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Legislative Council

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**Bills Committee on Interest on
Arrears of Maintenance Bill 2001**

Background paper prepared by the Legislative Council Secretariat

Interest on Arrears of Maintenance Bill 2001

Background

The Interest on Arrears of Maintenance Bill 2001 is part of a package of legislative proposals to implement the recommendations of an "Inter-departmental working group on review of law and administrative measures affecting divorcees and children who are eligible for alimony" (the Working Group). A total of 10 recommendations were made by the Working Group to address the difficulties encountered by maintenance payees in collecting and enforcing maintenance payments.

2. To address the problem of some maintenance payers withholding payment until shortly before the court hearings scheduled for the judgment summons but defaulting again after paying a few months, the Working Group recommended that the court be empowered to impose surcharge on late maintenance payments.

3. Following consultation with the Hong Kong Bar Association, the Law Society of Hong Kong and the Judiciary, the Administration now proposes, instead, to empower the court to impose interest at judgment rate on maintenance arrears.

The Bill

4. Under the Bill, the requirement to pay interest must be made pursuant to an application made by the maintenance payee in a proceeding instituted for enforcing the maintenance order, and the interest will be paid at the same rate as other judgment debts. The proposals in the Bill have not been discussed by the Panel on Home Affairs (the Panel).

Purpose of this paper

5. Although the proposals in the Bill have not been discussed by the Panel, the

Administration had briefed the Panel on the recommendations of the Working Group in June 2000. This paper provides a brief note on the discussions of the Panel on the Working Group's recommendations.

The Working Group's recommendations

6. At the Panel meeting on 2 June 2000, the Administration briefed members on the major recommendations in the report of the Working Group (LC Paper No. CB(2)2125/99-00(01)). The Administration pointed out that the report contained 10 recommendations to improve the existing administrative procedures for recovery of maintenance payments, some of which had already been implemented.

7. The Administration also informed members that the Working Group had considered the proposal of setting up an intermediary body for the collection of maintenance payments. However, it was concluded that an intermediary body would not be able to offer maintenance payees or taxpayers any significant benefits over and above those that could be achieved by improving the existing administrative system. The Administration had accepted the Working Group's recommendation not to set up an intermediary body.

Concerns raised by the Panel

8. Members expressed disappointment at the Administration's decision not to set up an intermediary body and were dissatisfied with the Administration's explanation of the rationale of the decision. The greater part of the discussion at the meeting was focused on this issue.

9. As regards improvements to the existing administrative system, members noted that the Working Group's recommendation that the court be empowered to order that maintenance specified in maintenance orders be paid into court in appropriate cases, and to impose a surcharge against defaulting maintenance payers. Members did not raise any comments regarding the proposal to empower the court to impose a surcharge against defaulting maintenance payers.

Minutes of the meeting

10. Members may wish to refer to an extract from the minutes of the meeting of the Panel on 2 June 2000 in the **Appendix** for details of the discussion on the Working Group's recommendations.

**Extract from Minutes of meeting of
LegCo Panel on Home Affairs held on 2 June 2000**

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III. Intermediary body for the collection of maintenance payments

[LC Paper Nos. CB(2)2159/99-00(01), CB(2)2195/99-00(01) and CB(2)2271/99-00]

3. Members noted that the Caritas Family Services Project on Extramarital Affairs had made a written submission expressing support for setting up an intermediary body for the collection of maintenance payments [Paper No. CB(2)2195/99-00(01)]. Members also noted that the Concerned Group on the Recovery of Alimony had also made a written submission expressing similar support. The written submission was tabled at the meeting and subsequently issued vide LC Paper No. CB(2)2271/99-00.

4. Acting Deputy Secretary for Home Affairs (1) (Ag DS(HA)1) briefed members on the major recommendations of the report presented by "the inter-departmental working group on review of law and administrative measures affecting divorcees and children who are eligible for alimony" (the Working Group) [Paper No. CB(2)2159/99-00(01)]. He said that the report contained ten recommendations to improve existing administrative procedures for recovery of maintenance payments which had been accepted by the Administration. He added that some of the recommendations had already been implemented.

Setting up an intermediary body for the collection of maintenance payments

5. Ag DS(HA)1 informed members that the Working Group had considered the proposal of setting up an intermediary body for the collection of maintenance payments. However, it was concluded that an intermediary body would not be able to offer maintenance payees or taxpayers any significant benefits over and above those that could be achieved by improving the existing administrative system. The Administration had accepted the Working Group's recommendation not to set up an intermediary body.

6. Members present expressed disappointment at the Government's decision not to set up an intermediary body for the collection of maintenance payments. They were also dissatisfied with the Administration's explanation of the rationale of the decision.

7. The Chairman noted that during the 24 months from April 1998 to March 2000, the Judiciary had received 57 applications for Attachment of Income Orders (AIO), although there were some 785 judgement summons issued for maintenance arrears during the same period. Only 18 of the 57 applications were approved and it took as long as six months for some cases to be approved. She queried why the Administration still maintained that the AIO was an effective means to address the problem of maintenance arrears.

8. The Chairman further said that the Legislative Council (LegCo) had passed two motions urging the Government to establish an intermediary body for the collection of maintenance payments in the past two years. LegCo Members and concerned organisations had reiterated on numerous occasions that an intermediary body was the only effective means to collect maintenance payments. She expressed regret that the report had failed to address Members' concerns.

9. Deputy Chairman said that he could not agree with the Administration's view that an intermediary body would not be able to offer maintenance payees or taxpayers any significant benefits more than those that could be achieved by improving the existing system. He pointed out that the Administration should not base its decision primarily on economic considerations. Deputy Chairman stressed that although the measures proposed by the Working Group could be of some assistance, the hardship and torment suffered by divorcees and their children in collecting maintenance payments would not be alleviated in the absence of an intermediary body. He added that the distress and bitterness that the children were exposed to in the process of collecting arrears would adversely affect the psychological development of these children. Miss CHAN Yuen-han expressed a similar view.

10. Ag DS(HA)1 responded that the Administration had not made the decision of not setting up an intermediary body primarily on economic considerations. He pointed out that maintenance payments were private affairs between the individuals concerned. It was a matter of principle that the Government should not interfere in personal matters unless there was a very strong reason to do so. For instance, Government's interference would bring substantial benefits to the individuals concerned and the taxpayers. Ag DS(HA)1 added that even if enforcement actions were to be taken by an intermediary body, a maintenance payee would still have to be approached by the body for confirmation that the maintenance payer had not paid direct to the payee; and to attend court hearings in case the court needed to vary a maintenance order.

11. The Chairman said that she did not agree with the Administration's position that setting up an intermediary body represented an intervention into private affairs. She remarked that divorce was also a personal matter but the

Government had set up a pilot scheme on family mediation to assist couples who intended to separate or divorce. Deputy Chairman pointed out that the problem of maintenance arrears mostly affected divorced women and children in need of assistance. If they did not receive the payments, their livelihood would be in difficulty. Hence, the Government had the obligation to protect these needy people from financial hardship and mental stress.

12. Ag DS(HA)1 said that if an intermediary body would arrange advance payments in order to relieve the maintenance payee of financial hardship, it might give the wrong impression to the maintenance payer that he could pass the burden to the intermediary body. The Chairman remarked that the intermediary body could always recover arrears from the maintenance payer. Ag DS(HA)1 responded that the intermediary body probably would not be able to recover all arrears from the maintenance payers. The end result would be that taxpayers shouldered a financial responsibility which should be that of the maintenance payers. Miss HO Sau-lan remarked that making advance payments should be a main purpose of establishing an intermediary body. She added that an intermediary body would always be more effective than an individual in recovering arrears of maintenance payments.

13. Mr LAW Chi-kwong said that it was illogical to decide against setting up an intermediary body on the grounds that it would be unable to recover all arrears. He stressed that the merit of setting up such a body was to save the divorced women and children from the pain and bitterness of having to collect money from the maintenance payers. It also saved them from the stress of having to go through the process of applying for Comprehensive Social Security Assistance (CSSA) and legal aid. The Government's decision not to set up an intermediary body was tantamount to telling all maintenance payers that they could evade responsibility to pay maintenance payments and even a governmental body was unable to recover the arrears.

14. Ag DS(HA)1 reiterated that it would be unfair that taxpayers had to advance maintenance for the maintenance payers who could afford but were unwilling to make the payments. In addition, the job of the intermediary body could be achieved by improving the existing administrative systems. Assistant Director of Social Welfare (Family and Child Welfare) (AD/SW(FCW)) supplemented that the Social Welfare Department (SWD) was aware that divorced single-parents needed support and advice on various family matters irrespective of whether they were in need of financial assistance. SWD was very concerned about their emotional well-being and had provided counselling service and practical assistance to them through the Family Services Centres.

15. Deputy Chairman said that the idea of an intermediary body stemmed from the existence of child support agencies in some developed countries. He queried why the Administration considered that the problem of maintenance

arrears could be dealt with more effectively in HKSAR without establishing an intermediary body. Ag DS(HA)1 responded that the main reasons for establishing child support schemes in overseas countries were that the courts were inconsistent in assessing the amounts of maintenance and the child support agencies took over from the courts the power to make maintenance orders. As far as he understood, those who supported the proposal of an intermediary body in HKSAR did not advocate the transfer of the courts' power to an executive body. He added that although the reviews conducted by Australia, New Zealand and the United Kingdom had re-affirmed the value and principles behind the child support schemes, there were many problems with their implementation. Referring to paragraph 5.1 of the LegCo Secretariat's research report dated April 1999, which stated that none of the countries "would want to dismantle the scheme", he suggested that the fact that dismantling was considered was indicative of the size of the problems.

Improvements on the existing administrative system

16. Members noted that the Working Group had recommended the court be empowered to order that maintenance specified in maintenance orders be paid into court in appropriate cases, and to impose a surcharge against defaulting maintenance payers. Deputy Chairman was of the view that these recommendations to improve the payment and collection methods were meaningless if the maintenance payers' addresses were not available.

17. Members also noted that another recommendation of the Working Group was that non-governmental bodies and professional bodies should be informed that cases of a maintenance payer failing to notify the maintenance payee of a change of address could be reported to the Police station nearest to the maintenance payer's last known address. The Working Group further recommended that the Law Society of Hong Kong be asked to inform its members that they could, with the use of a standard letter, request the Immigration Department to search its records for addresses of maintenance payers against whom legal actions would be taken for default on maintenance payments.

18. In response to the Deputy Chairman's query about the effectiveness of these recommendations, Ag DS(HA)1 explained that a maintenance payer must notify the maintenance payee of any change in address within 14 days. Failure to do so would constitute a criminal offence. However, no prosecution had been taken out apparently because even some lawyers did not know where to report such offences. Under the new procedure, cases of maintenance payers failing to notify the maintenance payees of changes of addresses could be reported to the Police station nearest to the maintenance payer's last known address. This would pose a deterrent effect on those maintenance payers who tried to conceal their addresses.

19. Ag DS(HA)1 further explained that a request for addresses of maintenance payers from government departments would normally be declined in the past because of concern of possible infringement of the Personal Data (Privacy) Ordinance (Cap. 486) because the requestor did not state the purpose for which the personal data would be used. With the use of a standard letter, as recommended by the Working Group, the Immigration Department, Transport Department, and Housing Department could be requested to search their records for addresses of maintenance payers so as to facilitate the process in obtaining their addresses. However, Ag DS(HA)1 admitted that if the government departments concerned did not have the latest addresses of the maintenance payers, the recommendation would be of little assistance.

20. The Chairman and Deputy Chairman asked whether the maintenance payees would receive CSSA during or before the recovery proceedings. Assistant Director of Social Welfare (Social Security) (AD/SW(SS)) responded that applicants for CSSA had to go through the necessary verification procedures. To avoid some divorcees relying on CSSA and refraining from applying for maintenance, SWD had introduced new procedures in August 1998. Under the new procedures, in processing CSSA applications involving divorcees who had not received maintenance or whose ex-spouses had defaulted on maintenance payments, SWD would ask the applicants to declare on an undertaking form their intention to file a claim for maintenance/enforcement of the maintenance order before CSSA payments could be made to them. SWD would not stop or reduce CSSA payment until the CSSA recipients had successfully recovered the maintenance. SWD dealt with each case in the light of its particular circumstances. For urgent cases where there was a genuine need, the Department could provide cash assistance as early as on the same day the application was made.

21. In response to members' concern about the complicated and time-consuming procedures in applying for CSSA and legal aid, AD/SW(SS) informed members that the present practice was that CSSA recipients were not normally required to undergo a means test when they applied for legal aid. While maintenance payees applying for CSSA and legal aid in the past might have to make numerous visits to SWD and Legal Aid Department (LAD), a pilot scheme had been conducted to synchronise the procedures in processing applications for CSSA and legal aid. SWD had also requested its social security field units to centralise the collection and keeping of all information of the maintenance payees applying for maintenance and CSSA for all other relevant government departments.

22. Miss HO Sau-lan pointed out that some maintenance payers would withhold payment until shortly before the scheduled court hearings. However, after paying for a few months, they defaulted again and the maintenance payees had to spend time and effort in instituting legal proceedings time and again. Miss HO noted that SWD would stop or reduce CSSA payment when the

CSSA recipients had successfully recovered the maintenance. She asked how SWD could ensure that the maintenance payees would receive immediate financial assistance whenever the maintenance payers defaulted on payments.

23. AD/SW(SS) responded that SWD was aware of the problem that some maintenance payers would stop paying or pay less and less in a sporadic manner. The whole aim of CSSA was to provide instant financial assistance to the needy. Maintenance payees were also advised to declare changes in the receipt of maintenance payments so that applications for CSSA could be filed as early as possible.

24. Miss HO Sau-lan expressed dissatisfaction with the Administration's response. She remarked that a maintenance payee still had to go through the whole process of applying to SWD, LAD and the court should the maintenance payer cease or reduce payments sporadically. Ag DS(HA)1 responded that if the maintenance payee was in genuine financial difficulty, SWD could provide immediate financial assistance. He said that AIO was one of the available means to recover maintenance arrears and the most common means was to apply for a Judgement Summons. If the maintenance payer had defaulted on payments without reasonable excuse, the court could commit him to a prison.

25. Miss HO Sau-lan said that a maintenance payee would be in great financial difficulty in case of default payment if she needed the maintenance for paying mortgage. Miss HO asked and AD/SW(SS) replied that the maintenance payee might be required to sell the property before applying for CSSA. If the maintenance payee had the custody of young children, she would not be required to sell the property unless the property value was great. Even if the maintenance payee was required to do so, a grace period would be given.

26. Deputy Chairman asked whether a maintenance payee seeking legal assistance would need to make numerous trips to SWD and LAD if the maintenance payer defaulted on payments time and again. Senior Legal Aid Counsel (SLAC) responded that under the pilot scheme, SWD would do preliminary investigations and collect all the relevant information about the maintenance payers and payees. Meritorious enforcement cases would be referred to LAD. Since only maintenance payees who had been granted CSSA would be referred to LAD, LAD did not have to do separate means tests and their processing time would be shortened. Where appropriate, the offer and acceptance documents for legal aid application would be signed by the payee at the first appointment. Under this scheme, the maintenance payee could save one trip to LAD. In the event the maintenance payer repeated default on payments, the maintenance payee did not have to go through the application procedure for legal aid if the legal aid certificate was still valid. However, self-employed persons or people not in receipt of CSSA would need to go through income check whenever they applied for legal aid. It normally

took not more than 10 days for a person to get an appointment to make a formal application for legal aid.

27. In summing up the discussion, the Chairman said that it was a consensus among members that setting up an intermediary body would address the problem of maintenance arrears and the difficulties faced by the divorcees effectively. It would also help avoiding some divorcees relying on CSSA and refraining from applying for maintenance or from taking legal actions to recover arrears. Further discussion would not be fruitful if the Administration took a completely different view.

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