipt of the equivalent of or less than special rate but above general rate disability pension or who has at least 80 impairment points under the *Military Rehabilitation and Compensation Act 2004* (Military Rehabilitation and Compensation Act). Additional amendments in the Schedule make minor changes to the Veterans' Entitlements Act consequent upon the enactment of the Same-Sex Relationships (Equal Treatment in Commonwealth Laws - General Law Reform) Bill 2008.

Background

A partner service pension is payable under the Veterans' Entitlements Act to the eligible partner of a veteran who is in receipt of, or is eligible to receive, a service pension. A partner service pension can also be paid to the separated spouse or the widow or widower of a veteran in certain circumstances.

The *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2008 Budget and Other Measures) Act 2008* gave effect to the 2008 Budget measure which increased the eligible age for partner service pension from age 50 to qualifying age with effect from 1 July 2008. Qualifying age for females is 58.5 years and for males is 60 years. (Female qualifying age is subject to age equalisation and is gradually being increased to age 60.)

Partner service pension is also payable, regardless of age, if the eligible partner has a dependent child or is the partner of a veteran in receipt of either a special rate disability pension under the Veterans' Entitlements Act or a Special Rate Disability Pension under the Military Rehabilitation and Compensation Act.

Explanation of the changes

The amendments to be made by Part 1 of the Schedule will set 50 years of age as the eligible age for partner service pension for partners of veterans who are in receipt of the equivalent of or less than special rate but above general rate disability pension under the Veterans' Entitlements Act or who have been assessed at 80 or more impairment points under the Military Rehabilitation and Compensation Act. The Veterans' Entitlements Act disability pension rates affected by this measure are:

- general rate disability pension that is increased by an amount specified in any of the items 1 to 6 of the table in subsection 27(1),
- extreme disablement adjustment disability pension;
- intermediate rate disability pension; and
- temporary special rate disability pension.

The amendments made by Part 2 will result in partner service pension recipients who separate from, but do not divorce their veteran partner, losing eligibility for the partner service pension in certain circumstances. Partner service pension recipients who are separated, but not divorced from their veteran partner are defined as a 'non-illness separated spouse'.

Under the existing provisions, a non-illness separated spouse loses eligibility for partner service pension if they enter into a marriage-like relationship.

These amendments will extend the circumstances under which a person who is the 'non-illness separated spouse' of a veteran and who is under pension age will lose eligibility for partner service pension. The new circumstances are, 12 months after the date of separation, or from the date from which the veteran partner enters into a marriage-like relationship. If the person is under pension age, eligibility for partner service pension will cease from whichever event occurs first. If a person is over pension age, the only circumstance under which eligibility for partner service pension would cease under this measure is the person entering into a marriage-like relationship.

The amendments made by Part 3 are consequential amendments that result from proposed changes to the Veterans' Entitlements Act to be made by the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008 to replace references to 'marriage-like' relationships with the common term 'de facto' which is to be used from 1 July 2009.

Part 1 – Amendments commencing on Royal Assent

Setting eligible age for partner service pension

Item 1 repeals paragraphs 38(1B)(a) and (b) and inserts new paragraphs 38(1B)(a), (b) and (c).

New paragraph 38(1B)(a) provides that, subject to subsection 38(1C) and (1D), a person is not eligible for partner service pension unless the person has a dependent child at the time the person makes the claim for partner service pension.

New paragraph 38(1B)(b) provides that, subject to subsection 38(1C) and (1D), if new subsection 38(1BA) applies to a person, the person is eligible for partner service pension if the person has reached 50 years of age.

New paragraph 38(1B)(c) provides that, if a person is a person to whom paragraph 38(1B)(a) or (b) does not apply, a person must have reached qualifying age to be eligible for partner service pension.

Item 2 inserts new subsection 38(1BA).

New subsection 38(1BA) will be applicable only to those persons who are eligible for partner service pension under paragraph 38(1)(a) or (f). Under these paragraphs, the person must be a member of a couple.

New subsection 38(1BA) provides that the subsection applies to a person who is eligible for partner service pension under either paragraph 38(1)(a) or (f) and who is the partner of a veteran in receipt of:

- disability pension at the extreme disablement rate under subsection 22(4); or
- disability pension at the intermediate rate under section 23; or
- disability pension at the temporary special rate under section 25; or
- general rate disability pension that is increased by an item described in items 1 to 6 of the table in subsection 27(1).

New subsection 38(1BA) also provides that the subsection applies to a person who is eligible for partner service pension under either paragraph 38(1)(a) or (f) and who is the partner of a veteran whom the Military Rehabilitation and Compensation Commission has determined suffers an impairment that constitutes at least 80 impairment points.

Item 3 is an application provision which provides that the amendments made by **items 1 and 2** will apply in relation to claims for partner service pension made on or after the commencement of the items.

Part 2 – Amendments commencing on 1 January 2009

Veterans' Entitlements Act 1986

Item 4 amends subsection 38(1) to remove the reference to the provisions of the subsection being subject to the provisions of subsections '(1B) and (4)' and replacing that reference with a reference to the subsection being subject to the provisions of 'this section'.

Item 5 inserts new subsections 38(2AA), (2AB) and (2AC). The new subsections are applicable to those persons who are eligible for a partner service pension under paragraph 38(1)(b) or (g). These paragraphs apply to a person who is a non-illness separated spouse.

A 'non-illness separated spouse' is defined in subsection 5E(1) as being a person who is legally married to another person but living separately and apart from that other person on a permanent basis. The definition does not include those persons determined as being members of 'an illness separated couple' as a result of a direction made under subsection 5R(5).

New paragraph 38(2AA)(a) provides that a person's eligibility for partner service pension will cease if, in the Commission's opinion, the person's veteran spouse is in a marriage-like relationship with another person when this subsection commences. The subsection is expected to commence on 1 January 2009.

New paragraph 38(2AA)(b) provides that a person's eligibility for partner service pension will cease if, at any time after this subsection commences, the person's veteran spouse enters into a relationship with another person and in the Commission's opinion that relationship is a marriage-like relationship.

New subsection 38(2AB) provides that a non-illness separated spouse's eligibility for partner service pension will cease 12 months after the person began living separately and apart from the veteran on a permanent basis.

New subsection 38(2AC) provides that the eligibility of the non-illness separated spouse will not cease under either subsection 38(2AA) or (2AB) if the non-illness separated spouse is of pension age (as defined under section 5Q).

Item 6 is a consequential amendment to paragraph 38(2B)(c) to include a reference to new subsections 38(2AA) and (2AB).

Subsection 38(2B) had provided that the non-illness separated spouse of a deceased veteran will not become eligible for partner service pension under paragraphs 38(1)(c), (d), (h) or (i) if, immediately before the veteran's death, the spouse was not eligible for the pension under the provisions of subsection 38(2A). Subsection 38(2B) will now provide that the non-illness separated spouse of a deceased veteran will not become eligible for partner service pension under paragraph 38(1)(c), (d), (h) or (i) after the death of the veteran if, prior to the veteran's death, the spouse was not eligible for the pension because the spouse had entered into a marriage-like relationship, the veteran had entered into a marriage-like relationship, or the veteran and spouse had been separated for more than 12 months.

Item 7 is an application provision, which provides that new subsection 38(2AB) (as inserted by **item 5** of this Schedule) will be applicable to a person living separately and apart from a veteran before, on or after the commencement of the application provision.

However, in the circumstances where the period of separation of 12 months that is referred to in new subsection 38(2AB) has ended prior to the commencement of the application provision, the eligibility of the separated spouse under paragraph 38(1)(b) or (g) will not cease until the commencement of the application provision.

This means that, if a non-illness separated spouse in receipt of partner service pension has been separated for more than 12 months as at 1 January 2009, their eligibility will cease on 1 January 2009, but not before.

The note to the application provision refers to the eligibility of the person not being lost under subsection 38(1) if the person has reached pension age as provided for under new subsection 38(2AC).

Part 3 – Amendments commencing on the same-sex start day

Items 8 to 11 make consequential amendments to subsection 38(2AA) (inserted by **item 5** of this Schedule).

These amendments are required as a result of the amendments being made to the Veterans' Entitlements Act by the Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Bill 2008.

Included in the bill are amendments to section 11A and various other sections to replace references to a 'marriage-like relationship' with references to a 'de facto relationship'.

Item 8 amends paragraph 38(2AA)(a) to replace the reference to 'marriage-like' with a reference to 'de facto'.

Item 9 replaces the words 'when this subsection commenced' in paragraph 38(2AA)(a) with a reference to 'on the same-sex start day'.

Item 10 replaces the reference to after ‘this subsection commenced’ in paragraph 38(2AA)(b) with a reference to after ‘the same-sex start day’.

Item 11 amends paragraph 38(2AA)(b) to replace the reference to ‘marriage-like’ with a reference to ‘de facto’.

Item 12 inserts new subsection 38(5).

New subsection 38(5) defines the term ‘same-sex start day’ as being the day on which Schedule 15 to the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* commences.

It is expected that this Schedule will commence from 1 July 2009.

Item 13 is a saving provision, which provides that the amendments to be made by Part 3 of this Schedule will not affect the operation of subsection 38(2AA) as in force before the commencement of this Part.

Schedule 3 – Child support

Summary

This Schedule will make minor amendments to the child support legislation, notably to address anomalies in relation to the child support formula reforms that commenced on 1 July 2008.

Background

This Schedule is set out in seven Parts, which deal with amendments in the general subject areas outlined below. Each Part has its own commencement date, set out at the end of each of the descriptions of the content of the Part. The commencement of some Parts is delayed to the day 28 days after Royal Assent for service delivery reasons, to allow for necessary implementation changes to computer systems and forms, and for staff training to take place.

In this Schedule, the *Child Support (Assessment) Act 1989* is referred to as 'the Assessment Act', and the *Child Support (Registration and Collection) Act 1988* as 'the Registration and Collection Act'.

Part 1 – Percentage of care

A number of changes will be made to provisions of the Assessment Act in existence from 1 July 2008 that enable the Registrar to determine a new care period for the purpose of calculating a *percentage of care.*

Amendments will mean that a change in percentage of care of less than 7.1 per cent which is brought about by a new or varied agreement, plan or order as to care, will be able to be reflected in the child support assessment. This allows for the recognition of a change in care where it arises by one of these mechanisms in which the parents have agreed to the change in care. This amendment ensures that, where parents come to a new agreement or obtain a new order about the care of a child, that care can be reflected in the child support assessment.

A new care period will commence and a new percentage of care will be able to be calculated where a person's percentage of care has increased to, or risen above 35 per cent or fallen below 35 per cent.

In instances where there is a change in care greater than 7.1 per cent but where there may not be a change in the annual rate of child support payable for the child, no new cost percentage may currently be reflected in the assessment. This situation may arise, for example, in situations where the child support payable is set by a change of assessment decision, by agreement, by court order, or because the person's assessment is set at the fixed annual rate or minimum annual rate. In these situations, a change in care may not give rise to a change in the annual rate payable. Amendments will allow for a change of at least 7.1 per cent in the percentage of care for a child to be reflected in the assessment if the change alters the person's cost percentage for the child, rather than requiring that the change in care alters the child support payable. This will mean that, where there is a later amendment to the assessment, child support assessments may more accurately reflect the percentage of care of each parent.

Amendments will change the date of effect of a change in a person's percentage of care, so that, in circumstances in which the Registrar becomes aware of a change in a reasonable timeframe, care arrangements can be reflected from the date the care changed. Where the Registrar is notified, or otherwise becomes aware, of a change in care within 28 days, the Registrar will be able to reflect the change on the assessment with a date of effect from the date the event occurred. Where the Registrar is not notified or does not become aware of the change within 28 days, the change will take effect from the date that the Registrar is notified or otherwise becomes aware of the event. In circumstances in which there is no clear date from which care changed, the Registrar will continue to be able to reflect the change from the date of notification of, or becoming aware of, the change.

Ongoing determinations of care by the Registrar

Section 52 of the Assessment Act allows the Registrar to make a determination of a parent's percentage of care in some circumstances where care is not occurring as ordered by a court or agreed by the parents. The Registrar must review, and may remake, such a determination every six months, during which time the parents and any non-parent carer are expected to take reasonable action to attempt to resolve the care situation. In some circumstances, such as domestic violence, where one parent is unable to be located or where one parent has undertaken a long-term, long-distance relocation, it is unlikely reasonable action can be taken which will allow care to be calculated on a different basis. Amendments are made which will allow the Registrar not to review a determination if satisfied there are special circumstances which justify the Registrar in not doing so.

This Part commences on the 28th day after Royal Assent.

Part 2 – Publication of reasons for decisions of the Social Security Appeals Tribunal

Since 1 January 2007, internal review decisions of the Registrar have been reviewable by the Social Security Appeals Tribunal ('the SSAT'). The SSAT is required to provide the reasons for its decision to the parties to the review, which include the Registrar. It was anticipated that de-identified decisions of the SSAT would be published, and provision was made for such publication not to be a breach of the restriction on the publication of review proceedings imposed by section 110X of the Registration and Collection Act. However, additional amendment of the secrecy provisions is required to allow this to occur.

The secrecy provisions will be amended to provide that the SSAT will not be prevented from communicating the reasons for its decision to the Secretary, or a person authorised by the Secretary. Similarly, the Secretary will not be prevented from communicating the reasons for a decision to a person authorised to undertake publication. The authorised person will not be prevented from publishing such reasons in de-identified form. The Secretary is likely to authorise the publication of SSAT child support decisions by particular bodies, such as universities, which already undertake publication and analysis of Tribunal decisions in other related fields, including social security and family assistance, or other interested legal publishers.

De-identification of the published reasons will be sufficient to ensure the privacy of a party or witness to the proceedings.

This Part commences on the day after Royal Assent.

Part 3 – Departure from assessments

<u>High child care costs</u>

The Assessment Act provides a mechanism for a parent to apply to the Registrar or a court for a child support assessment to be amended. There are specific grounds for departure from an assessment set out in subsection 117(2). One of these grounds is that the costs of maintaining the child are significantly affected because of high child care costs in relation to the child. Currently, this ground may only apply to a carer parent. Amendments will allow this ground of departure to apply to either parent.

Further changes will also allow a non-parent carer to seek departure on the basis of high child care costs. For non-parent carers, costs of child care will be considered high where the cost of child care is at least 25 per cent of the costs of the child for that period. This new test, specific to non-parent carers, is necessary because the existing test determines whether a parent's child care costs are high by reference to a percentage of a parent's adjusted taxable income. A non-parent carer, unlike a parent, is not required to provide income details for child support purposes. The existing test in subsection 117(3B) will remain, but will only apply to parents who apply for this ground of departure.

Reaching agreement during a change of assessment

Part 6A of the Assessment Act allows for administrative departure from formula assessment of child support upon application to the Registrar by a party to the assessment. This process is known as a change of assessment. Prior to 1 July 2008, parents could finalise their change of assessment by reaching an agreement, and seeking that the Registrar accept the agreement. The capacity for the Registrar to accept such an agreement was unintentionally removed from 1 July 2008, and amendments are now being made to restore this capacity.

An agreement made during the change of assessment process without legal advice will be required to meet all requirements for a limited child support agreement, save the requirement that the agreement represent a rate of child support which is at least that of the formula assessment. The Registrar will accept such an agreement where he or she considers it is just and equitable as regards the child, the liable parent and the carer entitled to child support to do so. The requirement that the agreement also be otherwise proper will be repealed because, under the scheme reforms, the Registrar will make a notional assessment of the child support payable as though no agreement had been accepted as the basis for the payment of family tax benefit to the parties. Once accepted, an agreement made without legal advice will otherwise be regarded as meeting the definition of a limited child support agreement for the purposes of the Assessment Act.

Setting aside an agreement

A party to a child support agreement may apply to a court to set aside the agreement in some circumstances. A party to an agreement accepted during the change of assessment process will similarly be able to apply to a court for the agreement to be set aside.

Varying a provisional notional assessment

A parent may currently seek to vary a provisional notional assessment made because of the acceptance of an agreement by seeking an administrative departure from the provisional notional assessment. Where the agreement in question is accepted by the Registrar during the change of assessment process, the initial application for a change of assessment will then be treated as though it were an application for departure in relation to the provisional notional assessment.

This Part commences on the 28th day after Royal Assent.

Part 4 – Terminating events

In conflict with the new child support formula, which provides for the assessment of child support regardless of with whom the children live from time to time, the legislation still provides for an administrative assessment to end where the person who is the carer entitled to child support for a child ceases to be an eligible carer of that child. Amendments will remove this terminating event, and continue the assessment where the child's care continues to be provided by either of the parents or any non-parent carer who is a party to the assessment and entitled to child support. However, where both parents cease to provide care for the child, and the child is not cared for by a non-parent carer who is a party to the assessment, the administrative assessment of child support for the child will end.

This Part commences on the 28th day after Royal Assent.

Part 5 – Reducing rate of child support under minimum annual rate assessments

In circumstances in which a parent is paying the minimum annual rate under section 66 of the Assessment Act, section 66A allows the Registrar to reduce an assessment to nil. The parent's application must satisfy the Registrar that the parent's income for the 12-month period starting on the day on which the parent applies is less than the total of the number of the parent's child support cases multiplied by the minimum annual rate of child support for the child support period, before the Registrar may grant the reduction application.

Amendments to section 66A will mean that, instead of the Registrar considering a parent's income for a 12-month period, a parent may nominate either the whole, or a part, of a child support period and apply to have the assessment varied to nil for the nominated period, providing the person nominates a minimum period of two months. The applicant will need to provide income details for the period for which the person is applying. The person will need to demonstrate that their income for the nominated period is lower than the total number of the parent's child support cases multiplied by the minimum annual rate of child support for the child support period, for the nominated period.

This Part commences on the 28th day after Royal Assent.

Part 6 – Overseas liabilities

Reflecting overseas liabilities in Australian child support assessments

The new child support formula provisions do not in all cases reflect the fact parents may have additional liabilities under an administrative assessment in a reciprocating jurisdiction. Amendments are being made to ensure that, for the purposes of formula calculation of child support, parents with such overseas liabilities are generally treated as 'multi-case' parents, and their overseas children for whom they are liable are included amongst the total of the children for whom they pay child support.

Currently, only New Zealand administrative child support assessments will be affected, but the provisions will cover any other reciprocating jurisdiction which commences an administrative scheme of assessing child support.

Departure prohibition orders to enforce payment of overseas maintenance liabilities

Recent amendments during the child support scheme reform process moved into the primary child support legislation provisions previously contained in regulations relating to overseas maintenance arrangements, including allowing various means for the Registrar to enforce administratively payment of such liabilities. However, provision was not made for the Registrar to undertake enforcement of such liabilities by issuing a departure prohibition order ('DPO') against the payer of the liability.

Amendments will include most overseas maintenance liabilities amongst the liabilities which the Registrar may enforce by issuing a DPO. As for domestic cases, the enforcement of overseas spousal maintenance liabilities or penalties will not be included.

This Part commences on the day after Royal Assent.

Part 7 – Crediting prescribed payments

Provision currently exists for payments by a parent liable to pay child support to the payee directly, or to a third party, to be credited as child support under the Registration and Collection Act. Where the payment is of a type prescribed in the regulations, the consent of the payee of the child support assessment to the credit in substitution for payment to the Registrar is not required. Examples of prescribed payments include payments of school fees or necessary medical expenses for the child.

From 1 July 2008, credit of a prescribed payment as child support is prohibited where, at the time the credit is to occur, the paying parent has at least regular care of the child or children. Similarly, from 1 July 2008, credit of a prescribed payment is prohibited where the payer and payee have a lump sum arrangement, where the payer has provided child support to the payee of the liability in the form of a lump sum payment, and such a payment is being credited against the amount payable under the liability. These amendments extend these restrictions so that credit of a prescribed payment is not available where, at the time the prescribed payment was made by the payer, the payer either had a lump sum arrangement with the payee, or had at least regular care of the child or children.

This Part commences on the 28th day after Royal Assent.

Explanation of the changes

Part 1 – Percentage of care

Item 1 repeals and replaces existing paragraph 48(1)(b) of the Assessment Act. New subparagraphs 48(1)(b)(i) to 48(1)(b)(viii) will be inserted, which will make a number of changes to the criteria that give rise to a new care period commencing and a new *percentage of care* for a day in a child support period being calculated. New subparagraph 48(1)(b)(i) will allow a new care period to commence, and a new percentage of care to be calculated, when there is a change in care of less than 7.1 per cent in the percentage of the care for the child that the person has because of a new or varied agreement, plan or order mentioned in paragraph 49(a) or (b).

Item 3 is a consequential amendment that amends paragraph 74A(b) by inserting new subparagraph 74A(b)(ia). This new subparagraph provides that the date of effect of a decision by the Registrar to change a percentage of care brought about by new subparagraph 48(1)(b)(i) will be consistent with the date of effect of changes to the percentage of care brought about by the other events described in section 48.

Item 8 is a consequential amendment, inserting new subparagraph 75(2)(aa) that will allow the Registrar to amend an assessment where there is a change in a person's percentage of care of less than 7.1 per cent, which is brought about by an agreement, plan, or order mentioned in paragraph 49(a) or (b).

New paragraph 48(1)(b)(ii) inserted by **item 1** will allow a change in the care level to be reflected in a person's assessment where there is a change of at least 7.1 per cent and the change in care impacts on the person's cost percentage for the child (worked out under section 55C), rather than requiring that such a change have an impact on the child support payable in relation to the child.

Item 4 is consequential upon the insertion of new paragraph 48(1)(b)(ii) by **item 1**. **Item 4** amends subparagraph 74(b)(i) that allows the Registrar to give effect to a change in care of at least 7.1 per cent, which impacts on a person's cost percentage for a child. This change will make the date of effect of changes brought about by events described in new paragraph 48(1)(b)(ii) consistent with the date of effect of changes to the percentage of care brought about by the other events described in section 48.

Item 9 is consequential upon new subparagraph 48(1)(b)(ii) and will amend paragraph 75(2)(a) so that the Registrar may amend an administrative assessment in circumstances in which a change in the percentage of care alters a person's cost percentage for the child.

New subparagraphs 48(1)(b)(v) and (vi) (inserted by **item 1**) will allow a new care period to commence and a new percentage of care to be calculated where a person's percentage of care has increased to, or risen above, or fallen below, 35 per cent. Consequential amendments have also been made, which insert new subparagraphs 48(1)(b)(iii) and (iv). Subparagraph 48(1)(b)(iii) has the same effect as previous subparagraph 48(1)(b)(ii) and subparagraph 48(1)(b)(iv) has the same effect as previous subparagraph 48(1)(b)(iii).

Items 5 and 6 make a consequential amendment to subparagraph 74A(b)(iii) and insert new subparagraphs 74A(b)(iv) and (v), which will make the date of effect of changes in care brought about by a change of the kind described in new subparagraphs 48(1)(b)(iv), (v) and (vi) consistent with changes brought about by the other events in subsection 48(1).

Item 10 is consequential to the insertion of new subparagraphs 48(1)(b)(v) and (vi) and will allow the Registrar to amend an assessment when a person's percentage of care falls below 35 per cent, or rises above 35 per cent.

New paragraph 48(b)(vii) (inserted by **item 1**) will mean that, where the Registrar is advised or otherwise becomes aware of a change in the level of care ('an event') within 28 days of the event occurring, the change in care can be reflected in the assessment from the date the event occurred. Subparagraph 48(b)(viii) provides that, where the Registrar does not become aware of a change in care within 28 days of the change, the change in care will be reflected in the assessment from the date that the Registrar is notified.

Item 7 is a consequential amendment that will amend section 74A to allow the Registrar to change an administrative assessment with a date of effect consistent with new subparagraph 48(b)(vii).

Item 11 provides that the changes in this Part (except **item 2**) apply in relation to changes in percentages of care that occur on or after 1 July 2008, although, where an amendment is made as the result of a change occurring before commencement, the amendment cannot take effect earlier than commencement.

Item 2 inserts additional subsection 52(5), providing a discretion for the Registrar not to review a determination described above at 'Ongoing determinations of care by the Registrar'. **Item 11** provides that **item 2** applies to determinations made on or after commencement

Part 2 – Publication of reasons for decisions of the Social Security Appeals Tribunal

Items 12 and 13 make the amendments described above at 'Publication of reasons for decisions of the Social Security Appeals Tribunal'. **Item 12** inserts new subsections 16(2AA), (2AB) and (2AC). Subsection 16(2AA) provides for the exception from subsection 16(2) for communication of the reasons for a decision of the SSAT by the SSAT to the Secretary or a person authorised by the Secretary, and by the Secretary to a person authorised. Subsection 16(2AB) authorises publication. Subsection 16(2AC) details the circumstances in which a publication is taken to identify a person. **Item 13** provides for the amendments to apply to decisions of the SSAT, regardless of when the decision was made. Given the de-identified nature of the information for this purpose, there will be no adverse effect.

Part 3 – Departure from assessments

Items 14, 16 and 17 make the amendments described above at 'Reaching agreement during a change of assessment'. **Item 14** repeals and replaces paragraph 80E(1)(d) to extend the definition of limited agreement to agreements accepted by the Registrar under section 98U. **Item 16** inserts new subsection 98(1A), directing the Registrar to disregard the rate comparison provisions of section 80E when deciding whether an agreement is a limited child support agreement for the purposes of subsection 98(1). **Item 17** repeals and replaces subsection 98U(2) to substitute a just and equitable test for whether the Registrar should accept a limited child support agreement in these cases.

Item 24 inserts into paragraph 136(1)(a) reference to an agreement accepted under section 98U, as described at 'Setting aside an agreement' above.

Item 25 adds subsection 146D(3), giving effect to the amendment described at 'Varying a provisional notional assessment' above.

Item 26 provides that the above amendments in this Part apply to requests to the Registrar for acceptance of agreements made after commencement, regardless of the date upon which the agreement was made. The amendments relating to 'Setting aside an agreement' will apply to agreements, whether accepted before or after commencement, thus reinstating the position in existence before 1 July 2008, as described above.

Items 15 and 18 to 24 make the amendments described above at 'High child care costs'. Paragraph 117(2)(b) of the Assessment Act provides that the court may consider as a ground for departure from the administrative assessment for child support, that, in the special circumstances of the case, the costs of maintaining the child are significantly affected because of one of the factors listed under paragraph 117(2)(b). Subparagraph 117(2)(b)(ib) provides that one of these circumstances is high child care costs in relation to the child.

Item 18 removes the phrase 'the carer entitled to child support' and substitutes the phrase 'a parent or non-parent carer' in paragraph 117(3A)(a) in order to allow either parent to apply for a change of assessment on this ground. **Items 19, 20 and 22** are consequential to **item 18**.

Item 21 inserts the phrase 'for a parent' after 'care costs' in subsection 117(3B) so that this test for what the court may consider to be high child care costs is restricted to parents.

Item 23 inserts a new subsection 117(3C), which will provide that costs of child care for a non-parent carer can only be high for the purpose of applying for a change of assessment if the costs equate to 25 per cent of the costs of the child for that period. **Item 15** is consequential to this amendment.

Item 26 provides that the amendments made by **items 18 to 23** apply in relation to applications to a court made on or after the commencement of those items. The amendments apply to applications to the Registrar for departure made on or after commencement.

Part 4 – Terminating events

Items 27 and 28 make the amendments described above at 'Terminating events'. **Item 27** repeals and replaces subsection 12(2) of the Assessment Act to remove the existing terminating event relating to ceasing care. **Item 28** inserts new subsection 12(2AA), creating the new terminating event.

Item 29 provides that the amendments apply in relation to child support terminating events which happen on or after commencement.

Part 5 – Reducing rate of child support under minimum annual rate assessments

Item 30 repeals subsections 66A(1), (2) and (3) and substitutes new subsections 66A(1), (2), (3), (3A), (3B) and (3C).

New subsection 66A(1) provides that, where the Registrar has made an assessment under section 66 (minimum annual rate), a parent may apply for an assessment to be varied to nil for the whole, or a portion, of a child support period (provided that this nominated period is for a minimum of two months). Subsection 66A(2) provides for the income comparison the Registrar must undertake in deciding whether to grant the application. The test is met if the figure resulting from subsection 66A(3) is less than the figure resulting from subsection 66A(3A).

The parent's annualised income for the period must be less than the total of the number of the parent's child support cases multiplied by the minimum annual rate of child support for the nominated part of the child support period.

Subsection 16(3B) is inserted as a result of the amendments in **Part 6**, to ensure that the earlier commencement date of the **Part 6** amendments is not overridden by the later commencement date of **Part 5**.

Subsection 66A(3C) provides that a reduction under subsection 66A(1) has no effect in relation to a day to which the assessment under section 66 does not apply.

Item 31 provides that the amendment in **item 30** applies in relation to applications made on or after the commencement of that item, and in relation to a part of a child support period that begins on or after the day of commencement. It ensures that, where a reduction under subsection 66A(1) has already taken place for a child support period which continues beyond commencement, new subsection 66A(1) does not apply to that child support period.

Item 31(4) makes amendments relating to **Part 6 – Overseas liabilities**, because **Part 6** makes amendments to section 66A, and commences prior to this Part, and the amendment would otherwise be reversed by this Part.

Part 6 – Overseas liabilities

Items 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 and 49 make the amendments described above at 'Reflecting overseas liabilities in Australian child support assessments'.

Items 33 and 41 insert new subsection 35D(2) and subsection 41(6), providing that section 35D and subsections 41(1) or (2) do not apply where a parent is liable to pay child support for a child under an administrative assessment under the law of a reciprocating jurisdiction.

Items 35, 37, 39, 41, **43, 44 and 46** amend various provisions to provide for circumstances in which a parent is to be taken to be assessed for the day in respect of the costs of a child in another child support case if they are liable to pay child support for one or more children for a day under an administrative assessment under the law of a reciprocating jurisdiction.

Items 47 and 48 provide for circumstances in which a parent is to be taken to have a child support case if the parent is liable to pay child support for one or more children under an administrative assessment under the law of a reciprocating jurisdiction.

Items 32, 34, 36, 38 and 40 are consequential amendments.

Item 54 provides for the application of these amendments, covering registrable overseas maintenance liabilities, regardless of when made, and allowing the Registrar to amend assessments to reflect the changes made by this Part from commencement of the Part.

Items 50, 51, 52 and 53 make the amendments described above at 'Departure Prohibition Orders to enforce payment of overseas maintenance liabilities'.

Items 50 and 51 include registrable overseas maintenance liabilities within the coverage of section 72D. **Item 53** extends the definition of 'child support liability' in section 72E.

Item 54 provides that the amendments apply to registrable maintenance liabilities, regardless of the date they arise.

Part 7 – Crediting prescribed payments

Items 55, 56 and 57 make the amendments described above at 'Circumstances in which payments otherwise than to the Registrar may be credited as child support'.

Item 55 inserts new paragraph 71C(1)(ba), relating to the payer's care of the children, such that subsection 71C(1) only applies to affect the crediting of those payments made while the payer does not have at least regular care of any of the children to whom the relevant administrative assessment relates. **Item 56** inserts subsection 71C(2), providing that subsection 71C(1) does not apply where a lump sum payment arrangement exists before the prescribed payment is made, and the lump sum payment has or will be credited in relation to the day the prescribed payment is made.

Item 57 applies the amendments to payments made on or after commencement.