2004-2005-2006

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CHILD SUPPORT LEGISLATION AMENDMENT
(REFORM OF THE CHILD SUPPORT SCHEME – INITIAL MEASURES)
BILL 2006

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough MP)
OUTLINE

The present bill represents the first stage in the implementation of the Government’s reform of the Child Support Scheme, in response to the report *In the Best Interests of Children*, which was produced by the Ministerial Taskforce on Child Support. The phased response to implementing the changes to child support will continue with further significant changes, including a new child support formula, being introduced in later bills.

The initial legislative changes introduced by the present bill amend the child support legislation by:

- increasing and indexing the minimum child support payment;
- reducing the cap on adjusted income for child support assessment purposes;
- amending the provisions dealing with a parent’s capacity to earn;
- increasing the limit on prescribed non-agency payments from 25 per cent to 30 per cent; and
- clarifying the constitutional validity of the Child Support Scheme for exnuptial children in Western Australia when the Scheme is amended from time to time.

Financial impact statement

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NOTES ON CLAUSES

Clause 1 sets out how the Act is to be cited, that is, the Child Support Legislation Amendment (Reform of the Child Support Scheme – Initial Measures) Act 2006.

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Clause 3 provides that each Act that is specified in a Schedule is amended or repealed as set out in that Schedule.

Clause 4 addresses the extension of amended child support Acts to Western Australia in relation to exnuptial children and is explained in detail along with the Schedule 5 amendments.

This Explanatory Memorandum uses the following abbreviations:

- ‘Child Support Assessment Act’ means the Child Support (Assessment) Act 1989; and
Schedule 1 – Minimum annual rate of child support

Summary

This Schedule increases the minimum annual payment of child support from $260 to $320, and includes a formula to calculate the minimum payment annually from 1 January 2007. The annual changes to the minimum annual payment of child support will be linked to increases in the consumer price index (CPI). The Schedule also amends a number of sections that refer to the present rate of $260.

Background

Presently, the minimum annual payment of child support is $260, or approximately $5 per week. Income support pensions and benefits are adjusted on different bases, with some being linked to movements in average wages, and others to movements in the CPI. However, the minimum annual payment of child support has not been linked to any index since it was introduced in 1999, with the consequence that inflation has eroded the value of the amount paid. Therefore, the minimum annual payment of child support is being increased, but only to a level that will remain affordable to parents on very low incomes. The Schedule increases the minimum annual payment of child support to a level that would have resulted if it had been linked to the CPI since 1999, and links the minimum annual payment to CPI on an ongoing basis. This means that the minimum annual payment of child support is now calculated in a manner that is consistent with the increases in income support pensions and benefits.

Explanation of the changes

Child Support Assessment Act

Item 1 inserts into section 5 a definition of ‘index number’. It provides that ‘index number’ has the meaning given in new subsection 66(4). This definition is used in that new subsection for calculating the minimum annual rate of child support.

Item 2 inserts into section 5 a definition of ‘minimum annual rate of child support’. It provides that ‘minimum annual rate of child support’ has the meaning given in subsection 66(4).

Items 3, 4, 5 and 6 omit from several subsections in section 66 the existing references to the previous $260 minimum payment, and substitute references to the new minimum annual rate, which will be derived from new subsections 66(4), (5) and (6). This change is made because the minimum annual rate of child support will now change each calendar year, and apply to all child support periods commencing within that calendar year.
Item 7 inserts at the end of section 66 new subsections 66(4), (5) and (6). Subsection 66(4) provides that the meaning of ‘minimum annual rate of child support’ is worked out using the formula set out. $320 represents the amount that would be paid if the present minimum amount of child support ($260) had been indexed since it was introduced in 1999. Subsection 66(4) also sets out the definition of ‘index number’, which is used in the formula for calculating the minimum annual rate of child support. This index number is the All Groups Consumer Price Index number that is the weighted average of the 8 capital cities published by the Australian Statistician in respect of that quarter. This is the standard CPI figure frequently used in such applications.

The formula ensures that the minimum annual rate of child support will increase in accordance with CPI increases. If the CPI does not increase, then using the highest index number for a September quarter in a year preceding the commencement of the child support period ensures that the minimum annual rate of child support will stay the same as it was for the previous year. That is, the minimum annual rate of child support will increase if there is a net increase in CPI, but will not decrease. The formula uses the index number of ‘the September quarter of a later year that ends before the child support period commences’. This ensures that any child support period that commences between October and December of any year (that is, after the index number for the September quarter is released) will still use the minimum annual rate of child support that was calculated on 1 January of that calendar year. The same minimum amount of child support will be payable throughout a child support period, regardless of whether a new calendar year commences during that period.

Presently, child support assessments are calculated as an annual rate, which is rounded to the nearest dollar in accordance with section 156 of the Child Support Assessment Act. The periodic amount payable is then reduced to a daily rate (that is, it is divided by 365.25), with rounding applied to five decimal places. The amount payable each week, month or fortnight is then determined by multiplying the daily rate by 7, 14 or 30.4375, and rounded to the nearest cent. This process will continue under the new arrangements.

Item 7 also inserts new subsections 66(5) and (6). Subsection 66(5) provides that the first index number for a quarter published by the Australian Statistician is the number used in working out the minimum annual rate of child support in accordance with subsection 66(4). If the Australian Statistician publishes a later number for a quarter, that number is disregarded for the purposes of subsection 66(4). Subsection 66(6), to which subsection 66(5) is subject, provides that, if the Australian Statistician changes the reference base for the CPI, then only the index numbers published in terms of the new reference base are relevant for subsection 66(4).
Item 8 omits from subsection 66A(2) the existing reference to the previous $260 minimum payment and substitutes a reference to ‘the minimum annual rate of child support in respect of that period’. This change is made because the minimum annual rate will now change each calendar year, and apply to all child support periods commencing within that calendar year.

Similarly, item 9 amends subsections 98A(4) and (5) by omitting the existing references to ‘under an assessment to a rate below $260 per annum’ and substituting ‘in relation to a day in a child support period under an assessment to a rate below the minimum annual rate of child support in respect of that period’.

Item 10 amends section 155 by inserting a new paragraph (e), which requires the Registrar to publish in the Gazette before the end of each calendar year the minimum annual rate of child support. This means that the minimum annual rate of child support can be determined by using the formula in subsection 66(4), but is also readily obtainable in the Gazette. Other amounts that are calculated each calendar year for the purpose of calculating a child support assessment for a period commencing during that year are also published in the Gazette.

Item 11 provides that the amendments in the Schedule apply to a day in a child support period that is, or is after, commencement of these amendments. In accordance with the commencement provisions in clause 2, this date is likely to be 1 July 2006, but if not, will be the start of the day after the day on which this Act receives the Royal Assent. This means that, from commencement, all payers who pay the minimum amount of child support will pay an increased amount, regardless of when they start a new child support period.
Schedule 2 – Lower cap on child support

Summary

This Schedule amends the figure that sets the ‘cap’ on a liable parent’s adjusted income for child support purposes, and aligns it with the figure that is used to calculate the payee’s disregarded income. That is, in determining the maximum amount used as a liable parent’s adjusted income for child support assessment purposes, the ‘all employees average weekly total earnings’ (EAWE) figure will be used instead of the ‘full-time adult average weekly total earnings’ (AWE) figure. Because the EAWE figure is lower than the AWE figure, these changes effectively lower the maximum amount of child support payable by liable parents with high incomes.

Background

The basic purpose of the cap is to limit the possibility of child support being paid by higher income earners at a level that exceeds the actual costs of caring for the child. However, the existing level of the cap has been seen as too high and inequitable, partly because of the use of a higher statistical income figure than is used for other purposes of the Child Support Assessment Act, such as the disregarded income of a payee. The changes to section 42 mean that a liable parent’s maximum adjusted income will be based on the same statistical measure as the one used in section 46 for a payee’s disregarded income. The income measure that will be used for assessing a liable parent’s income is a more realistic measure of income than is currently used, and is consistent with the treatment of the payee’s income.

Explanation of the changes

Part 1 – Main amendments

Child Support Assessment Act

Item 1 repeals the definition of ‘relevant AWE amount’, and item 2 repeals the definition of ‘yearly equivalent of the relevant AWE amount’, in section 5. These concepts will no longer be used in the Child Support Assessment Act.

Item 3 omits from section 42 the words ‘relevant AWE amount’ (first occurring), and substitutes the words ‘EAWE amount’.

Item 4 repeals in section 42 the formula for calculating the cap on a liable parent’s adjusted income amount. It substitutes a new formula, which provides that the cap on a liable parent’s adjusted income amount is calculated by deducting the liable parent’s exempted income amount from the figure which is 2.5 times the yearly equivalent of the EAWE amount.
Items 5, 6 and 7 omit the words ‘relevant AWE amount’ and substitute ‘EAWE amount’ in paragraph (b) of the definition of ‘maximum possible child support liability’ in subsection 52(2), in subsection 58(1), and in subparagraphs 98S(1)(f)(i) and 118(1)(f)(ii).

Item 8 amends section 154 by omitting the reference to the full-time adult average weekly total earnings.

Item 9 amends paragraph 155(a) by omitting the words ‘of the relevant AWE amount, and’.


Division 1 – Amendments that might not commence

Child Support Assessment Act

Item 10 inserts into section 5 a definition of ‘yearly equivalent of the EAWE amount’. This term means, in relation to a child support period, 52 times the EAWE amount. This amendment will not commence if the Child Support Legislation Amendment Bill 2004 (currently before the Parliament) is enacted and commences as the Child Support Legislation Amendment Act 2006 before the present bill, because that bill already contains an amendment to introduce this definition (see item 11 below). However, if the 2004 bill is enacted and commences after the present bill, then item 10 will commence as set out in the commencement provisions in clause 2 of this bill.

Child Support Legislation Amendment Act 2006

Item 11 repeals item 4 of Schedule 3, which inserts the definition of ‘yearly equivalent of the EAWE amount’, will not be required if the Child Support Legislation Amendment Bill 2004 is enacted and commences as the Child Support Legislation Amendment Act 2006 after the present bill. In that case, item 10 of this Schedule will have inserted that definition. However, item 4 will not be repealed if the 2004 bill is enacted and commences before the current bill.

Items 10 and 11 ensure that the definition of ‘yearly equivalent of the EAWE amount’ is only included once in the Child Support Assessment Act.

Division 2 – Amendment that commences after the Child Support Legislation Amendment Act 2006 commences

Child Support Assessment Act

Item 12 omits from subsection 58C(2) the words ‘relevant AWE amount’ and substitutes ‘EAWE amount’. Item 12 ensures that the amendment introduced by the Child Support Legislation Amendment Bill 2004 is consistent with the changes in terminology introduced by the present bill.
Part 3 – Application

Item 13 provides that the amendments, apart from item 12, apply in relation to a day in a child support period that is, or is after, the commencement of Part 1 of this Schedule. In accordance with the commencement provisions in clause 2, this date is likely to be 1 July 2006, but if not, will be the start of the day after the day on which this Act receives the Royal Assent. This means that the lower cap applies in relation to all child support liabilities on or after commencement of Part 1 of this Schedule, regardless of when a new child support period commences. The effect of changing the cap is that a high-income earning parent will pay at the higher rate (that is, the cap based on 2.5 times AWE) until this Schedule commences, and will pay at the lower rate (that is, 2.5 times EAWE) after that day.

The amendments in item 12 apply in relation to a day in a child support period that is, or is after, the commencement of Part 1 of this Schedule, or the day on which item 12 commences, whichever is later. That is, the application of item 12 depends on the date of commencement of the Child Support Legislation Amendment Act 2006.
Schedule 3 – Earning capacity of a parent of a child

Summary

This Schedule sets out a new way of assessing a parent’s capacity to earn. In particular, the changes prescribe in greater detail than was previously contained in the Child Support Assessment Act, how a parent’s capacity to earn is assessed.

Background

‘Capacity to earn’ decisions have been among the most controversial child support decisions. A capacity to earn decision is one where the decision-maker recognises that a parent’s real income is as stated, but considers that he or she has a capacity to earn that is greater than is being exercised. Consequently, the parent’s child support liability is assessed using a notional income based on the parent’s earning capacity. Where the liable parent is assessed on his or her earning capacity, the amount payable by the liable parent is increased. Where the payee parent is assessed on his or her earning capacity, the amount payable by the liable parent decreases. However, there have been problems in how a parent’s capacity to earn has been assessed. Many of these problems have arisen from the lack of a clear statutory definition of ‘capacity to earn’. For example, the current method of assessing a parent’s capacity to earn permits a decision that requires a parent to work extensive overtime, if that had been the parent’s working pattern before the relationship broke down. This Schedule introduces changes that provide that assessment of a parent’s maximum capacity to earn is based on the level of normal full-time work for the occupation or industry in which he or she is involved.

The new method of assessment is intended to be flexible enough to allow parents whose earning capacity has been assessed for child support purposes to make decisions about their work and life, for example, choosing to pursue a different career or reducing work hours due to caring responsibilities, in the same way as parents in intact families. However, it is also important to take account of whether a parent, either payer or payee, whose earning capacity is assessed for child support purposes, makes changes to his or her work, where a major purpose of those changes was to affect the assessment of his or her liability. Therefore, the Schedule introduces provisions that allow a court to make an order that a parent has a greater capacity to earn than he or she is presently exercising if the parent has not demonstrated that affecting his or her assessment for child support was not a major purpose of that decision. That is, the court may make an order that a parent has a capacity to earn greater than he or she is presently exercising if the parent cannot show that he or she had an appropriate reason for his or her decision about work changes.
Explanation of the changes

Child Support Assessment Act

**Item 1** omits from subparagraph 117(2)(c)(i) the words ‘either parent or’. This is because the grounds for departure that are related to either parent’s income, property, financial resources and earning capacity will be dealt with in a separate paragraph.

**Item 2** introduces after subparagraph 117(2)(c)(i) new subparagraph 117(2)(c)(ia), which sets out that the income, property and financial resources of either parent may be a ground for departure in a court order. **Item 2** also introduces new subparagraph 117(2)(c)(ib), which sets out that the earning capacity of either parent may be a ground for departure. These new subparagraphs cover the matters that were omitted from subparagraph 117(2)(c)(i) by **item 1**.

**Item 3** is a minor amendment that corrects in subsection 117(3A) an incorrect reference to ‘sub-paragraph 117(2)(b)(i)(C)’.

**Item 4** omits from paragraph 117(4)(d) the words ‘earning capacity’. This is because matters concerning a parent’s earning capacity will be dealt with separately.

**Item 5** inserts after paragraph 117(4)(d) new paragraph 117(4)(da), which deals with the earning capacity of each parent who is a party to the proceedings. This new subparagraph covers the matters that were omitted from paragraph 117(4)(d), and ensures that a parent’s earning capacity is still a matter to which a court must have regard in determining whether it would be just and equitable to make a particular order.

**Item 6** omits from subsection 117(7) the words ‘or a parent of a child’. **Item 7** omits from paragraph 117(7)(a) the words ‘or parent’ (wherever occurring). This is because the income, earning capacity, property and financial resources of each parent will be dealt with in separate subsections. These changes mean that subsection 117(7) now applies only in relation to the child.

**Item 8** inserts after subsection 117(7) a new subsection 117(7A). This subsection 117(7A) deals with the same matters as are dealt with in subsection 117(7), but with two important distinctions. Firstly, subsection 117(7A) only applies in relation to a parent of a child, and not the child. Secondly, subsection 117(7A) only deals with the income, property and financial resources of a parent of a child. A parent’s earning capacity is dealt with separately (see subsection 117(7B) below).
Item 8 also introduces a new subsection 117(7B) along with new subsection 117(7A). Subsection 117(7B) sets out the matters about which a court must be satisfied before determining that the parent's earning capacity is greater than is reflected in his or her income. These matters include, in paragraph 117(7B)(a), that the parent does not work despite ample opportunity to do so, or has reduced his or her hours below what are considered normal full-time hours for the occupation or industry in which the parent is employed, or has changed his or occupation, industry or working pattern.

Paragraph 117(7B)(b) provides that the court must also be satisfied that the parent's decision about one of the matters set out in paragraph 117(7B)(a) is not justified on the basis of the parent's caring responsibilities or state of health. ‘Caring responsibilities’ may include responsibilities to persons other than children in relation to whom child support is paid, such as parents or a new partner in relation to whom no reasonable alternative caring arrangements are available.

Paragraph 117(7B)(c) provides that the court must also be satisfied that the parent has not demonstrated that affecting the administrative assessment of child support was not a major purpose of his or her decision about work changes. Paragraph 117(7B)(c) is a rebuttable presumption but the onus to rebut the presumption is on the parent. That is, the parent must demonstrate that there are good reasons why he or she has changed his or her working behaviour. For example, a parent working in a low-skill manufacturing position may decide that there are better long-term employment prospects if he or she undertakes retraining to enable him or her to work in information technology. This may result in lower, or no, earnings for a period of time, but he or she would not be subject to a capacity to earn decision because the decision about changing work was made for a reason other than affecting the child support assessment.

Subsection 117(7B) limits the ability of the court to make an order on the grounds of a parent's earning capacity. If the ground on which the court would have made the order is that the parent's earning capacity is not reflected in their income, then the court will not be able to find that the 'just and equitable ground' has been met unless subsection 117(7B) has been met. An assessment of earning capacity cannot be a reason for making an order unless subsection 117(7B) is satisfied.

Item 9 amends subsection 124(3) by providing that the court must have regards to the matters set out in new subsection 117(7A) in deciding whether it would be just and equitable to make a particular order. As the matters set out in new subsection 117(7A) were previously included in subsection 117(7), this is simply a consequential change.
Item 10 amends section 124 by introducing a new subsection 124(3A). This subsection 124(3A) deals with a parent’s earning capacity when a court is considering whether making orders for provision of child support otherwise than in the form of periodic payments would be just and equitable. The court must be satisfied as to the matters set out in section 117(7B) in order to make a determination that the parent’s earning capacity is greater than is reflected in his or her income. As this subsection 124(3A) refers to subsection 117(7B), the description of subsection 117(7B) in item 8 above also applies in relation to subsection 124(3A).

Item 11 amends subsection 124(5) by inserting after ‘(3)’ a reference to ‘(3A)’. The effect of this is that the court is not limited in the matters it may consider in making a court order.

Item 12 amends subsection 125(5) by providing that the court must have regard to the matters set out in new subsection 117(7A) in deciding whether it would be just and equitable to make a particular order. As the matters set out in new subsection 117(7A) were previously included in subsection 117(7), this is simply a consequential change.

Item 13 amends section 125 by introducing a new subsection 125(5A). Subsection 125(5A) deals with how a court must consider a parent’s earning capacity when stating whether child support ordered under section 124 is to be credited against the parent’s liability under an administrative assessment. The court must be satisfied of the matters set out in section 117(7B) in order to make a determination that the parent’s earning capacity is greater than is reflected in his or her income. As subsection 125(5A) refers to subsection 117(7B), the description of subsection 117(7B) in item 8 above also applies in relation to subsection 125(5A).

Item 14 amends subsection 125(7) by inserting after ‘(5)’ a reference to ‘(5A)’. The effect of this is that the court is not limited in the matters it may have regard to when stating, in an order under section 124, whether the child support ordered to be paid in the order is to be credited against the liable parent’s liability under any administrative assessment.

Item 15 amends subsection 129(5) by providing that the court must have regard to the matters set out in new subsection 117(7A) in deciding whether it would be just and equitable to make a particular order. As the matters set out in new subsection 117(7A) were previously included in subsection 117(7), this is simply a consequential change.

Item 16 amends section 129 by introducing a new subsection 129(5A). Subsection 129(5A) deals with how a court must consider a parent’s earning capacity when modifying orders made under section 124. The court must be satisfied of the matters set out in section 117(7B) in order to make a determination that the parent’s earning capacity is greater than is reflected in his or her income. As subsection 129(5A) refers to subsection 117(7B), the description of subsection 117(7B) item 8 above also applies in relation to subsection 129(5A).
**Item 17** amends subsection 129(7) by inserting after ‘(5)’ a reference to ‘(5A)’. The effect of this is that the court is not limited in the matters it may have regard to when modifying orders made under section 124.

**Item 18** sets out the application of the amendments in this Schedule. The amendments in this Schedule apply on the day on which this Schedule commences. In accordance with the commencement provisions in clause 2, this date is likely to be 1 July 2006, but if not, will be the start of the day after the day on which this Act receives the Royal Assent. The amendments apply to certain decisions or determinations made by the Registrar, and certain court decisions made on or after commencement of the Schedule.
Schedule 4 - Prescribed non-agency payments

Summary

These changes increase to 30 per cent the maximum percentage of a payer’s child support liability that may be credited in relation to prescribed non-agency payments.

Background

Section 71C of the Child Support Registration and Collection Act allows for certain third party payments to be credited towards a payer’s child support liability. The types of payment, known as prescribed non-agency payments, that may be credited are listed in regulation 5D of the Child Support (Regulation and Collection) Regulations 1988 and include payments such as child care costs, school fees and essential medical and dental bills, amongst other things. Presently, credit may be given up to a maximum of 25 per cent of the ongoing liability in any payment period, provided that the balance of child support is paid as it becomes due and payable. The changes provide that credit may be given up to a maximum of 30 per cent of the ongoing liability in any payment period. The purpose of these changes is to give payers of an enforceable maintenance liability greater determination over how child maintenance money is spent.

Explanation of the changes

Child Support Registration and Collection Act

Item 1 omits from subsection 71C(1) references to ‘25%’ wherever it occurs and substitutes ‘30%’.

Item 2 provides that the change applies in relation to any uncredited amount that arises on or after the day on which this Schedule commences, as well as to amounts that arose before that day but that have not been fully credited. In accordance with the commencement provisions, this date is likely to be 1 July 2006, but if not, will be the start of the day after the day on which this Act receives the Royal Assent. Crediting will take place as is set out in the following example:

Rob (a payer) pays school fees of $500 on 1 April 2006 and applies for this to be credited on 2 April 2006. The application is accepted and the $500 becomes an ‘uncredited amount’. His child support is $400 per month. In the first three months, Rob pays $300 and $100 is credited from his uncredited amount. On 1 July 2006, Rob has $200 that has not been credited. Rob pays $280 on his first payment day in July, and $120 (that is, 30 per cent of his monthly liability) is credited from his uncredited amount, leaving $80 uncredited. The remaining $80 will be credited against his next monthly payment.
Schedule 5 – Exnuptial children and Western Australia

**Summary**

This Schedule addresses a constitutional issue with the application of the Child Support Scheme to exnuptial children in Western Australia. More specifically, the amendments confirm the validity of the longstanding practice of administering two parallel schemes during periods that fall between amendments being enacted to the Commonwealth legislation and Western Australia adopting those amendments for its exnuptial children.

**Background**

The Commonwealth child support legislation relies on the marriage and territories powers in the Constitution. Those heads of power do not cover exnuptial children. All states have referred their power to make laws about exnuptial children to the Commonwealth except Western Australia, which has chosen instead to adopt the child support legislation from time to time through a series of Acts. However, the Western Australian adoption Acts have lagged behind the Commonwealth amendments, sometimes by considerable periods. For example, Commonwealth amendments from 1995, 1997 and 1998 were not adopted by Western Australia until 2000. More recently, the July 2001 Commonwealth amendments were adopted by Western Australia in December 2002.

The Child Support Agency has operated on the basis that, until Western Australia adopts any set of Commonwealth amendments, the law operating in Western Australia for exnuptial children is the child support legislation that existed before the Commonwealth amendments. This means two child support schemes operate during these hiatus periods – a pre-amendment scheme applying to exnuptial children in Western Australia and a post-amendment scheme applying the up-to-date legislation to all other children in Australia, including children of marriage in Western Australia.

Legal advice on the constitutional validity of using this approach during the hiatus periods has confirmed that the legal risks are low. Specifically, it is unlikely that a court may find there is in fact no child support legislation operating in Western Australia for exnuptial children during the hiatus periods. However, amendments have been advised to put the matter beyond doubt.

In broad terms, the amendments involve:

- including provisions in all future Acts amending the child support legislation, to ensure the continued operation of the pre-amendment legislation in Western Australia for exnuptial children, together with a special amendment to make similar provision for all past amending Acts (a short-term solution not requiring the cooperation of the Western Australian Parliament), and
• a once-only amendment to the child support legislation to guarantee the valid operation in Western Australia for ex-nuptial children of the pre-amendment legislation, until Western Australia adopts further Commonwealth amendments (a long-term solution requiring the cooperation of the Western Australian Parliament in adopting the amendments).

The Western Australian Government has agreed to cooperate with the amendments involved in the long-term solution. However, because it cannot be predicted accurately when the Western Australian Parliament will adopt those amendments, both solutions are pursued in this bill so that the short-term solution can address the issue for past hiatus periods, as well as for future hiatus periods for as long as it takes for the long-term solution to fall into place through an adopting Act.

It is clearly desirable to put these matters beyond doubt in the face of the extensive child support reform provided by this current bill and forthcoming bills, as announced by the Government.

These amendments commence on Royal Assent.

**Explanation of the changes**

**Clause 4 – Extension of amended Child Support Acts to Western Australia in relation to exnuptial children**

This clause is the first iteration of the standard provision, described above in relation to the short-term solution to this issue, that will be included in future Acts amending the child support legislation. It ensures the continued operation in Western Australia for exnuptial children of the child support legislation that has been in force before this bill commences. This continued operation will apply until the Western Australian Parliament adopts the amendments made by this bill, from which point the child support legislation as amended by this bill will extend to Western Australia for exnuptial children.

Although there is no reason to believe the Western Australian Government will change its longstanding adoption approach to these matters, the clause specifically recognises the constitutional alternative of referral of power, as the other states have done. Thus, the rule that extends the post-amendment legislation is expressed to apply from the point at which Western Australia either adopts the amendments or refers its power. Similarly, the rule that extends the pre-amendment legislation in the meantime is expressed to apply until either of those events occurs.

A note to the clause makes the consequence of the new rule clear. That is, two separate schemes are intended to operate during the hiatus periods – one for exnuptial children in Western Australia and one for all other children in Australia, including children of marriage in Western Australia.
It will no longer be necessary to include a clause such as this one in amending Acts once the long-term solution provided by Parts 1 and 2 of this Schedule have been adopted by Western Australia.

**Schedule 5 – Exnuptial children and Western Australia**

**Part 1 – Amendment of Child Support (Assessment) Act 1989**

This Part provides the Child Support Assessment Act amendments involved in the long-term solution discussed above. **Part 2** provides the equivalent Child Support Registration and Collection Act amendments.

The long-term solution involves amending the existing provisions in the two primary child support Acts that extend and apply the Acts, and the Western Australian Parliament adopting these amended provisions. The amendments will make clear the intention that, whenever the Acts are amended in future, the *pre-amendment* legislation will extend to Western Australia for exnuptial children until the Western Australian Parliament adopts the amendments, from which point the child support legislation *as amended* will extend to Western Australia for exnuptial children.

This long-term solution, once concluded with adoption, will eliminate the need to include a provision such as **clause 4**, which addresses the short-term solution, in each Act amending the child support legislation.

The drafting for the long-term solution is very similar to that for the **clause 4** short-term solution, including the specific reflection of a possible referral of power as an alternative to adoption of amendments, and a note making clear the intention for there to be two parallel schemes during the hiatus periods.

In making the Child Support Assessment Act amendments, it is being made clear in section 13 that it addresses the extension of the Act in relation to exnuptial children only. **Section 14** continues to apply the Act in relation to children of marriage. However, subsection 14(1) is *not* being similarly amended to refer only to children of marriage. This is because section 14 is drafted as a reading down provision, whereas section 13 is an application/extension provision. Therefore, the current broad reference in subsection 14(1) to the *maintenance of children* must remain as it is so that subsection 14(2) will apply correctly to read down the effect of the section to children of marriage only.

**Item 8** provides the substantive amendments for this Part. It adds new subsections 13(5A) and (5B) to achieve the effect described above.

**Items 2 and 7** make minor consequential amendments to reflect the insertion of new subsections 13(5A) and (5B).

**Items 1** (including note 1), 3, 4 and 6 make minor amendments to clarify that section 13 relates only to exnuptial children.
Subsection 13(2), as substituted by item 2, and the amendment made to subparagraph 13(4)(a)(ii) by item 5, remove an existing phrase (‘, or are included in,’), which is superfluous and confusing now that section 13 has been clarified as relating only to exnuptial children.

Note 2 to item 1, and the notes to items 3 and 4, insert headings to some existing subsections in section 13, to help with readability of the now longer section.

Part 2 – Amendment of Child Support (Registration and Collection) Act 1988

This Part provides the Child Support Registration and Collection Act amendments involved in the long-term solution discussed above. Part 1 provides the equivalent amendments to the Child Support Assessment Act.

The effect of the amendments is the same as explained above for the Child Support Assessment Act. In this case, section 5 is the provision being amended, including being clarified as addressing the extension of the Act in relation to exnuptial children only. Section 6 continues to apply the Act in relation to children of marriage and is not being amended for the same reasons as given above for section 14 of the Child Support Assessment Act.

Item 17 provides the substantive amendments for this Part. It adds new subsections 5(5A) and (5B) to achieve the effect described above.

Items 11 and 16 make minor consequential amendments to reflect the insertion of new subsections 5(5A) and (5B).

Items 9 (including note 1), 12, 13 and 15 make minor amendments to clarify that section 5 relates only to exnuptial children.

Subsection 5(2), as substituted by item 11, and the amendment made to subparagraph 5(4)(a)(ii) by item 14, remove a phrase (‘, or are included in,’), which is superfluous and confusing now that section 5 has been clarified as relating only to exnuptial children.

Note 2 to item 9 and the notes to items 12 and 13 insert headings to some existing subsections in section 5, to help with readability of the now longer section.
There are two minor additional amendments in this Part that do not have equivalents in Part 2. The first is item 10, which amends subsection 5(1) to reflect the fact that Queensland referred its power in this matter to the Commonwealth some time ago and should therefore be explicitly covered by the same rule as the other named states that have referred their power, as is the case in the (later drafted) Child Support Assessment Act. The second additional amendment is the note to item 17, which brings the heading to section 6 into line with that for the equivalent section 14 of the Child Support Assessment Act – that is, ‘Additional application of Act in relation to maintenance of children of marriages’.

Part 3 – Extension of amended Child Support Acts to Western Australia in relation to exnuptial children

This Part provides the element of the short-term solution discussed above that confirms the past intention that, whenever either child support Act was amended by any of the 39 amending Acts listed, the pre-amendment legislation applied in Western Australia for exnuptial children until the Western Australian Parliament adopted the amendments. From that point, the child support legislation as amended applied in Western Australia for exnuptial children.

Additionally, this intention is confirmed for past amendments made by any of the listed amending Acts that are yet to be adopted by Western Australia – in reality, this will mean the more recent amending Acts on the list. To achieve this broad coverage, the provision is drafted in a combination of past and future tenses.

Again, the drafting of this element is very similar to the clause 4 drafting, including a note making clear the intention for there to have been, or to be, two parallel schemes during the hiatus periods. However, this time there is no need to reflect specifically the possibility of a referral of power as an alternative to adoption of amendments because we know in fact that that did not occur before the last of the listed amending Acts was enacted.

Item 19 is the main substantive provision for this Part, to achieve the aim set out above.

Item 20 is a special provision to confirm the validity of the appropriations underpinning payments made during the hiatus periods. Payments and repayments of amounts under the Child Support Registration and Collection Act are, and have been, made through mechanisms referred to in section 75. Currently, the mechanism is the Child Support Account, which is a Special Account for the purposes of the Financial Management and Accountability Act 1997, and therefore is appropriated under section 21 of that Act.
To make sure that past payments made were valid, **item 20** effectively makes them debts, creates a new, equal entitlement, provides for the necessary appropriation, and allows the debt and entitlement to be offset against each other. There is no net effect on clients from this approach. Certain other technicalities are addressed to make sure that several provisions to do with payments and overpayments do not impede this validation exercise.

Similarly, **item 21** makes sure that any rights and liabilities of a person that may have been affected by any weakness in the arrangements historically applied during the hiatus periods are valid rights and liabilities as intended at the time.

**Item 18** sets up a definition of ‘Child Support Act’ for the purposes of this Part, to provide a shorthand reference to either the Child Support Assessment Act or the Child Support Registration and Collection Act.