

## **LEGISLATIVE COUNCIL BRIEF**

### **INTEREST ON ARREARS OF MAINTENANCE BILL 2001**

#### **INTRODUCTION**

At the meeting of the Executive Council on 11 December 2001, the Council ADVISED and the Chief Executive ORDERED that the Interest on Arrears of Maintenance Bill 2001 at **Annex A** should be introduced into the Legislative Council (LegCo).

#### **BACKGROUND AND ARGUMENT**

2. In recent years, the Administration has been receiving comments from Legislative Councillors and non-government organizations (NGOs) about the difficulties encountered by maintenance payees in collecting and enforcing maintenance payments. An Inter-departmental Working Group (WG), in a report published in May 2000, made a series of recommendations to improve the relevant law and administrative measures. The recommendations have been adopted by the Administration. A progress report on their implementation is at **Annex B**.

3. A common complaint made by the NGOs is that some maintenance payers withhold payment until shortly before the court hearings scheduled for the judgement summons (which is the most common legal device to sue for maintenance arrears) but default again after paying for a few months. As a result, the maintenance payees suffer financially, in addition to the inconvenience of having to take repeated legal actions.

4. To address the problem, the WG recommended that the court be empowered to impose surcharge on late payments. When the Hong Kong Bar Association (the Bar Association) and Law Society of Hong

Kong (Law Society) were consulted on the draft legislation, the Bar Association expressed concerns on the grounds that –

- (a) a surcharge amounted to a punitive measure, which was against the philosophy of family law; and
- (b) a maintenance payee might be unjustly enriched as a result of the proposed surcharge.

5. The Bar Association proposed, instead, that interest at judgement rates (i.e. interest rates determined by the Chief Justice from time to time in respect of judgement debts) be introduced. The Bar Association considered that there was no good reason not to regard arrears of maintenance as any other judgment debts, which attracted interest at judgment rates. The proposal was supported by the Law Society and also, the Judiciary Administrator after consultation within the Judiciary.

6. After further consideration, we propose that –

- (a) maintenance payees may apply for interest in legal proceedings instituted to recover maintenance arrears; and
- (b) the court shall have a discretionary power to award interest, at judgement rates\*, after taking into account factors such as the maintenance payers' ability to pay and whether or not he has given the maintenance payee a reasonable explanation for his failure to pay punctually.

7. The purposes of the proposal are to –

- (a) compensate 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 maintenance payments;

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\* The judgement rate, approved by the Chief Justice, is set at three percentage points above the average best lending rate charged by Hongkong Bank over a period of three months. In December 2001, the judgement rate is 9.82%.

- (b) correct the present wrong signal, caused by the fact that no interest can be levied on any maintenance arrears, that late payments are permitted by the law; and
- (c) achieve (a) and (b) above without penalizing any maintenance payer who has a reasonable excuse for late payment or who cannot afford to pay the interest.

## **THE BILL**

8. Implementation of the proposal requires amendments to four Ordinances relating to maintenance orders. They are the Guardianship of Minors Ordinance (GMO), Separation and Maintenance Orders Ordinance (SMOO), Matrimonial Causes Ordinance (MCO) and Matrimonial Proceedings and Property Ordinance (MPPO).

### **Part II: Amendment of the Guardianship of Minors Ordinance**

9. Clause 2 of the Bill adds a definition to the term “maintenance order” to GMO so that the definition will be applicable to the whole Ordinance (similar arrangements made in Clause 5 and 9 for SMOO and MPPO respectively). Clause 3 seeks to repeal the definition of “maintenance order” in the existing section 20(1AA) (similar arrangements made in Clauses 6 and 10 for SMOO and MPOO respectively). The effect of the existing definition is that where a lump-sum maintenance order has been issued but the maintenance payer does not pay punctually, the maintenance payee can enforce payment by applying for an attachment of income order (AIO) only if the maintenance order is for the lump sum to be paid by instalments. A payee cannot do so if the lump sum is to be paid in one amount. If the proposed amendment is enacted, the court may issue, in respect of a lump-sum maintenance order (as defined in section 2), an AIO regardless of whether the lump sum is to be paid in one amount or by instalments.

10. Clause 4 of the Bill seeks to empower the court to order, in any proceedings to enforce a maintenance order, the payment of interest (similar arrangements made in Clauses 7, 8 and 11 for SMOO, MCO and MPPO). No retrospectivity is allowed. The court may exercise such a

power only –

- (a) in enforcement proceedings instituted on or after the commencement date of the new legislative provision; and
- (b) in respect of maintenance arrears which accrue on or after the commencement date.

11. The proposed sub-section (3) of the above Clause provides a formula to calculate the maximum amount of interest.

12. The proposed sub-section (4) of the above Clause provides for the factors which the court shall take account in deciding whether or not to impose interest and if so, the amount. The provision seeks to strike a right balance between the interests of the maintenance payees and those of the maintenance payers.

**Part III: Amendment of the Separation and Maintenance Orders Ordinance**

**Part IV: Amendment of the Matrimonial Causes Ordinance**

**Part V: Amendment of the Matrimonial Proceedings and Property Ordinance**

13. The proposed amendments in each part are similar to those under Part II, i.e. paragraphs 9 to 12 above, except for Part IV to which a definition of “maintenance order” is inserted because there is no such definition in the existing MCO.

**PUBLIC CONSULTATION**

14. The Bar Association and Law Society were consulted on the contents of the legislative amendments to impose interest on maintenance arrears. Their suggestions have been incorporated in the Bill.

**BASIC LAW IMPLICATIONS**

15. The Department of Justice advises that the Bill does not conflict with those provisions of the Basic Law carrying no human rights

implications.

## **HUMAN RIGHTS IMPLICATIONS**

16. The Department of Justice advises that the Bill is consistent with the human rights provisions of the Basic Law.

17. This legislative exercise is a positive step towards the implementation of Article 27(4) of the United Nations Convention on the Rights of the Child as the potential liability to pay interest on maintenance arrears may provide an incentive for maintenance payers to make full and punctual payments. Article 27(4) requires parties to the Convention to “take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child”.

## **BINDING EFFECTS OF THE LEGISLATION**

18. The amendments will not affect the current binding effect of the four Ordinances set out in paragraph 8 above.

## **FINANCIAL AND STAFFING IMPLICATIONS**

19. By discouraging deferred maintenance payments or default through the imposition of interest, the proposal could possibly reduce the number of single-parent families who have to apply for Comprehensive Social Security Assistance (CSSA) due to failure in receiving maintenance payments. The number of such cases, however, cannot be estimated. It is believed that the savings from single-parent families leaving the CSSA net, if arising, should be insignificant.

20. There are no staffing implications arising from the proposal.

## **LEGISLATIVE TIMETABLE**

21. The legislative timetable will be as follows –

|  |                  |
|--|------------------|
| Publication in the Gazette   | 21 December 2001 |
| First Reading and commencement of the Second Reading debate            | 9 January 2002   |
| Resumption of Second Reading debate, committee stage and Third Reading | To be notified   |

## **PUBLICITY**

22. A press release will be issued on 20 December 2001. A spokesman will be available to handle media and public enquiries.

## **ENQUIRY**

23. Enquiries on this LegCo brief may be directed to Mr Ng Hon-wah, Principal Assistant Secretary for Home Affairs, at telephone number 2835 1383.

**Home Affairs Bureau**  
**20 December 2001**  
**HAB/CR/1/19/96 Pt.2**

**INTEREST ON ARREARS OF MAINTENANCE BILL 2001****CONTENTS**

| Clause                                      |  | Page |
|---|--|------|
| PART I                                      |  |      |
| PRELIMINARY                                 |  |      |
| 1.  | Short title and commencement               | 1    |
| PART II                                     |  |      |
| GUARDIANSHIP OF MINORS ORDINANCE            |  |      |
| 2.  | Interpretation                             | 1    |
| 3.  | Attachment of income to satisfy order      | 2    |
| 4.  | Section added                              |      |
|   | 20A. Interest on arrears of<br>maintenance | 2    |
| PART III                                    |  |      |
| SEPARATION AND MAINTENANCE ORDERS ORDINANCE |  |      |
| 5.  | Interpretation                             | 5    |
| 6.  | Attachment of income to satisfy order      | 5    |
| 7.  | Section added                              |      |
|   | 9B. Interest on arrears of maintenance     | 5    |
| PART IV                                     |  |      |
| MATRIMONIAL CAUSES ORDINANCE                |  |      |
| 8.  | Section added                              |      |
|   | 53A. Interest on arrears of<br>maintenance | 8    |

| Clause   |   | Page |
|--|---|------|
| PART V   |   |      |
| MATRIMONIAL PROCEEDINGS AND PROPERTY ORDINANCE |   |      |
| 9.   | Interpretation                              | 11   |
| 10.  | Attachment of income to satisfy order       | 11   |
| 11.  | Section added                               |      |
|  | 28AA. Interest on arrears of<br>maintenance | 11   |

|   |                |    |
|---|----------------|----|
| PART VI                                 |                |    |
| CONSEQUENTIAL AMENDMENTS                |                |    |
| <b>Attachment of Income Order Rules</b> |                |    |
| 12.                                     | Interpretation | 14 |

A BILL

To

Amend the Guardianship of Minors Ordinance, the Separation and Maintenance Orders Ordinance, the Matrimonial Causes Ordinance and the Matrimonial Proceedings and Property Ordinance.

Enacted by the Legislative Council.

PART I

PRELIMINARY

**1. Short title and commencement**

(1) This Ordinance may be cited as the Interest on Arrears of Maintenance Ordinance 2001.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Home Affairs by notice published in the Gazette.

PART II

GUARDIANSHIP OF MINORS ORDINANCE

**2. Interpretation**

Section 2 of the Guardianship of Minors Ordinance (Cap. 13) is amended by adding -

"maintenance order" (贍養令) means an order made -

- (a) under section 10(2)(b), 11(1)(b)(ii), 12(b)(ii) or 13(2)(b), (3)(a) or (4) for periodical payments; or
- (b) under section 10(2)(c), 11(1)(b)(iii) or 12(b)(iii) for secured periodical payments; or
- (c) under section 10(2)(a), 11(1)(b)(i), 12(b)(i) or 13(2)(a) for payment of a lump sum;".

### **3. Attachment of income to satisfy order**

Section 20(1AA) is amended by repealing the definition of "maintenance order".

### **4. Section added**

The following is added in Part IV -

#### **"20A. Interest on arrears of maintenance**

(1) In this section -

"commencement date" (生效日期) means the date on which the

Interest on Arrears of Maintenance Ordinance 2001

( of 2002) comes into operation;

"judgment creditor" (判定債權人) means a person entitled to

enforce a maintenance order;

"judgment debtor" (判定債務人) means a person liable under a

maintenance order;

"judgment rate" (判定利率) means the rate of interest

determined by the Chief Justice under section 49(1)(b) of the High Court Ordinance (Cap. 4) or section 50(1)(b) of the District Court Ordinance (Cap. 336), as the case may be.

(2) Where a maintenance order has been made against a judgment debtor, and the judgment debtor fails to make full and punctual payment in compliance with the maintenance order, the court may, on an application made by the judgment creditor in any proceedings instituted on or after the commencement date for enforcing the maintenance order, require the judgment debtor to pay interest in respect of arrears of maintenance which accrue on or after the commencement date.

(3) The amount of interest for the purpose of subsection (2) shall not exceed the total of the amounts which are calculated in accordance with the following formula -

$$A \times B \times \frac{C}{365}$$

where -

A represents the amount unpaid in respect of each periodical payment, each secured periodical payment or payment of a lump sum, as the case may be, under the maintenance order; and

B represents the judgment rate prevailing on the due day for payment specified by the maintenance order; and

C represents the number of days, from the day following the due day for payment specified by the maintenance order to the day of actual payment of the amount unpaid.

(4) In determining whether to require the judgment debtor to pay interest and, if so, the amount of interest, the court shall take into account all the circumstances of the case, including (but not limited to) the following -

- (a) whether the judgment debtor has a reasonable excuse for his failure to comply with the maintenance order;
- (b) whether the judgment debtor has evaded service of court documents;
- (c) the judgment debtor's past record and conduct in connection with the making of maintenance payments to the judgment creditor pursuant to the maintenance order or an undertaking in any proceedings;
- (d) whether the judgment debtor has given the judgment creditor a reasonable explanation for his failure to comply with the maintenance order; and
- (e) the judgment debtor's ability to pay."

PART III

SEPARATION AND MAINTENANCE ORDERS ORDINANCE

**5. Interpretation**

Section 2 of the Separation and Maintenance Orders Ordinance (Cap. 16) is amended by adding -

"maintenance order" (贍養令) means an order made -

(a) under section 5(1)(c) or (d) or 9(1) for periodical payments; or

(b) under section 5(1)(c) or (d) for payment of a lump sum;".

**6. Attachment of income to satisfy order**

Section 9A(1AA) is amended by repealing the definition of "maintenance order".

**7. Section added**

The following is added -

**"9B. Interest on arrears of maintenance**

(1) In this section -

"commencement date" (生效日期) means the date on which the

Interest on Arrears of Maintenance Ordinance 2001

( of 2002) comes into operation;

"judgment creditor" (判定債權人) means a person entitled to enforce a maintenance order;

"judgment debtor" (判定債務人) means a person liable under a maintenance order;

"judgment rate" (判定利率) means the rate of interest determined by the Chief Justice under section 49(1)(b) of the High Court Ordinance (Cap. 4) or section 50(1)(b) of the District Court Ordinance (Cap. 336), as the case may be.

(2) Where a maintenance order has been made against a judgment debtor, and the judgment debtor fails to make full and punctual payment in compliance with the maintenance order, the court may, on an application made by the judgment creditor in any proceedings instituted on or after the commencement date for enforcing the maintenance order, require the judgment debtor to pay interest in respect of arrears of maintenance which accrue on or after the commencement date.

(3) The amount of interest for the purpose of subsection (2) shall not exceed the total of the amounts which are calculated in accordance with the following formula -

$$A \times B \times \frac{C}{365}$$

where -

- A represents the amount unpaid in respect of each periodical payment or payment of a lump sum, as the case may be, under the maintenance order; and
- B represents the judgment rate prevailing on the due day for payment specified by the maintenance order; and
- C represents the number of days, from the day following the due day for payment specified by the maintenance order to the day of actual payment of the amount unpaid.

(4) In determining whether to require the judgment debtor to pay interest and, if so, the amount of interest, the court shall take into account all the circumstances of the case, including (but not limited to) the following -

- (a) whether the judgment debtor has a reasonable excuse for his failure to comply with the maintenance order;
- (b) whether the judgment debtor has evaded service of court documents;
- (c) the judgment debtor's past record and conduct in connection with the making of maintenance payments to the judgment creditor pursuant to the maintenance order or an undertaking in any proceedings;
- (d) whether the judgment debtor has given the judgment creditor a reasonable explanation for

his failure to comply with the maintenance order; and

(e) the judgment debtor's ability to pay.".

PART IV

MATRIMONIAL CAUSES ORDINANCE

**8. Section added**

The Matrimonial Causes Ordinance (Cap. 179) is amended by adding -

**"53A. Interest on arrears of maintenance**

(1) In this section -

"commencement date" (生效日期) means the date on which the Interest on Arrears of Maintenance Ordinance 2001

( of 2002) comes into operation;

"judgment creditor" (判定債權人) means a person entitled to enforce a maintenance order;

"judgment debtor" (判定債務人) means a person liable under a maintenance order;

"judgment rate" (判定利率) means the rate of interest determined by the Chief Justice under section 49(1)(b) of the High Court Ordinance (Cap. 4) or section 50(1)(b) of the District Court Ordinance (Cap. 336), as the case may be;

"maintenance order" (贍養令) means an order made in the matrimonial cause for the payment of money.

(2) Where a maintenance order has been made against a judgment debtor, and the judgment debtor fails to make full and punctual payment in compliance with the maintenance order, the court may, on an application made by the judgment creditor in any proceedings instituted on or after the commencement date for enforcing the maintenance order, require the judgment debtor to pay interest in respect of arrears of maintenance which accrue on or after the commencement date.

(3) The amount of interest for the purpose of subsection (2) shall not exceed the total of the amounts which are calculated in accordance with the following formula -

$$A \times B \times \frac{C}{365}$$

where -

A represents the amount unpaid in respect of each periodical payment, each secured periodical payment or payment of a lump sum, as the case may be, under the maintenance order; and

B represents the judgment rate prevailing on the due day for payment specified by the maintenance order; and

C represents the number of days, from the day following the due day for payment specified by the maintenance order to the day of actual payment of the amount unpaid.

(4) In determining whether to require the judgment debtor to pay interest and, if so, the amount of interest, the court shall take into account all the circumstances of the case, including (but not limited to) the following -

- (a) whether the judgment debtor has a reasonable excuse for his failure to comply with the maintenance order;
- (b) whether the judgment debtor has evaded service of court documents;
- (c) the judgment debtor's past record and conduct in connection with the making of maintenance payments to the judgment creditor pursuant to the maintenance order or an undertaking in any proceedings;
- (d) whether the judgment debtor has given the judgment creditor a reasonable explanation for his failure to comply with the maintenance order; and
- (e) the judgment debtor's ability to pay."

PART V

MATRIMONIAL PROCEEDINGS AND PROPERTY ORDINANCE

**9. Interpretation**

Section 2(1) of the Matrimonial Proceedings and Property Ordinance (Cap. 192) is amended by adding -

"maintenance order" (贍養令) means an order made -

- (a) under section 4(1)(a), 5(2)(a), 8(5) or (6)(a) or (d) or 15(4) or (5) for periodical payments; or
- (b) under section 4(1)(b), 5(2)(b), 8(6)(b) or (e) or 15(4) or (5) for secured periodical payments; or
- (c) under section 4(1)(c), 5(2)(c) or 8(6)(c) or (f) for payment of a lump sum;".

**10. Attachment of income to satisfy order**

Section 28(1AA) is amended by repealing the definition of "maintenance order".

**11. Section added**

The following is added before section 28A -

**"28AA. Interest on arrears of maintenance**

- (1) In this section -

"commencement date" (生效日期) means the date on which the Interest on Arrears of Maintenance Ordinance 2001 ( of 2002) comes into operation;

"judgment creditor" (判定債權人) means a person entitled to enforce a maintenance order;

"judgment debtor" (判定債務人) means a person liable under a maintenance order;

"judgment rate" (判定利率) means the rate of interest determined by the Chief Justice under section 49(1)(b) of the High Court Ordinance (Cap. 4) or section 50(1)(b) of the District Court Ordinance (Cap. 336), as the case may be.

(2) Where a maintenance order has been made against a judgment debtor, and the judgment debtor fails to make full and punctual payment in compliance with the maintenance order, the court may, on an application made by the judgment creditor in any proceedings instituted on or after the commencement date for enforcing the maintenance order, require the judgment debtor to pay interest in respect of arrears of maintenance which accrue on or after the commencement date.

(3) The amount of interest for the purpose of subsection (2) shall not exceed the total of the amounts which are calculated in accordance with the following formula -

$$A \times B \times \frac{C}{365}$$

where -

A represents the amount unpaid in respect of each periodical payment, each secured periodical payment or payment of a lump sum, as the case may be, under the maintenance order; and

B represents the judgment rate prevailing on the due day for payment specified by the maintenance order; and

C represents the number of days, from the day following the due day for payment specified by the maintenance order to the day of actual payment of the amount unpaid.

(4) In determining whether to require the judgment debtor to pay interest and, if so, the amount of interest, the court shall take into account all the circumstances of the case, including (but not limited to) the following -

- (a) whether the judgment debtor has a reasonable excuse for his failure to comply with the maintenance order;
- (b) whether the judgment debtor has evaded service of court documents;
- (c) the judgment debtor's past record and conduct in connection with the making of maintenance payments to the judgment creditor pursuant to

the maintenance order or an undertaking in any proceedings;

- (d) whether the judgment debtor has given the judgment creditor a reasonable explanation for his failure to comply with the maintenance order; and
- (e) the judgment debtor's ability to pay."

## PART VI

### CONSEQUENTIAL AMENDMENTS

#### **Attachment of Income Order Rules**

#### **12. Interpretation**

Rule 2 of the Attachment of Income Order Rules (Cap. 13 sub. leg.) is amended, in the definition of "related maintenance order", by repealing "20(1AA)", "9A(1AA)" and "28(1AA)" and substituting "2" in all places.

#### **Explanatory Memorandum**

The purposes of this Bill are -

- (a) to amend the Guardianship of Minors Ordinance (Cap. 13), the Separation and Maintenance Orders Ordinance (Cap. 16) and the Matrimonial Proceedings and Property Ordinance (Cap. 192) so that the court may make, in respect of a lump sum maintenance

order, an attachment of income order regardless of whether the lump sum is to be paid in one amount or by instalments (clauses 2, 3, 5, 6, 9 and 10); and

(b) to amend the Guardianship of Minors Ordinance, the Separation and Maintenance Orders Ordinance, the Matrimonial Causes Ordinance (Cap. 179) and the Matrimonial Proceedings and Property Ordinance in empowering the court, in case a judgment debtor defaults to pay maintenance specified by a maintenance order, may require him to pay interest in respect of the arrears which accrue on or after the commencement date of this Ordinance (clauses 4, 7, 8 and 11).

## Annex B

### **Progress Report on the Recommendations Endorsed by the Administration in May 2000**

| <i>Item</i> | <i>Recommendation</i>  | <i>Progress</i>   |
|-------------|--|---|
| (a)         | To relax the circumstances for the issue of Attachment of Income Orders.   | <ul style="list-style-type: none"><li>• The Attachment of Income Order (Amendment) Ordinance was enacted in July 2001.</li><li>• The Attachment of Income Order (Amendment) Rules 2001 was gazetted on 7 December 2001.</li></ul> |
| (b)         | To relax the requirement for judgement summons to be served personally and to enable the court to order payment of maintenance arrears accrued up to the date of court hearing instead of up to the date of application for judgement summons as at present. | The draft Amendment Rules are being finalized and will be sent to the Bar Association and Law Society for comments within the year 2001.  |
| (c)         | Court Bailiffs to serve judgement summons for maintenance payees who are not legally represented.  | The non-governmental organizations (NGOs) and professional bodies have been informed.<br><b>Action completed.</b>   |
| (d)         | The court to order that maintenance specified in maintenance orders be paid into court in appropriate cases.   | The NGOs and professional bodies have been informed.<br><b>Action completed.</b>  |
| (e)         | To empower the court to impose a surcharge against defaulting maintenance payers.  | The Home Affairs Bureau now proposes, instead, to empower the court to impose interest at judgment rate on maintenance arrears. This is the subject matter of the present Bill.   |

| <i>Item</i> | <i>Recommendation</i>  | <i>Progress</i>  |
|-------------|--|--|
| (f)         | To inform NGOs and professional bodies that cases of maintenance payers failing to notify the maintenance payees of changes of address can be reported to the police.  | The NGOs and professional bodies have been informed.<br><b><i>Action completed.</i></b>                        |
| (g)         | To request the Law Society to inform its members that they can, with the use of a standard letter, request the Immigration Department, Transport Department, and Housing Department to search their records for the addresses of maintenance payers against whom legal actions will be taken to sue for maintenance arrears. | The Law Society has been informed.<br><b><i>Action completed.</i></b>  |
| (h)         | To conduct a pilot scheme to synchronize the procedures in processing applications for CSSA and legal aid.   | The streamlined procedures were made permanent from September 2000 onwards.<br><b><i>Action completed.</i></b> |
| (i)         | Social Welfare Department to streamline the procedures in referring single-parent families to obtain timely counseling and family services.  | New procedures have been put into practice.<br><b><i>Action completed.</i></b>                                 |
| (j)         | To mount publicity and public education measures on matters relating to maintenance.   | On-going task.   |