



Law Society
of Scotland

Consultation Response

Child Maintenance: A New Compliance and Arrears Strategy

February 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Family Law Sub-committee welcomes the opportunity to consider and respond to the Department of Work & Pensions' consultation: Child Maintenance: A New Compliance and Arrears Strategy. The Sub-committee has the following comments to put forward for consideration.

General comments

We welcome the objectives listed at paragraph 2 of the consultation document, including the objective of "addressing the historic arrears which are built up under the CSA". However, we have concerns over the manner in which this matter is to be addressed.

Under the heading *Encouraging Collaboration* there is a reference to Child Maintenance Options (CMO) which is described as a "free service that provides information and signposts to specialist support". Unfortunately, the information provided is too often inadequate. The service fails to provide information about variations, which is one of the most important aspects of the system. If the staff at CMO were to refer the public to specialist advice in cases where a variation could be appropriate, then the parties who would prefer to reach their own agreements in the light of a notional CMS calculation could be more confident when trying to do so. The answering announcement on the CMO telephone promises the service will provide "information and guidance on all aspects of child maintenance". This is inaccurate and that matter should be addressed urgently. It is accepted that an agreement made between the parties is more satisfactory than a calculation imposed from without. Unfortunately these agreements are susceptible to cancellation after only 12 months, and section 9(4) of the Child Support Act 1991 prohibits contracting out of the statutory system for any longer than that. Although it would not represent a complete answer to the problem, we suggest that the 12 month rule should be extended to 48 months and that the rule against private enforcement of historic arrears should be abolished.

At present the parent with care (PWC) is not able to enforce the child support liability herself. They must rely on the Child Support Agency (CSA) and Child Maintenance Service (CMS) to do the job for them. If this fails then they are left without a remedy. The prohibition on enforcement by the PWC should be

removed, at least for those cases in which CMS proposes to write off arrears. If the DWP considers that a particular sum is irrecoverable, then it should be remembered that under article 1, protocol 1 of ECHR the money belongs not to the Secretary of State but to the PWC. They should not be deprived of the opportunity to recover it herself. They are the one, after all, who has suffered from its non-collection.

At the time of the consultation on the 2012 system we recommended that the 12-month rule should be extended to 36 or to 48 months so that realistic and useful agreements could be entered into between parties, each of whom would be able to rely on the terms of the agreement.¹ At present many useful agreements are not signed due to the prospect of the alimentary part of any such agreement being removed after only one year. We repeat our suggestion that the period of time excluding the jurisdiction of the Secretary of State should be extended. This would encourage parties to reach their own agreements – something which we understand is a policy goal.

Consultation Questions

Where an asset does not generate an income, a notional income would need to be determined. In previous schemes of maintenance this was at a set rate of eight percent of the value of the asset. What notional income should be assumed?

The deemed rate of 8% per annum may have been justifiable in 1993 but became wholly unfair towards the end of the 2003 system. That could happen with any fixed rate. We suggest that a deemed income of 2% above base rate would be fair. That would give a reasonable estimate of income across the board and would prevent a non-resident parent (NRP) from effectively diverting income by deliberately failing to exploit, on the child's behalf, a capital asset with an income potential. We would exclude the paying parent's actual home and would allow exceptions along the lines of the original regulation 18 of the Variations Regulations 2000 for assets which could not reasonably be sold or exploited.

Regulation 20 of the same regulations was another one of the very useful Additional Cases Regulations in the pre-2012 system. If an NRP's lifestyle was plainly higher than could be afforded on his declared income then that in itself could allow a variation. This was difficult to apply sometimes but it did allow for justice to be done in many cases. Anecdotally, we understand that a very high proportion of regulation 20 applications met with refusal at CSA level, but the Tribunals were keener to be creative in applying the law. A return to this provision could help CMS and Tribunals to do justice without having to bend the letter of the remaining regulations by referring to the NRP's apparent expenditure in the course of a challenge to the veracity of the HMRC figure.

¹ National Audit Office Value for Money Study on the Administration of Child Maintenance, The Law Society of Scotland's Response, September 2011

What is the minimum value of an asset on which the CMS should assume a notional income?

We consider that a minimum value of £65,000 would be a reasonable sum. There seems to be no good reason why a qualifying child should not share in such income. We suggest that paragraph 52 of the consultation should be reconsidered in that light.

Do you agree that these measures strike the right balance between improving how we calculate maintenance for complex earners, while protecting tax payers' money by focusing on only those cases most likely to be affected?

We have no comment on this question.

Do you think it's reasonable to extend the facility to make flat rate deductions of maintenance from UC to those who have earnings?

We have no comment on this question.

Do you agree deductions for arrears should be aligned with deductions for on-going maintenance at the equivalent of £8.40 per week?

We have no comment on this question.

We intend to consider representations for both lump sum and regular deductions prior to money being removed from an account. We intend to offer a 28 day and 14 day period respectively in line with our plans for joint accounts. Is there any reason why we shouldn't mirror the process for partnership accounts?

DWP proposes to extend powers to deduct maintenance from accounts held jointly. The principle is a good one but could cause injustice. For example, if an NRP had re-partnered with the mother of another qualifying child, CMS could find itself using its expensive enforcement machinery to remove maintenance received (into a joint account), by one PWC, putting it into the account of another PWC. The strengthened Financial Investigation Unit (FIU) may have to investigate complex cases in which there is a dispute about the two derivation funds in a joint account. The wise NRP will of course ensure that none of his partner's income goes into such a joint account.

By leaving a minimum balance in a debtor's account, DWP needs to strike a balance between the impact on legitimate business activities and collecting maintenance owed in an efficient manner. Are there any reasons you consider we should not follow HMRCs approach of leaving £2000?

We cannot support the proposal to allow deductions orders from partnership accounts. Business structures can be complicated if there is more than one partner and it is not necessarily straightforward to establish which funds should properly be assigned to which partner. The effect on small businesses of having a deduction order on its working funds could be disastrous. There may well be some cases in which it is clear how the account should be attributed and in which the business will not be seriously wounded by such a deduction. However, this will not be so in every case, and expertise would be required in order to make these judgements. This risk is referred to in paragraph 70 but the proposal to allow representations is an inadequate safeguard. The notional figure of £2,000 as a threshold does not solve the problem.

The paying parent is advised to bring their passport with them to the court hearing, and if they fail to do so we intend to ask the court to order the paying parent to surrender it to the court within 48 hours (the deadline would be at the discretion of the court). Is this timescale reasonable?

We have no comment on this question.

Do you think that disqualification of a paying parent's passport for two years would be more effective than current alternative actions, such as commitment to prison or disqualification from driving?

We do not consider that many non-residents parents who defy the statutory systems at the risk of imprisonment or the loss of a driving licence will be pressured into compliance by a threat to remove a passport.

Can you think of any powers that we don't already have that would help us increase compliance and recover arrears within these difficult groups?

Experience tells us that compliance could be increased if there were a greater confidence that maintenance liabilities were being correctly calculated. Too frequently we meet clients who have tried over lengthy periods to persuade CSA/CMS to look properly at the relevant facts of cases. It would be useful to know the percentage of mandatory reconsideration requests which are refused and the percentage of first tier Tribunal decisions made which are in favour of the appellant.

Apart from that, compliance would surely be enhanced if the powers which already exist were to be used. As stated above, we do not consider that many non-residents parents who defy the statutory systems at the risk of imprisonment or the loss of a driving licence will be pressured into compliance by a threat to remove a passport.

The power under section 32L has been in place since the Child Maintenance and Other Payments Act 2008 but has almost never been used. The wealthier or self-employed NRP will often seek to avoid or to minimise liability by transferring assets. Section 32L is designed to reverse such tactics but CSA/CMS have seemed to be unaware of its very existence. This remains an issue even after the abolition of the assets variation in Regulation 18 of the Variations Regulations 2000 because the asset concerned could well be income producing.

Although we welcome the greater resources to be given to the FIU, investigation is only part of the answer. The statutory system should be more willing to use information produced by the FIU to ensure payment. Actual use of section 32L, amongst other remedies could have a beneficial therapeutic effect.

Bearing in mind we have limited resources which we need to focus on collecting money for today's children, what degree of action do you think is reasonable for historic CSA cases?

The proposals to write off historic arrears are not acceptable. It would appear from the consultation that a PWC who is owed £400 under the 2003 rules will not be entitled to insist on the recovery of that money. It should be remembered that the statutory system has prohibited her from seeking that aliment from the NRP directly and has prohibited her from enforcing the calculated debt. It is accepted that the enforcement of a debt of £14.92 which has been outstanding since 2004 would not be a justifiable use of public funds. Nevertheless, the system proposed in the consultation is too unambitious, and fails to do justice to those PWCs who were told that they could not take action themselves to recover money when the case and the liability was fresh. There is no guarantee that CSA/CMS still have the correct addresses for all of these PWCs. If the addresses are not up to date then there will be no request for enforcement. The proposals do not represent an honest way of reducing the uncollected arrears which have built up due to the failures of the statutory system.

Do you think 60 days is a reasonable period of time to allow representations regarding write-off, or would a shorter period be appropriate?

We have no comment on this question.

What information do you think should be included in all write-off notification letters?

We have no comment on this question.

Do you think the proposed thresholds for not offering the opportunity to make representations, based on age of case and amount of debt provide a reasonable balance between cost to taxpayers and fairness to receiving parents?

We have no comment on this question.

Do you think it is reasonable to not send write-off notification letters on cases with debt balances of £65 and under?

We have no comment on this question.



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