

立法會 *Legislative Council*

LC Paper No. CB(2)2025/02-03

Ref : CB2/BC/5/01

Report of the Bills Committee on Interest on Arrears of Maintenance Bill

Purpose

This paper reports on the deliberations of the Bills Committee on the Interest on Arrears of Maintenance Bill.

Background

2. The Interest on Arrears of Maintenance Bill (the Bill) is part of a package of legislative proposals to implement the recommendations of the "Inter-departmental working group on review of law and administrative measures affecting divorcees and children who are eligible for alimony" (the Working Group). In its report published in May 2000, the Working Group made a total of 10 recommendations to address the difficulties encountered by maintenance payees in collecting and enforcing maintenance payments.

3. 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.

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

The Bill

5. Under the Bill, the maintenance payer may be required to pay interest only upon an application by the maintenance payee in proceedings instituted for enforcing the maintenance order, and the amount of interest will be calculated according to a prescribed formula.

The Bills Committee

6. At the House Committee meeting on 11 January 2002, Members agreed that a Bills Committee should be formed to study the Bill. The Bills Committee was activated on 28 June 2002 and first met on 22 July 2002. The membership list of the Bills Committee is in **Appendix I**.

7. Under the chairmanship of Hon Margaret NG, the Bills Committee has held 10 meetings with the Administration and has met with representatives from eight organisations as listed in **Appendix II**.

Deliberations of the Bills Committee

Interest to be calculated automatically in case of default in maintenance payment

8. Under section 50 of the District Court Ordinance (Cap. 336) (DCO), judgment debts carry simple interest at the rate the court orders or, in the absence of an order, at the rate the Chief Justice determines by order. Members consider that arrears of maintenance should be deemed judgement debts so that interest would arise automatically upon default of maintenance payment.

9. In considering whether maintenance payment should be treated as judgment debts, the Administration has pointed out that a maintenance order is different from an ordinary civil debt in that -

- (a) periodical maintenance payments are on-going payments while debt means a contractual liability that has already been incurred;
- (b) a maintenance order can be varied or discharged by an order of the court but not a debt;
- (c) bankruptcy cannot be used as a means to enforce periodical payments whereas it may be used so for civil debts; and
- (d) unsecured periodical payments are not assignable.

10. The Administration has further pointed out that section 11 of the Matrimonial Proceedings and Property Ordinance (Cap. 192) (MPPO) empowers the court "to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended". This provides both the payer and the payee of a maintenance order with a channel to vary or discharge the order should either or both parties feel the need. Although this lends strength to the argument that a maintenance order is not a final judgment, any change to the maintenance order will only ensue following an application to

vary or discharge it. In cases where no such application has been made, the maintenance payee has legitimate and reasonable expectation to receive full and punctual payment(s). As the maintenance payer should be in the best position to assess his/her own financial situation, the onus is on the maintenance payer to apply to vary or discharge a maintenance order when he/she considers it necessary. Another court order is the only legal means to vary or discharge the original maintenance order.

11. In view of the above, the Administration agrees that a maintenance order is arguably a judgment debt until the court decides to have it varied or discharged. It therefore considers it not unreasonable for interest to be calculated automatically in case of default in maintenance payments until the court, on application, makes an order to vary or discharge the original maintenance order.

12. The Administration has also pointed out that a person is not entitled, without leave of the court, to enforce through the court the payment of arrears, if the arrears became due more than 12 months before proceedings to enforce payment are begun. The provision is to prevent large sums from mounting up, and to avoid the payer from being mistakenly led to believe by the payee's acquiescence that he/she will not enforce the order. The Administration considers that this principle should also apply in the calculation of interest on maintenance arrears.

13. In calculating interest on maintenance arrears, the Administration recommends, and the Bills Committee agrees, that the following principle should be followed -

- (a) simple interest as provided in section 50 of DCO should be adopted;
- (b) the amount of arrears should no longer be subject to the 12-month enforcement rule specified under section 12 of MPPO if it has been affirmed through enforcement proceedings as an item of debt by the court; and
- (c) if the court makes a committal order against the maintenance payer and suspends it under rule 87(6) of the Matrimonial Causes Rules (Cap. 179 sub. leg.), any payment made by him/her is subject to the order of priority stipulated in rule 87(8) thereof.

Surcharge on maintenance arrears as a further deterrent

14. Members consider that as a further deterrent, the court should have discretion to impose a surcharge on maintenance arrears in cases where the maintenance payer repeatedly defaults without reasonable excuse. Members have pointed to cases where the maintenance payer repeatedly makes irregular and partial payments, even after enforcement orders have been made and despite their

financial capability to make full payments.

15. The Administration has pointed out that in normal circumstances, either interest or surcharge is required for default in payment. Whereas interest awarded is something due the maintenance payee for not being able to obtain full and punctual payment(s), a surcharge serves a different function and carries an implication that the payer has been at fault or not been able to fulfill what is required of him/her.

16. In recognition of the not insignificant number of cases referred to by members in paragraph 14 above, the Administration agrees that a surcharge may be imposed as a further deterrent in cases where the court finds blameworthy conduct on the part of the maintenance payer. The Administration has emphasized that while maintenance payees should automatically be entitled to interest on arrears at judgment rate unless otherwise determined by the court, a surcharge may be imposed by the court only in deserving cases. The Administration proposes that -

- (a) on application from a maintenance payee, the court may impose a surcharge;
- (b) an order for a surcharge should only be made when the court is satisfied that the payer has defaulted repeatedly without reasonable excuse; and
- (c) a maintenance payer may be summoned to the court by a judgment summons and should be given the opportunity to defend himself/herself.

Surcharge ceiling

17. The Administration proposes to set the ceiling at 30% of the total arrears of maintenance, taking into account that the payee would have already been compensated for his/her loss in interest on the maintenance arrears by the automatic interest at judgment rate. However, members of the Bills Committee are unanimously of the view that the surcharge ceiling should be set at 100% of the arrears and to leave the discretion to the court to determine the appropriate amount of surcharge in each case.

18. The Administration has explained that while it shares members' view that the surcharge ceiling should be of a sufficiently high level in order to be an effective deterrent against blameworthy conduct of defaulting repeatedly without reasonable excuse, it considers that a 100% surcharge ceiling too onerous. The Administration appreciates that the surcharge ceiling serves as a reference to the court in determining the surcharge requires but considers that it has also to be reasonable.

19. The Administration has further pointed out that in deciding on the nature and amount of payment(s) to be provided in a maintenance order, the court has already taken into account a host of factors involved, including the financial position of the maintenance payer. Pitching the ceiling at too high a level may actually defeat a purpose of the surcharge, i.e. to compensate the payee for the distress and anxiety caused. In this connection, the Administration has referred to the comment of the Law Society of Hong Kong that the surcharge proposal together with the imposition of interest can lead to the payer "simply opting to disappear" as in the majority of cases, there is simply insufficient money to pay maintenance.

20. The Administration has also pointed out that a 30% ceiling is already higher than the surcharge on late payment of tax and Government rent (5% for late payment not exceeding six months, and 10% thereafter).

Problem of deliberate evasion of service summons by maintenance payers

21. Members have expressed concern about the problem of deliberate evasion of service of summons by maintenance payers. To address the problem, some members suggest that the court should be given the power to impose a surcharge even though the maintenance payer fails to appear before the court, so long as the summons has been served to the address provided by the payer.

22. In response to the suggestion, the Administration has pointed out that the blameworthy conduct of the maintenance payer is a fact to be established by the court before imposing a surcharge. As accrued maintenance arrears can amount to tens of thousands of dollars and since the surcharge scheme is designed to cover all maintenance arrears cases, the imposition of a surcharge by the court may inflict a serious detriment on some maintenance payers. From the general legal policy perspective, where there is a serious detriment to an individual on the establishment of certain facts, the criminal standard of proof (i.e. beyond reasonable doubt) would be required even though the case is not a criminal matter. The facts will not be taken to be proved merely on a balance of probabilities.

23. The Administration has further explained that if the court is empowered to impose a surcharge on a maintenance payer in his/her absence, there may be cases where the criminal standard of proof is not satisfied. It is only appropriate that a maintenance payer be afforded a chance to present his/her points to the court. Otherwise, there is no way for the court to find that there is no reasonable excuse for the payer's failure to comply with the maintenance order.

Application for surcharge

24. In response to members' request, the Administration has provided additional information on the application procedures for surcharge.

Enforcement proceedings and summons

25. Members note that a maintenance payee may attach an application for surcharge to any concurrent enforcement proceedings. These include judgment summons, attachment of income order, garnishee proceedings and charging order to enforce the maintenance order under which arrears have accrued.

26. Application for surcharge may also be made by way of summons, which provides for alternative modes of service and would cater for the scenario where the maintenance payer in question tries to evade service of the summons. Apart from personal service, the payee could choose to serve on the legal representative acting for the maintenance payer, if represented, or by sending the summons and other relevant documents to the last known address of the maintenance payer, if unrepresented. If the payer fails to attend the hearing or if the service has been unsuccessful, the court could direct service in such manner as appropriate, or make an order of surcharge in the absence of the payer at the hearing if it is satisfied with the payee's efforts to serve the documents in the first attempt.

27. If the court makes an order of surcharge in the absence of the payer, the payer may apply to the court to set aside or vary the order or to appeal against the order after he has knowledge of the order being made. The court will take into consideration all relevant matters, including all applicable legal requirements and Articles 10 and 11 of the Hong Kong Bills of Rights Ordinance (Cap. 383), in exercising its discretion to confirm, set aside or vary the order or to allow or dismiss the appeal, as the case may be.

28. As for enforcement of payment of surcharge, a maintenance payee could choose the enforcement proceedings available under the law which best fit the circumstances.

Provision of user-friendly forms for use of applicants

29. Members have expressed concern about the user-friendliness of the proposed summons procedures for application for surcharge. They have asked for application forms to be provided for perusal in order to gauge their user-friendliness. In response to the request, the Administration has submitted to the Bills Committee the standard summons forms with the Administration's annotations and suggested wordings for completion by maintenance payees, together with a draft affidavit in support of the application for surcharge.

Computer software for calculation of interest on maintenance arrears

30. Members have asked the Administration to develop a computer software for calculation of interest on arrears of maintenance. Following discussion with the departments concerned on the timeframe for the project, the Administration has informed the Bills Committee that the whole process is expected to take 90 to 110 days. The Administration is sorting out with the departments concerned on the technical issues involved and will proceed with the procurement procedures once it is ready.

Consultation with the legal profession

31. As requested by the Bills Committee, the Administration has sought the views of the Hong Kong Bar Association, the Law Society of Hong Kong and the Hong Kong Family Law Association on the Committee Stage amendments (CSAs) proposed by the Administration.

32. The Administration has advised that the Hong Kong Family Law Association is agreeable to the latest proposal from the Administration and the Bar Association has no comments.

33. As regards the Law Society of Hong Kong, its Family Law Committee supports in principle the introduction of interest on maintenance arrears, but points to the possible resource implications on the court arising from the need to calculate the interests for unrepresented litigants. The Family Law Committee considers that the imposition of interest and surcharge might be too onerous in that in the majority of cases, there is simply insufficient money to pay the maintenance.

Intermediary body for the collection of maintenance payments

34. Members note that the Working Group had considered the proposal of setting up an intermediary body for the collection of maintenance payments. However, the Working Group 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.

35. Members consider that as in the case of Attachment of Income Orders, the present proposals are not cost effective and will only benefit a small number of maintenance payees. Despite the implementation of such proposals, many maintenance payees would still encounter difficulties in collecting maintenance payments.

36. As the various legislative amendments implemented hitherto to improve the enforcement of maintenance order are ineffective, members disagree with the

conclusion reached by the Working Group and urge the Administration to reconsider the proposal of setting up an intermediary body for the collection and enforcement of maintenance payments. Apart from shielding maintenance payees from emotional turmoil when confronting their ex-spouses, the intermediary body, with expert knowledge and concerted efforts, would be more cost-effective and efficient in recovering arrears from maintenance payers than if the same act is carried out by the maintenance payees themselves. Members also share the view that more efficient collection and enforcement of maintenance payments would also help to relieve the pressure on legal aid and the Comprehensive Social Security Assistance Scheme.

37. As the establishment of an intermediary body is outside the ambit of the Bills Committee, members agree that the matter should be referred to the Panel for Home Affairs for follow-up.

Committee Stage amendments (CSAs)

38. The Chairman would move CSAs on behalf of the Bills Committee to set the surcharge ceiling at 100% of the total amount of arrears of maintenance. Except the percentage, the wording of the CSAs to be moved by the Bills Committee is identical to the relevant parts of the CSAs to be moved by the Administration.

Follow-up action by the Panel on Home Affairs

39. As stated in paragraph 37 above, the Bills Committee recommends that the issue of setting up an intermediary body for the collection and enforcement of maintenance payments should be followed up by the Panel on Home Affairs.

Follow-up action by the Panel on Administration of Justice and Legal Services

40. The Bills Committee also requests that the Panel on Administration of Justice and Legal Services to follow up with the Administration on ways to address the problem of evasion of service of summons by maintenance payers.

Follow-up action and undertaking by the Administration

41. As mentioned in paragraph 30 above, the Administration has undertaken to develop a computer software for calculation of interest on maintenance arrears for reference by all parties concerned. The Secretary for Home Affairs would undertake in his speech at the resumption of the Second Reading debate on the Bill to develop the software and to brief the Panel on Home Affairs on the software

during the user acceptance test stage before the commencement of the Ordinance.

Late submission of papers / draft CSAs by the Administration

42. On 21 March 2003, the Chairman of the Bills Committee brought to the House Committee's attention the late submission of discussion papers and draft CSAs by the Administration which had caused delay in completing the scrutiny of the Bill. The Chairman of the House Committee wrote to the Chief Secretary for Administration on 26 March 2003 to convey the concerns expressed by Members on the matter.

43. The Administration has apologised for the late submission of papers/CSAs. It has explained that some fundamental changes have been proposed during the scrutiny of the Bill, and some of these proposals required detailed examination within the Administration, and with the Judiciary, before a consolidated response could be formulated for consideration by the Bills Committee. Also, the Bill seeks to amend four pieces of principal legislation, namely the Guardianship of Minors Ordinance, Separation and Maintenance Orders Ordinance, Matrimonial Causes Ordinance and the MPPO. This increases the volume of draft CSAs required and hence the lead time for preparation and checking, causing the delay in providing papers / CSAs to the Bills Committee.

Consultation with the House Committee

44. The Bills Committee consulted the House Committee on 25 April 2003 and obtained its support for the Second Reading debate on the Bill to be resumed on 21 May 2003.

Council Business Division 2
Legislative Council Secretariat
9 May 2003

Appendix I

Bills Committee on Interest on Arrears of Maintenance Bill 2001

Membership List

Chairman	Hon Margaret NG
Members	Dr Hon David CHU Yu-lin, JP
	Hon Cyd HO Sau-lan
	Hon Albert HO Chun-yan
	Hon CHAN Yuen-han, JP
	Hon YEUNG Yiu-chung, BBS
	Hon Miriam LAU Kin-yea, JP
	Hon CHOY So-yuk
	Hon LAW Chi-kwong, JP
	Hon LI Fung-ying, JP
	Hon Audrey EU Yuet-mee, SC, JP
	 (Total : 11 Members)
Clerk	Ms Doris CHAN
Legal Adviser	Mr LEE Yu-sung
Date	22 July 2002

Appendix II

Bills Committee on Interest on Arrears of Maintenance Bill 2001

List of deputations

- Caritas - Hong Kong
- Hong Kong Association for the Survivors of Women Abuse (Kwan Fook)
- Hong Kong Catholic Marriage Advisory Council
- Hong Kong Family Welfare Society
- Hong Kong Federation of Women's Centres
- Hong Kong Single Parents Association
- Maintenance Concern Group
- The Law Society of Hong Kong