

EXPLANATORY MEMORANDUM TO
THE CHILD SUPPORT (MISCELLANEOUS AMENDMENTS) REGULATIONS
2018

2018 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by The Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument introduces a number of changes to child maintenance legislation. These include improving how child maintenance liabilities are calculated, increasing the range of collection and enforcement powers to help collect more money for children and addressing historic arrears that built up under the 1993 and 2003 Child Support Agency (CSA) schemes. It will also introduce powers to write off debt that has been sequestered.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 These regulations have been withdrawn and re-laid, and now include all of the amendments recommended by the JCSI counsel, and two policy amendments. These are as follows:
- that the definition of an asset for the purpose of prescribing a notional income will include assets subject to a trust where the non-resident parent (NRP) is the sole beneficiary or one of a number of beneficiaries;
 - that, in cases where it will be necessary for an NRP to sell an asset in order to pay additional maintenance, the Secretary of State will make the decision as to whether the sale of the asset would be unreasonable or may cause hardship to the child of a NRP;
 - a minor amendment to the definition of virtual currency; and
 - the definition of asset will now include assets owned jointly by, or held in the joint names of, the non-resident parent and another individual or individuals. This is to ensure that a provision which was intended to offer protection to third parties cannot be exploited by an NRP by transferring assets into joint names.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 The territorial application of this instrument includes Scotland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is Great Britain.
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- 4.3 The power to impose deduction orders against joint personal accounts will apply to England and Wales and Scotland. The application of deduction orders against unlimited partnership accounts will apply to partnerships formed in England and Wales but not in Scotland. This is because in Scotland an unlimited partnership has a separate and distinct legal identity from the partners which make it up.
- 4.4 Corresponding provisions will be made for Northern Ireland by the Northern Ireland Department for Communities although powers to disqualify NRPs from holding or obtaining a UK passport will not apply to Northern Ireland.

5. European Convention on Human Rights

- 5.1 The Minister for Family Support Housing and Child Maintenance, Justin Tomlinson MP has made the following statement regarding Human Rights:

“In my view the provisions of the Child Support (Miscellaneous Amendments) Regulations 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The 1991 Child Support Act as amended introduced statutory child maintenance to ensure that parents no longer living with their children continue to fulfil their obligations to make financial provision for those children.
- 6.2 There are currently three statutory schemes in place; the 1993 and 2003 schemes (collectively known as the ‘legacy schemes’) administered by the Child Support Agency (CSA) and the 2012 scheme administered by the Child Maintenance Service (CMS). The process of ending liabilities in all existing legacy scheme cases began in June 2014 and is due to end in 2018.
- 6.3 These Regulations have been made using the following powers:
- Paragraph 4(2) of Schedule 4B to the Child Support Act 1991 enables the Secretary to State to make regulations prescribing cases in which a variation can be made to a maintenance calculation. These Regulations seek to amend the Child Support Maintenance (Calculation) Regulations 2012 to allow for a variation on the grounds of notional income from assets.
 - Sections 14, 32A, 32C and 32D of the 1991 Act make provision for regular deduction orders in respect of joint and unlimited partnership accounts¹ for which a liable NRP is an account-holder. These Regulations will set out how these provisions will be applied.
 - Sections 14, 32E, 32F, 32I, 32J, 32K of the 1991 Act make provision for lump sum deduction orders in respect of joint, sole trader and unlimited partnership accounts for which a liable NRP is an account-holder. These Regulations will set out how these provisions will be applied.
 - Section 27 of the Child Maintenance and Other Payments Act 2008 makes provision for new sections 39B to 39G to be inserted into the Child Support Act 1991. These provisions will be commenced by way of a commencement order. Under these new powers the Secretary of State may apply to the court for an order to disqualify parents from holding or obtaining travel authorisation - a UK passport for up to two years where the court is satisfied

¹ Such partnerships are ones formed in England and Wales.

there has been wilful refusal or culpable neglect by the NRP. These Regulations make provision for commitment to prison in cases where an NRP fails to appear or surrender his/her passport.

- Under Section 41E of the Child Support Act 1991 the Secretary of State has a discretion to write off arrears only if he considers that it would be unfair or inappropriate to enforce the liability and the circumstances of the case are specified in regulations. These circumstances are set out in the Child Support (Management of Payments and Arrears) Regulations 2009.
- 6.4 This package of regulations seeks to amend the Child Support (Management of Payments and Arrears) Regulations 2009 by extending our powers to write off non-paying debt that built up under legacy schemes in certain specific circumstances.
- 6.5 These Regulations will also give the Secretary of State the power to write off arrears which relate to debt which is subject to sequestration (insolvency) in Scotland for legacy schemes or 2012 scheme cases, once the trustee administering the sequestration has paid out any dividends to creditors and the period of sequestration has been discharged.

7. Policy background

What is being done and why?

- 7.1 The policy objective of the parent Act (the Child Support Act 1991) is to ensure that NRPs fulfil their obligations to provide financial support to their children. The changes made will help prevent NRPs with complex financial arrangements from artificially lowering their child maintenance liability, as well as closing loopholes that currently exist by introducing new provision for orders which would enable regular or lump sum deductions to be made from joint, sole trader and unlimited partnership accounts. The ability to remove passports from non-compliant NRPs will provide a powerful incentive to comply with their responsibilities.
- 7.2 Changes made will also introduce powers to allow for arrears which accrued on the legacy schemes to be written off in certain circumstances. With the final closure of the CSA approaching, all CSA cases will need to be closed. These powers will allow the Department to give certainty to clients over our approach to this debt, while focussing on collecting money that will benefit children today, in line with the policy objective of the parent Act - Child Support Act 1991.

Child maintenance calculation amendments

- 7.3 The Child Maintenance Calculation Regulations 2012 are being amended to go some way towards addressing the concerns of stakeholders that a small number of wealthy NRPs are currently able to use complex arrangements of assets to artificially lower their child maintenance liability, or avoid it entirely. The legacy schemes have provisions to determine a notional income from assets held that were not carried forward to the 2012 scheme, as the method of calculation on that scheme allowed for a more comprehensive range of income types to be taken into account – i.e. earned and unearned income (subject to taxation by HM Revenue & Customs).
- 7.4 With the maturity of the current scheme, we recognise that there are still some NRPs for whom adding a notional income from assets provision would lead to a more appropriate income figure being used to calculate a maintenance liability. These

Regulations introduce this power for use in the 2012 scheme, to ensure our approach to the calculation of maintenance liabilities results in NRPs paying an amount that more accurately reflects their means.

- 7.5 The change enables a notional income to be taken into account where a NRP holds assets of a high value. We think this new provision will be particularly appropriate in situations where an individual has an affluent lifestyle, and a source of income cannot be identified but ownership of significant assets can be.
- 7.6 When an asset falls within this power, it will be considered to be producing an income according to a set percentage. Eight per cent has been chosen as the set percentage as it was used for this purpose on the 2003 scheme, and was subject to public consultation.
- 7.7 Protections within these Regulations are present to ensure the use of the power is proportionate.
 - a) To provide a minimum single value of £31,250 below which we would not use this power. This is to prevent large numbers of low value assets being targeted, as this would be difficult to administer (although, to be clear, where for example the NRP has a number of gold bars or a number of shares, these will be treated as one asset). It will also allow for the minimum level of notional income to be set at £2,500 per year. This is the same as the current threshold for variation based on unearned income, so ensures our overall approach remains consistent.
 - b) To disregard the primary residence of the NRP, or any child of the NRP. This is to ensure that there is no risk of the NRP and dependents losing their home where it is necessary to sell the property in order to pay any additional maintenance which would become payable as a result of taking the property into account.
 - c) In the case of an asset which is subject to a mortgage or charge, only the value of the equity in the property will be taken into account.
 - d) An asset already producing an income stream captured by the standard calculation or other variation provisions is disregarded. This is to prevent income being generated twice for an asset.
 - e) Assets used in the course of the NRP's business will not be taken into account.

Deductions from joint and unlimited partnership accounts

- 7.8 We want to do more to prevent parents from evading their financial obligations to their children by amending the Child Support (Collection and Enforcement) Regulations 1992 to extend the Secretary of State's ability to use regular and lump sum deduction orders in relation to joint and unlimited partnership bank accounts and use lump sum deduction orders in relation to sole trader accounts.
- 7.9 It has become evident over the years that a loophole exists where NRPs are able to place all their funds into joint or unlimited partnership accounts rendering them inaccessible.
- 7.10 The Department has been clear that it wishes to strike a balance between recovering money from NRPs who are refusing to pay child support maintenance while protecting the rights of other account holders. A number of safeguards have been put in place to prevent the other account holder's funds being deducted.

- 7.11 Before action is taken, the last six months' bank statements will be checked to establish ownership of funds. In a small number of cases, where despite investigation it is not possible to establish how much of the funds within the account belong to the NRP (for example, because no evidence is furnished as to ownership), a pro-rata approach will be adopted. This will assume the NRP has an equal share of the funds as the other account holders.
- 7.12 All account holders will be notified that action is to be taken and given the opportunity to make representations in relation to the funds targeted. Representation periods will be set at 14 days for Regular Deduction Orders (RDOs) and 28 days for Lump Sum Deduction Orders (LSDOs).
- 7.13 For regular and lump sum deductions orders all joint account-holders will have the right to apply for a review or variation of the order made. Where appropriate the department may make the decision to lapse either or both a RDO or LSDO, and may choose to revive these deduction orders where appropriate. All account holders will have appeal rights.

Passports

- 7.14 We are commencing powers in sections 39B to 39G of the Child Support Act 1991 and making regulations to enable the Secretary of State to apply to the court for an order to disqualify a NRP from holding or obtaining a UK passport. The grounds for obtaining an order are that there has been wilful refusal to pay the child maintenance due, or culpable neglect. The order can last for a maximum period of two years.
- 7.15 The powers will be brought into effect for use under all three child maintenance schemes. They will only be used where all other enforcement options have been attempted but proved unsuccessful at recovering the full sums owed, and where the NRP has the financial means but demonstrates wilful refusal or culpable neglect in making payment.
- 7.16 Disqualification from holding or obtaining a UK passport may be used as an alternative to commitment to prison.

Historic debt built up on Child Support Agency schemes

- 7.17 We want to extend the Secretary of State's write-off powers, to end the uncertainty for families about how the £2.5bn historic arrears owed to parents that built up under the legacy schemes will be treated in future. Now is the right time to address these arrears as the final liabilities on CSA systems are brought to an end during 2018.
- 7.18 We have considered a range of options to address these historic arrears which are included in our consultation that can be found at www.gov.uk/government/consultations/child-maintenance-a-new-compliance-and-arrears-strategy.
- 7.19 Some of the things we considered included selling the debt to debt collection agency although our investigations revealed this was not a commercially viable option.
- 7.20 To attempt to collect all of the £3.7bn CSA debt of which £2.5bn is owed to parents and £1.2bn is owed to government would cost around £1.5bn. This would involve us working on every case. Based on our estimations this would collect between £0.1bn

and £0.6bn. The £0.6bn is based on achieving 100% compliance in the cases where we can recover – this is highly unlikely to be the case. The likely low levels of collection are due to NRPs simply not having the resources to pay these debts.

- 7.21 To continue maintaining the historic debt on CSA IT systems would incur significant technology costs of around £30 million per year – an annual cost potentially lasting for decades.
- 7.22 Moving all the debt to the CMS system would cost around £230 million, requiring a check of the debt balance for each case before it is moved to ensure it is correct. Each of these options would require significant amounts of taxpayer funding while doing nothing to increase the amount of money flowing to children.
- 7.23 The NAO and the Work and Pensions Select Committee have recently asked the Department to clarify its position in relation to historic arrears cases. Taking action now to address these historic arrears will allow us to draw a final line under the problems of the previous child support systems and focus on building on the success of the CMS. It will also give us the opportunity to offer Parents with Care (PWCs) a final chance at collection, where it is cost effective to do so and we can be reasonably certain the action would be successful.
- 7.24 These Regulations amend the Child Support (Management of Payments and Arrears) Regulations 2009 by providing additional circumstances in which the Secretary of State may exercise the power to write off arrears.
- 7.25 The regulations will allow representations to be sought from clients who have a 1993 or 2003 CSA scheme cases where there has not been a payment in the last three months. The client will need to make a representation to the CMS if they would like a last attempt to collect the debt, where:
- the case started on or before 1 November 2008 and the debt is more than £1000, or
 - the case started after 1 November 2008 and the debt is more than £500.
 - the arrears accrued under a 1993 or 2003 scheme case which have transferred to the CMS system and the debt is more than £500.
- 7.26 Where no representations are received, or collection of the debt is not possible, the Secretary of State may exercise the power to write off the debt.
- 7.27 The regulations will also enable CSA debt to be written off without seeking representations from clients, where there has not been a payment in the last three months and:
- the case started on or before 1 November 2008 and the debt is less than £1000, or
 - the case started after 1 November 2008 and the debt is less than £500.
 - the arrears accrued under a 1993 or 2003 scheme case which have transferred to the CMS system and the debt is less than £500.
- 7.28 It is not cost effective to attempt collection on individual debts of less than £500 (or debts of less than £1000 where the case is ten or more years old). It costs on average between £500 and £1000 to investigate and take action on these cases. This average cost includes some of the cases going forward for collection activity in our arrears teams and some cases being put through legal enforcement processes. The thresholds

based on age of case and amount of debt provide a reasonable cut off point to ensure that cases are not pursued at disproportionate cost to the taxpayer.

- 7.29 Where a case has CSA debt under £65 and payments have not been received in the last three months, these regulations will enable it to be written off without notice to the parties.
- 7.30 If a case has debt subject to sequestration (Scottish insolvency) these regulations will enable it to be written off when the sequestration expires. This technical amendment will apply to both CSA and CMS cases, as this debt becomes legally uncollectable due to the way sequestration operates.
- 7.31 In respect of these new circumstances, the Regulations amend existing provisions relating to the Secretary of State's duties to send written notice; consider representations; and notify the parties of the decision to write off the arrears.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 No consolidation changes are being made in this package of regulations.

10. Consultation outcome

- 10.1 We consulted on these measures between 14th December 2017 and 8th February 2018. We received a total of 99 responses: 11 from organisations and 88 from private individuals, of which 21 identified themselves as paying parents and 24 as receiving parents.
- 10.2 The consultation invited responses to 15 questions covering the following measures included in this package:
- how child maintenance liabilities are calculated;
 - new enforcement powers for the CMS; and
 - how to deal with CSA arrears.
- 10.3 The overall response to our proposals for improving the calculation of child maintenance liabilities was positive.
- 10.4 Respondents offered a range of views on our proposed new power to allow the CMS to derive a notional income from an asset for the purpose of varying a calculation.
- 10.5 There was no clear consensus on the percentage rate we should use to derive a notional income or minimum value. We therefore opted to proceed with the 8% rate proposed in line with the Judgment Debts (rate of interest) Order 1993, and we will set the minimum value of £31,250.
- 10.6 For joint and unlimited partnership business accounts, a number of respondents expressed concern that the other account holder's funds could be deducted when we introduce deductions from joint and business accounts. To address these concerns we have put additional checks in place for joint and business accounts to ensure the other account holders funds are not deducted in error, as well as introducing representation

periods for all account holders of 14 days for regular deduction orders (RDOs) and 28 days for lump sum deduction orders (LSDOs).

- 10.7 For RDOs, since funds cannot be frozen, once deducted from the NRP's account they will be held by the Secretary of State for a period of time before being paid to the PWC, although this will be in our procedures and is not provided for in these Regulations. We will also leave a minimum of £2000 in unlimited partnership business accounts to safeguard businesses and allow them to continue to trade, this will not be included in the regulations so we can monitor how it is working.
- 10.8 Our proposal to introduce a new power to disqualify those parents who consistently fail to pay from holding a passport were received positively. Following comments during the consultation that the ban should be revoked if payment is made, we adapted our approach and will now revoke the restrictions we have placed on passports if the NRP pays their outstanding debt in full. This will hopefully provide a strong incentive for parents to pay, even at this late stage.
- 10.9 On the whole our proposals for tackling the arrears built up under the CSA were well received. Many respondents agreed that clients should be given certainty over the status of this debt. Respondents also understood why we proposed to focus our efforts of collection on those cases where we can be reasonably certain of success
- 10.10 We proposed to give parents with care the opportunity to make written representations to us about whether their arrears should be written-off, for which they would have 60 days to respond.
- 10.11 The responses to this question were considered carefully when we developed our policy. There was no clear consensus amongst respondents on what the period would be best; some felt a shorter period would be preferable as it would ultimately allow for action to be taken quicker. Others felt that 60 days or longer was appropriate. We ultimately decided to retain the 60 day period as we feel it offers clients sufficient time to make what it a very important decision, without unduly delaying any action we could take.
- 10.12 We sought views on what type of information should be contained in letters about writing off debt. Responses were mixed on whether we should include final debt balances and details about accrual periods. On this basis we decided to continue with our proposal not to include accrual periods in any of these letters and to only include debt balances where the debt relates to a case with an effective date after 1st November 2008.
- 10.13 The consultation also sought views on whether our thresholds for not offering the opportunity to make representations were reasonable. These thresholds are based upon age of case and amount of debt. We also sought views upon our proposal to not send letters in cases with debt balances under £65 notifying the parties that the debt is to be written off. The majority of respondents agreed with the proposals. Some respondents disagreed with the level of the thresholds but did not suggest an alternative amount and accepted that having a threshold was the right approach. On this basis we decided to proceed with our current proposals. The full consultation response can be found at <https://www.gov.uk/government/consultations/child-maintenance-a-new-compliance-and-arrears-strategy>

11. Guidance

- 11.1 The Department is continuing to work to ensure that its clients and stakeholders are fully informed of the changes arising from the introduction of these powers. Information will be made available on our website explaining the changes and how they will impact clients.

12. Impact

- 12.1 An Impact Assessment is submitted with this memorandum and is published alongside the Explanatory Memorandum on the <http://www.legislation.gov.uk/>. This document sets out the expected costs to business introduced by this legislation.
- 12.2 There are three measures which will impose new costs on businesses: (1) provision for deductions from joint accounts; (2) provision for deduction from business partnership accounts; and (3) provision for lump sum deductions from sole trader accounts. A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the [legislation.gov.uk](http://www.legislation.gov.uk) website.
- 12.3 For joint accounts and business partnership accounts, banks and building societies will incur costs when a deduction order is used to obtain child maintenance arrears. This will only occur when no solely held accounts with sufficient funds are identified. In the case of Lump Sum Deduction Orders (LSDOs) there is a one-off cost of approximately £40 per LSDO. In the case of Regular Deduction Orders (RDOs), there are one-off set up and shut down costs as well as ongoing deduction and amendment costs are incurred while the RDO is in place, the total expected cost is £40 per order. For sole trader accounts, there will be also a one-off cost for making the LSDO of approximately £40 per LSDO.

13. Regulating small business

- 13.1 The legislation applies activities that are undertaken by small businesses.
- 13.2 To reduce the regulatory burdens on small businesses (employing up to 50 people), the approach taken is to give all unlimited partnership account holders the opportunity to make representations before any funds are deducted from these accounts. The Department will also leave a minimum balance in the unlimited partnership account of £2000 to enable the business to continue to trade. This will not be included in our regulations to allow us to monitor how it is working and adjust the amount if necessary.

14. Monitoring & review

- 14.1 A review provision for this instrument has been included and will apply in relation to the joint account provisions (which cover unlimited partnership accounts too). This will require the Department to review these particular provisions every five years.

15. Contact

- 15.1 Sheena Taylor at the Department for Work and Pensions, email: sheena.m.taylor@dwp.gsi.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Julia Gault, Deputy Director for Children, Families and Disadvantage, at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.

15.3 Justin Tomlinson, Parliamentary Under-Secretary of State for Family Support, Housing and Child Maintenance at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.