

**Bills Committee on Interest on Arrears of Maintenance Bill 2001
Matters Arising from the 2nd Meeting on 23 September 2002**

A. Calculation of the Interest on Arrears

The following points were raised at the meeting –

- (a) interest should be imposed on late payment of interest on arrears of maintenance payment;
- (b) whether interest would be imposed on arrears of maintenance payments and interest payable by the Judgement Debtor (“JD”) between the date of judgement and the date of payment or on arrears of maintenance payment only between the date of judgement and the date of payment; and if so, to specify such in the Bill;
- (c) calculation of interest on arrears of maintenance payments should be clearly spelt out in the Bill; and
- (d) apart from imposing interest on arrears of maintenance payments, JD should be penalized for repeatedly failing to pay maintenance payments in full and on time without reasonable excuse.

Nature of Maintenance Arrears

2. As set out in the relevant Legislative Council Brief on the Bill, we agree with the Bar Association that punitive measures are against the philosophy of family law. There is no good reason not to regard arrears of maintenance as a judgement debt, and to provide for remedial and corrective measures in justified circumstances. The same logic applies to repeated failure to make maintenance payments in full and on time.

3. We noted that it would be more effective to encourage voluntary compliance with maintenance order. To this end, one of the messages we have been spreading through non-governmental organizations is that a person

should be responsible for the maintenance of his/her ex-spouse and children even after divorce. This is also one of the reasons behind the 3-Year Pilot Scheme on Family Mediation introduced by the Judiciary on 2 May 2000. The Scheme provides mediation service to help separating or divorcing couples to reach their own *mutually acceptable* agreements regarding the on-going arrangements for their children and/or resolution of financial matters.

The Calculation

4. As we have set out in our notes for the Bills Committee on matters arising from the 1st meeting, the formula 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 interests (which is the judgement rate as in all judgement debts) and the period in question. To take account of the complexity in calculation that may ensue in a case where the payer habitually makes irregular payments of maintenance for some time, we consider that the formula would need to be modified.

- (a) We consider maintenance arrears as a kind of judgement debts. Calculation of interest thereon takes reference of s.50 of the District Court Ordinance (Cap.336) (“DCO”). The section provides that –

“(1) Judgment debts are to carry simple interest –

- (a) at the rate the Court orders; or
- (b) in the absence of an order, at the rate the Chief Justice determines by order,

on the total amount of the judgement debt, or on the part that for the time being remains unpaid, from the date of the judgement until payment.

- (2) Interest under this section may be calculated at different rates for different periods.”

The court is to be empowered to impose **simple interest** on arrears of maintenance, i.e. interest will be reckoned on the principal or the amount in arrears and will be capped at **judgement rate**, which usually is 3% above the Best Lending Rate.

- (b) Section 50 of the DCO provides that part of the judgement debt that for the time remains unpaid should carry interest from the date of the judgement until payment. However, in cases where the court requires the payer to repay the arrears by instalments, application of s.50 of DCO would render the calculation unduly complex. As the court should have considered the circumstances of the case (including that of the payer and the reasons for not meeting the maintenance payment) in making the judgement, we propose that for the purpose of interest calculation, the payment arrangements set out in the judgement should be considered afresh. In other words, the part of the judgement debt that remains unpaid for the time being would not attract interest if the payer meets the arrangements set out in the judgement. If he/she fails to do so, interest would be calculated in the manner in which the arrangements in the judgement have not been met.
- (c) We have considered the cases where the court requires lump sum payment for maintenance arrears. For parity reason, we propose that (b) above should also apply for these cases despite the fact that calculation of interest for such cases should be relatively easy.
- (d) We are aware that r.87(8) of Matrimonial Causes Rules (“MCR”) provides that all payments made under an order of commitment “shall be deemed to be made, first, in or towards the discharge of any sums from time to time accruing due under the original order and, secondly, in or towards the discharge of the debt in respect of which the judgement summons was issued and the costs of the summons”. We consider that the priority calls on any payment made by the payer after the judgement should be in the following order –
- (i) the interest ordered by the court, if any;
 - (ii) the fixed cost ordered by the court, if any; and
 - (iii) the periodical payment, including the instalment.

This would realize the legislative intent of compensating the maintenance payees for the loss in interest on their savings or for the interest payable by them in respect of the loans they have to obtain owing to the maintenance payer’s default or delay in making

payments.

Subject to Members' view, we would clarify the above in our proposal of Committee Stage Amendments.

B. The Legal Cost for Preparing the Calculation

5. The Administration was asked to estimate the administrative costs for handling the two cases in the hypothetical example cited by the Law Society. We take this to mean the legal costs involved in the case of those who ask their legal representative(s) to prepare for them the calculation of interest. Legal costs would not occur in cases where the payee does the calculation himself/herself.

6. Legal costs are assessed on an hourly rate. On the basis of the calculation methodology proposed by the Administration, the legal costs for preparing the calculation of interest would come to about \$1,317 in the experience of the Legal Aid Department. The costs cover both cases in the hypothetical example and the breakdown is as follows –

<i>Personnel</i>	<i>Unit cost</i>	<i>Cost</i>
Litigation clerk to do the calculation	1 hour at \$650/hour	\$650
Solicitor* to approve the calculation	20 minutes at \$2,000/ hour	\$667
Total		\$1,317

* Assuming work to be undertaken by a 5-year standing solicitor

C. Application for Interest on Arrears of Maintenance

7. A point raised at the meeting was that there should be no need for maintenance payees to apply for interest in legal proceedings to recover maintenance arrears, i.e. once the court issued an order to enforce maintenance payment, interest on arrears of maintenance payments should be automatically calculated.

8. Under the Bill, a maintenance payee may apply to the court for interest in respect of arrears of maintenance in any proceedings to enforce a maintenance order. There is no need to institute separate proceedings for interest on arrears.

9. We do not recommend an automatic mechanism for triggering interest on maintenance arrears. Under the Matrimonial Proceedings and Property Ordinance (Cap.192) (“MPPO”), the court has wide discretion to consider the “re-allocation of property” between parties as it deems appropriate. It also has the power to vary or discharge the order for periodical payment. The proposed calculation of interest provides in fact a ceiling on the interest that a payee may claim. An automatic mechanism would fetter the court’s discretion in this regard.

10. An automatic mechanism would also not be equitable in that it denies the payer a chance to make representations. The court has to determine first whether the debtor did owe the creditor money, and if so, whether there is a reasonable excuse for late payment. The interests of both the payer and payee should be balanced. The current proposal allows the court the discretion to consider the circumstances of the case and to determine whether interest should be granted, and if so, the amount to be granted.

D. Definition of Address

11. A representative of the Law Society considered that the address of the maintenance payer should be defined in the relevant legislation to pre-empt use of a post office box as the address. Section 19 of the Guardianship of Minors Ordinance (Cap.13) (“GMO”), s.10 of the Separation and Maintenance Orders Ordinance (Cap.16) (“SMOO”) and s.28A of MPPO obliges a person under an obligation to make payment to give notice of change of address. These three sections have been added by Order No.69 of 1997 that introduces the attachment of income order provisions and are applicable to all persons obliged to make maintenance payments under the respective ordinance. The two relevant forms in the MCR, Form 2 “General Form of Petition” requires the petitioner to set out the residential address of the respondent and Form 4 “Acknowledgement of Service” requires the respondent to give his/her place of residence. As regards GMO and SMOO, the District Court Ordinance shall apply to applications thereunder (s.11 of SMOO and s.23 of GMO). Order 12 rule 3 of the Rules of District Court, stipulates that the defendant must state his/her place of residence in the Acknowledgement of Service. Therefore, the address referred to in the “change of address” provisions refers to residential address.

Home Affairs Bureau
30 September 2002