

**Bills Committee on Interest on Arrears of Maintenance Bill 2001
Matters Arising from the First Meeting on 22 July 2002**

A. The Law Society's Letter of 16 January 2002

Background

The proposal of introducing interest on maintenance arrears derived from an Inter-departmental Working Group's recommendation of empowering the court to impose surcharge on maintenance arrears. In October 2000 we consulted the Hong Kong Bar Association and the Law Society on the Working Group's report, highlighting the surcharge proposal. The Law Society responded in its reply of 13 November 2000 that members of its Family Law Committee "considered the recommendations to be sensible and have endorsed the same". The Bar Association, on the other hand, objected to the surcharge proposal in its reply of 17 November 2000. The Bar Association pointed out that –

- (a) as a punitive measure it was against the philosophy of Family Law; and
- (b) the recipient of maintenance would be unjustly enriched.

2. The Administration re-considered the issue in the light of the above advice and concluded that interest should be introduced instead. In June 2001, we consulted the Law Society again on the "new" proposal. In its reply dated 13 July 2001, the Law Society said "there was general agreement with the principle [of introducing interest]" and recommended that judges of the family court should be granted "the power to charge interest on arrears of periodical payments as well as lump sum payments at Judgment Rate". Subsequently, the Interest on Arrears of Maintenance Bill 2001 was introduced.

The Letter

3. On 16 January 2002 the Law Society sent this Bills Committee a letter, saying that it "endorsed the policy" but at the same time indicated its concerns on the computation of interest. The Law Society commented that "additional provisions are required on apportionment of arrears of principal to assist with the calculation of principal and interest" and that "[t]he Bill as currently drafted is not user-friendly". A copy of the Law Society's letter is at Annex A.

The Administration's Response

4. The formula currently adopted in the Bill is the simplest possible as it contains the minimum elements in any calculation of interest, i.e. the amount involved (which is the arrears), the rate of interest (which is the judgment rate as in all judgement debts) and the period in question. This is same as the formula found in school arithmetic textbooks. Most commercial banks, we believe, also use the same concept in their calculation of interests on savings. The Bill's proposal of interest calculation should therefore be familiar to most people.

5. That said, we recognize that in quite a substantial number of maintenance arrears cases, the payer habitually makes irregular payments of maintenance for quite some time. Despite this, we do not see a need for "provision for apportionment of arrears" in the Bill. Payment made on a particular day is to be deducted from the cumulative amount of maintenance owed to the payee on that day.

6. Annex B illustrates the calculation involved for the hypothetical example cited by the Law Society. The amount of maintenance arrears and interest payable by the Judgement Debtor (i.e. the maintenance payer) as at 25 February 2001 is \$31,431, while the amount of maintenance arrears and interest payable by the Judgement Debtor as at 1 February 2002 is \$58,602.

7. Subject to Members' endorsement, we will work towards the clarification of the new arrangements under the Bill.

B. Issues raised at the meeting on 22 July 2002

(a) Deterrent Effect

8. As maintenance arrears are in a way debts owed by the maintenance payer in question to the maintenance payee, we consider it only equitable to enable the maintenance payee to seek interests on the amount in arrears from the payer, just as in the case of other civil debts.

9. The imposition of interest on maintenance arrears in essence means that the maintenance payer has to make extra payment to the maintenance payee for his/her failure to make payment on time and in full. We believe that the Bill will have a deterrent effect in discouraging deferred maintenance payments when a maintenance payer knows that the payee can apply for interest on the arrears. We will publicize the new provisions of interest on maintenance arrears upon enactment of the Bill.

10. Whether it is worthwhile for a maintenance payee to apply for interest in legal proceedings to recover maintenance arrears would depend on the circumstances of the case. Factors like the amount of arrears, the duration of the default period, the legal costs involved if any, etc. may all have a bearing on the maintenance payee's perception of the matter. However, the existence of such a provision would enable the maintenance payee to apply to the court for imposition of interest on maintenance arrears if he/she so wishes.

(b) Component "B" in the Formula

11. Component "B" refers to the "judgment rate prevailing on the due day for payment specified by the maintenance order". In our consideration of the hypothetical case provided by the Law Society, we concluded that it is simpler, in terms of calculation of interest in respect of periodical payments, to deduct payment made by the maintenance payer on a particular day from the cumulative amount of maintenance owed to the payee in question on that day. That being the case, the outstanding maintenance as at a particular day will be subject to the judgment rate prevailing on that day. In other words, the judgment rate will vary.

(c) Cases handled by the Legal Aid Department (LAD)

12. LAD issued 5 445 (or 52.8% out of 10 314 applications) and 5 875 (or 52.7% out of 11 148 applications) legal aid certificates in connection with divorce and other matrimonial suits in 2000 and 2001 respectively. LAD has no breakdown of the number of cases which sought and which did not seek maintenance payments, the average amount of monthly maintenance payment awarded.

13. About 25% of the legal aid cases were handled by LAD's in-house lawyers and the rest was taken care of by solicitors in the private sector on the Legal Aid Panel. In the latter situation, LAD does not have first-hand information on the details of the cases. In the experience of LAD's lawyers, maintenance payments are normally sought in majority of the cases involving wife petitioners although in quite a number of these cases the petitioner's claim for maintenance is settled with nominal maintenance at \$1 per annum. The most common reasons for a wife petitioner to accept nominal maintenance or give up maintenance altogether are –

- (a) the respondent cannot be located;
- (b) the respondent is unemployed, has no asset or income;
- (c) the respondent is a recipient of Comprehensive Social Security

Assistance;

- (d) the respondent is a casual worker with very unstable income and can hardly maintain himself;
- (e) the respondent earns a meagre income only and is heavily indebted;
- (f) the respondent is a casual worker with an unstable income and is indulged in bad habit, such as drug addiction, which makes it unrealistic to expect him to pay maintenance;
- (g) the respondent does not earn much and the petitioner gives up custody of the children of the family to the respondent;
- (h) the petitioner is gainfully employed, able to maintain herself and the children and does not want to seek maintenance from the respondent; and
- (i) the petitioner is cohabiting with another man and is able to maintain herself and the children with contribution from her cohabitee.

(d) Emergency Assistance to Maintenance Payees

14. The average time taken by the Social Welfare Department (SWD) to process a new Comprehensive Social Security Assistance application from a maintenance payee is about 28 working days, counting from the date of application to the date of payment approval. For cases with a genuine need for urgent cash assistance, SWD can arrange payment within a couple of days subject to investigation being completed. In addition, based on individual circumstances, SWD may provide a needy maintenance payee with cash grants from charitable trust funds to tide over acute financial hardship as early as on the same day when application is made.

Annex A

Practitioners Affairs

FL0204/02/55668
HAB/CR/1/19/96 II

16 January, 2002

The Chairman
Bills Committee
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road, Central, Hong Kong

Dear Sir/Madam,

Re: Legislative Council Brief for the Interest on Arrears of Maintenance Bill 2001

The Law Society's Family Law Committee was consulted by the Home Affairs Bureau on the policy of awarding interest on arrears of maintenance payment. The Law Society endorsed the policy and suggested it would be appropriate to adopt judgment rate to calculate interest on arrears.

After perusal of the Bill concern has been expressed by practitioners on the calculation of interest.

I attach an example of the complications that practitioners, and indeed members of the Legal Aid Department, will face in calculating the interest on arrears of maintenance payment. The Law Society is of the opinion that additional provisions are required on apportionment of arrears of principal to assist with the calculation of principal and interest. This is obvious when the judgment debtor has a long history of either defaulting on payment, or habitually making irregular payment of maintenance. The Bill as currently drafted is not user-friendly. The computation of the interest on arrears will be a complicated and time consuming exercise with serious cost implications for the class of people the legislation is intended to benefit.

The Law Society would be willing to discuss this matter further.

Yours sincerely,

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Director of Practitioners Affairs
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cc Betty Chan, Legal Aid Department
Mr. Andrew Cheung, Home Affairs Bureau

Encl.

Interest on Arrears of Maintenance Bill 2001 ("the Bill")

The Law Society of Hong Kong's Family Law Committee has the following observations on the Bill as follows:

1. Arrears of Maintenance

Arrears of maintenance are not like other judgment debts as the amount of arrears may vary from time to time. These payments are usually paid on a monthly basis and so when arrears occur any payment by the judgment debtor will require an apportionment exercise. The payment will have to be apportioned to repay the arrears on the outstanding maintenance first and then any surplus will be apportioned to subsequent maintenance outstanding. It should be acknowledged that many maintenance payers make irregular payments of maintenance.

The Bill does not contain any provision for apportionment of arrears, only the formula to calculate the interest on the arrears. The following example will serve as an illustration of the difficulties private practitioners and the staff of the Legal Aid Department will face when attempting to calculate interest on arrears of maintenance.

The example is hypothetical but in fact is a rather typical situation assuming that the provisions in the current Bill has been in force at all material times:

- i) The Maintenance Payer (JD) was ordered to pay the Maintenance Payee (JC) periodical payments at the rate of \$5000 per month commencing from 1.6.2000 and thereafter payment on the 1st day of each and every succeeding month.**
- ii) JD has failed to make adequate payments since the date of the Order. A Judgment Summons was issued against JD and was heard on 25.2.2001. Payments made by JD from 1.6.2000 to 25.2.2001 were as follows:**

Dates of payment	13.6.2000	\$3000
	26.8.2000	\$2000
	9.10.2000	\$8000
	23.12.2000	\$2000
Total amount paid:		\$15,000
Amount due:		\$45,000
Total arrears		\$30,000
Interest:		?

- iii) Upon hearing the Judgment Summons on 25.2.2001 the Judge made a committal order against JD, and an interest order in favour of the JC.

The committal order was suspended on condition that:

JD settle the arrears of periodical payments together with interest thereon at judgement rate from their respective due dates of payment. The JD was also ordered to pay fixed costs for the enforcement proceedings in the sum of \$5000. The arrears were to be paid by monthly instalments of \$2000 each commencing from 1.3.2001 and thereafter payment on the 1st day of each and every succeeding month until full payment.

The Judge reminded JD that the \$2000 per month was to be paid by him on top on the recurring maintenance of \$5000 per month due under the original maintenance order.

- iv) JD made the following payments during the period from 1.3.2001 to 1.2.2002:

Dates and amount of payment:

1.3.2001	\$7000
3.4.2001	\$5000
6.5.2001	\$7500
3.7.2001	\$8000
1.9.2001	\$3000
15.10.2001	\$2000

- v) Questions for consideration:

- a. What is the amount of arrears of maintenance and interest payable by JD as at 25.2.2001?
- b. What is the amount of arrears of maintenance and interest owing by JD as at 1.2.2002?

2. The Law Society considers that further consideration is required on the practical problem of apportionment which the current Bill has failed to address.

The Law Society of Hong Kong
Family Law Committee
15 January 2002
55697

Calculation of arrears of maintenance and interest thereon to 25.2.2001

Appendix III

Date	Payment due	Payment made by JD	Maintenance Payment subject to interest	Interest Period	No. of days	Judgement rate	Interest thereon at judgement rate (Note 1)
	\$	\$	\$			% p.a.	\$
1.6.2000	5,000		5,000	2/6/2000-13/6/2000	12	11.54%	19
13.6.2000		3,000	2,000	14/6/2000-1/7/2000	18	11.54%	11
1.7.2000	5,000		7,000	2/7/2000-1/8/2000	31	11.98%	71
1.8.2000	5,000		12,000	2/8/2000-26/8/2000	25	11.98%	98
26.8.2000		2,000	10,000	27/8/2000-1/9/2000	6	11.98%	20
1.9.2000	5,000		15,000	2/9/2000-1/10/2000	30	11.98%	148
1.10.2000	5,000		20,000	2/10/2000-9/10/2000	8	12.50%	55
9.10.2000		8,000	12,000	10/10/2000-1/11/2000	23	12.50%	95
1.11.2000	5,000		17,000	2/11/2000-1/12/2000	30	12.50%	175
1.12.2000	5,000		22,000	2/12/2000-23/12/2000	22	12.50%	166
23.12.2000		2,000	20,000	24/12/2000-1/1/2001	9	12.50%	62
1.1.2001	5,000		25,000	2/1/2001-1/2/2001	31	12.50%	265
1.2.2001	5,000		30,000	2/2/2001-25/2/2001	24	12.50%	247
	45,000	15,000			269		1,431

Note

1. Judgement rate as advised by Judiciary:	Effective Date	Effective Period	Judgement rate (% p.a.)
	1.4.2000	1.4.2000-30.6.2000	11.54
	1.7.2000	1.7.2000-30.9.2000	11.98
	1.10.2000	1.10.2000-31.3.2001	12.5

2. The maintenance balance as at 25.2.2001 = 45,000 - 15,000 = \$30,000

Calculation of arrears of maintenance and interest owing by JD as at 1.2.2002

Date	Payment due		Payment made by JD		Maintenance Payment subject to interest	Interest Period	No. of days	Judgement rate	Interest thereon at judgement rate (Note 3)
	Fixed Cost	Maintenance Payment	Maintenance Payment	Fixed Cost					
		Arrears (Note 1)	Recurrent						
	\$	\$	\$	\$	\$				
25.2.2001	5,000								
1.3.2001		2,000	5,000	2,000	5,000	2.3.2001-1.4.2001	31	12.50%	53
1.4.2001		2,000	5,000		12,000	2.4.2001-3.4.2001	2	12.08%	8
3.4.2001				5,000	7,000	4.4.2001-1.5.2001	28	12.08%	65
1.5.2001		2,000	5,000		14,000	2.5.2001-6.5.2001	5	12.08%	23
6.5.2001				7,500	6,500	7.5.2001-1.6.2001	26	12.08%	56
1.6.2001		2,000	5,000		13,500	2.6.2001-1.7.2001	30	12.08%	134
1.7.2001		2,000	5,000		20,500	2.7.2001-3.7.2001	2	10.86%	12
3.7.2001				8,000	12,500	4.7.2001-1.8.2001	29	10.86%	108
1.8.2001		2,000	5,000		19,500	2.8.2001-1.9.2001	31	10.86%	180
1.9.2001		2,000	5,000	3,000	23,500	2.9.2001-1.10.2001	30	10.86%	210
1.10.2001		2,000	5,000		30,500	2.10.2001-15.10.2001	14	9.82%	115
15.10.2001				2,000	28,500	16.10.2001-1.11.2001	17	9.82%	130
1.11.2001		2,000	5,000		35,500	2.11.2001-1.12.2001	30	9.82%	287
1.12.2001		2,000	5,000		42,500	2.12.2001-1.1.2002	31	9.82%	354
1.1.2002		2,000	5,000		49,500	2.1.2002-1.2.2002	31	8.72%	367
1.2.2002		2,000	5,000		56,500				
	5,000	24,000	60,000	27,500	5,000		337		2,102

Note

1. In accordance with court judgement, the arrears of maintenance together with interest thereon were to be paid by monthly instalments of \$2,000 each commencing from 1.3.2001 and thereafter payment on the 1st day of each and every succeeding month.

2. It was assumed that payment by JD on 1.3.2001 would discharge the fixed cost first and no interest was imposed on the fixed cost.

3. Judgement rate as advised by Judiciary:

Effective Date	Effective Period	Judgement rate (% p.a.)
1.10.2000	1.10.2000-31.3.2001	12.5
1.4.2001	1.4.2001-30.6.2001	12.08
1.7.2001	1.7.2001-30.9.2001	10.86
1.10.2001	1.10.2001-31.12.2001	9.82
1.1.2002	1.1.2002- now	8.72

4. The maintenance balance as at 1.2.2002 = 24,000+(60,000-27,500) = \$56,500