EXPLANATORY MEMORANDUM TO

THE CHILD SUPPORT (MISCELLANEOUS AMENDMENTS) REGULATIONS 2011

2011 No. 1464

1. This explanatory memorandum has been prepared by the Child Maintenance and Enforcement Commission on behalf of the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

This is a package of miscellaneous amendments to various pieces of legislation relating to child maintenance payments. The provisions will introduce some minor and technical changes to the current legislation.

3. Matters of special interest to the Joint Committee on Statutory Instruments

None

4. Legislative Context

4.1 Operational experience of the Child Support Agency has led to a number of minor and technical issues being highlighted that require an amendment to secondary legislation in order to resolve them. The instrument will introduce minor and technical amendments to existing regulations governing how the Child Support Agency, on behalf of the Child Maintenance and Enforcement Commission, carries out its statutory functions. The Commission cannot quantify the number of cases where these technical amendments to regulations will have an effect, but the new measures will only apply in specific instances and will help to improve the accuracy of decisions made under child support legislation.

4.2 The child maintenance scheme in the 1991 Act was substantially amended by the Child Support, Pensions and Social Security Act 2000 ("the 2000 Act"). In this memorandum, the child maintenance scheme in force prior to the amendments to the 1991 Act made by the 2000 Act is referred to as "the 1993 scheme" and the child support scheme in force following those amendments is referred to as "the 2003 scheme".

5. Territorial Extent and Application

This instrument applies to Great Britain.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

7.1 A number of minor and technical issues have been highlighted by the Child Support Agency, the operational arm of the Commission that require an amendment to secondary legislation in order to resolve them. The instrument will make minor changes to the calculation, collection and enforcement of child maintenance, which is an amount of money (based on earnings) that parents who do not normally live with the children concerned pay as a contribution to the upkeep of their children.

7.2 This instrument amends several sets of regulations, governing both the 1993 and 2003 child support schemes.

Relevant other child or relevant child ceases to be a 'child' for child maintenance purposes

7.3 A relevant other child is a child for whom a non-resident parent or their partner receive child benefit. The presence of such a child in the household will mean that the amount of maintenance to be paid by a non-resident parent will be reduced. When this child has attained the age of 19 years, or child benefit is no longer paid to a non-resident parent or their partner for that child or the child has otherwise left the household that reduction in maintenance should no longer apply. A recent Upper Tribunal case (CCS/3212/2008, attached at Appendix 1) highlighted that there is presently no provision in legislation to backdate the change to the date it occurred if the Agency is notified after the event. This means that there would be a delay in adjusting the amount of maintenance to be paid to the parent with care.

7.4 This instrument amends existing 2003 scheme legislation so that in changes of circumstances involving cases where a relevant other child ceases to be a child for child maintenance purposes the change should be backdated to the beginning of the maintenance period in which the change occurred.

7.5 This instrument will also introduce similar changes for relevant children in the 1993 scheme (a child of an absent parent or a parent with care who is a member of the same family as that parent) so that in instances where a relevant child ceases to be a child for child maintenance purposes the change will be backdated to the beginning of the maintenance period in which the change occurred.

Adjustment of child maintenance liability where non-resident parents begin or cease to receive benefits

7.6 Current legislation allows the Commission to adjust child maintenance liability from the first day in the maintenance period in which benefit

information or evidence becomes available. Feedback from stakeholders has indicated that the current provisions for dealing with situations where the non-resident parent leaves benefits are problematic because they rely on the Commission being notified that the change has occurred and this does not always happen as efficiently as it should.

7.7 These regulations therefore amend current legislation and set an effective date for going on benefit and off benefit for 2003 scheme cases as the date when the parents actually began or ceased receiving benefits. The reference to the day on which a person begins or ceases to receive a benefit is to the day on which entitlement to the benefit commences or ends, as the case may be.

7.8 1993 scheme regulations currently prevent the Agency from adjusting liability in the same way as in the current scheme when a parent goes onto benefit. Whilst there is an effective date in the regulations for when a benefit decision is revised or superseded there is none for a decision going on benefit.

7.9 In order to ensure consistency across the schemes and bring greater clarity to the process, this instrument will amend old scheme legislation so that the effective date of these changes in liability will be the first day in the maintenance period in which the non-resident parent actually began or ceased to receive benefits. This will ensure that the liability on these cases will more accurately reflect the circumstances of the parents during the lifetime of the case. The reference to the day on which a person begins or ceases to receive a benefit is to the day on which entitlement to the benefit commences or ends, as the case may be

Decisions where there are multiple changes of circumstance over a period of time

7.10 Existing primary legislation applies where caseworkers are making a decision in relation to a case and they find that there have been a number of further changes on the case in the meantime or future changes can be identified. The intention of the legislation is to avoid excessive complication and delay when processing these multiple changes and the threshold for applying a change of circumstances (in the 2003 scheme this is a 5% change in maintenance liability) should not apply in relation to these subsequent decisions. These regulations will confirm in secondary legislation that the threshold does not apply to these decisions.

7.11 The instrument will also clarify in the 2003 scheme the effective dates of decisions made under this primary legislation. Where the change is notified after the application for supersession, i.e. replacement of an early decision, but it occurred before that date the effective date will be the first day in the maintenance period in which the application was made. This is in line with all other effective date policy, which is intended to prevent the amount of money to be paid from changing in the middle of a week**.**

7.12 In the 1993 scheme legislation there is currently no effective date for these multiple changes so a new provision is being introduced by this instrument which mirrors the 2003 scheme effective date and threshold provisions described above.

Revisions to certain 1993 scheme cases where an appeal is outstanding

7.13 There is an inconsistency between 1993 and 2003 scheme legislation when revising maintenance assessments where an appeal is outstanding. In the 1993 scheme, the Agency is prevented from revising a decision where an appeal is outstanding if the decision is less advantageous to the appellant than the original decision. The 2003 scheme rules allow such a revision, which means that the Agency can ensure the non-resident parent's liability is correct (and that the correct amount of maintenance is paid to the parent with care in the meantime) if the appeal is unsuccessful. If the appeal is successful then any money incorrectly paid would be refunded, if appropriate.

7.14 This instrument therefore amends 1993 scheme legislation to allow the Agency to make these revisions on 1993 scheme cases.

Minutes of Agreement in Scotland

7.15 Minutes of Agreement are a type of legal agreement in Scotland, which perform the same function in relation to child maintenance as court orders in England and Wales (known as 'maintenance orders'). If parents agree how much maintenance should be paid, they can have a Minute of Agreement drafted. Once this has been registered a Sheriff Officer can take action if the non-resident parent fails to pay the agreed amount of maintenance. This instrument will align registered Minutes of Agreement with maintenance orders where an application for a maintenance calculation is made after the registered Minute of Agreement has been in place for more than a year and the agreement was made on or after 3 March 2003. This means that the calculation will have the same effective date as for maintenance order cases (court orders in England and Wales).

Consolidation

7.16 Informal consolidation of the instrument will be included in due course in the Department's 'The Law relating to Child Support' available on the internet at no cost to the public at:

http://www.dwp.gov.uk/publications/specialist-guides/law-volumes/the-law-relating-to-child-support/

8. Consultation outcome

8.1 The Commission consulted a wide range of stakeholders with an interest in child maintenance on the draft Regulations between 30 March and 30 June 2010. A total of five responses were received from representatives of bodies / organisations with an interest in child maintenance.

8.2 Respondents to the consultation were generally supportive of the draft regulations. Whilst none objected to what was being proposed, some additional issues were raised by stakeholders. This instrument reflects stakeholder comments in relation to a non-resident parent going on or off benefits (regulations 2 and 3). The Commission informally consulted the main stakeholders again and none of them were opposed to the amendment made.

8.4 The response to the consultation is available on the Commission's website at:

http://www.childmaintenance.org/en/publications/consultations.html

9. Guidance

Internal guidance and training materials have been developed to enable Child Support Agency Decision Makers to handle cases under the new rules. The Commission will write to inform its stakeholders of the changes and also publicise the Commission Response to the external consultation via its website at http://www.childmaintenance.org/en/pdf/Commission-Response-to-Consultation.pdf

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is negligible.

10.3 A full impact assessment has not been prepared for this instrument.

11. Regulating small business

The legislation does not apply to small business.

12. Monitoring & review

This instrument makes only minor changes to Regulations and there is no fundamental change of policy so a formal review of these amendment regulations will not be undertaken. However, the Commission monitors the accuracy of its decision making and actively engages with its stakeholders, including parents' representative groups and will continue to do so to ensure that the policy intent is maintained.

13. Contact

Duncan Gilchrist at the Child Maintenance and Enforcement Commission can answer any queries regarding the instrument, Tel: 020 7853 8013 or
E-mail: Duncan.Gilchrist1@childmaintenance.gsi.gov.uk

Appendix 1 – Upper Tribunal Decision

IN THE UPPER TRIBUNAL **Appeal Nos: CCS/3212/2008 and CCS/3213/2008**

ADMINISTRATIVE APPEALS CHAMBER

Before: Judge J.P. Powell

DECISION

The decisions of the appeal tribunal sitting at Colwyn Bay on 24 June 2008, are erroneous in point of law. The appeals against those decisions are allowed and both decisions are set aside.

I remit both matters to the first respondent (that is, the Child Support Maintenance and Enforcement Commission) for the amounts of child support maintenance to be re-calculated on the basis that the 15% reduction in the second respondent's net weekly income should have ceased from the week in which the son of the appellant and the second respondent attained 19.

REASONS

1. These are appeals, with my permission, against two decisions of the appeal tribunal sitting at Colwyn Bay on 24 June 2008 (the "appeal tribunal").

2. The two appeals, which are linked, relate to child support matters. The appellant and the second respondent were married. It is convenient to refer to the appellant as the "mother" and to the second respondent as the "father". Unfortunately their marriage broke down and they separated in, I think, early 2002. There were three children of the marriage. Two daughters and a son. The elder of the two daughters – who is the eldest of the three children and who was born on 1 May 1985 – has reached an age where she does not play a part in these appeals. The son and the younger daughter do. I shall refer to them as the "son" and the "daughter". The first respondent in each appeal is the Child Support Maintenance and Enforcement Commission (the "Commission").

3. The following, background, facts are relevant. The son was born on 29 September 1987. The daughter was born on 11 February 1993. The mother and the

father separated in early 2002. All three children went to live with the mother when the separation occurred. However, towards the end 2004, the son, who would then have been about 17, went to live with the father. He has continued to do so. He attained the age of 19 on 29 September 2006. The daughter has continued to live mainly with the mother although she spends an average of one night a week with the father.

4. The mother appealed to the appeal tribunal against the following two decisions.

(1) A decision dated 24 January 2008, that the father was liable to pay £67.71 per week in respect of the daughter from the effective date of 30 August 2007. That appeal was numbered 190/08/00387 before the appeal tribunal and is numbered CCS/3212/2008 before me.

(2) A decision dated 14 February 2007, that the father was liable to pay £57.43 per week in respect of the daughter from the effective date of 1 February 2007. That appeal was numbered 190/08/00388 before the appeal tribunal and is numbered CCS/3213/2008 before me.

The issue

5. The figures of £57.43 and £67.71, were calculated in accordance with the rules laid down in the legislation. The calculations are complex. I am glad to say that only one element is in issue. This is what is known as the "relevant other child" deduction. It should be remembered that while the daughter lives mainly with the mother the son has, since 2004, lived with the father. At the relevant time he was in full time education. In such circumstances, among others, the legislation provides that in calculating the non-resident parent's liability in respect of what the legislation calls qualifying children – and in this case the non-resident parent is the father – a deduction is to be made for relevant other children. That is, children other than the qualifying children for whom the non-resident parent is responsible and in respect of whom he is receiving child benefit. Maintenance calculations are provided for by section 11 of, and Schedule 1 to, of the Child Support Act 1991, as amended. Part I of Schedule 1 is headed "Calculation of weekly amount of child support maintenance". The calculations are complicated but it is not necessary to go into the mechanics for present purposes. The focus is on paragraph 2(2) of the Schedule which provides as follows.

(2) If the non-resident parent also has one or more relevant other children, the appropriate percentage referred to in sub-paragraph (1) is to be applied instead to his net weekly income less –

15% where he has one relevant other child

20% where he has two relevant other children

25% where he has three or more relevant other children

Consequently, when calculating his liability a non-resident parent, such as the father, who is responsible for one relevant other child is entitled to a 15% deduction from his net weekly income.

6. It is not in dispute that when the son went to live with the father he was a relevant other child. The father received the child benefit payable in respect of him. The issue in these appeals is whether, assuming all other conditions including the requirement to be in education are satisfied, the son continued to be a relevant other child after he attained 19. The issue is one of statutory construction. Its resolution is made a little more difficult because of the fact that the expressions "child" and "children" a differently defined in child support and social security legislation.

The appeal tribunal's answer

7. The decisions of 14 February 2007 and 24 January 2008, allowed the relevant other child deduction in respect of the son who was, of course, 19 on 29 September 2006. The mother appealed and her appeals were heard together on 24 June 2008. The appeal tribunal dismissed both appeals. Its reasoning emerges most clearly in its statement of reasons in relation to the appeal against the decision of 24 January 2008.

> "8. The issue for the purposes of this appeal was whether or not the Secretary of State was in error in allowing [a] 15% deduction from [the father's] net income for [the son], who was living with him and hence a "relevant other child". [The mother] argued that the terminal date for that allowance should have been 29 September 2006, which was [the son's] 19th birthday.
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> 9. The Secretary of State continued the allowance beyond his 19th birthday because [the father] received child benefit for him and would have continued to do so until 3 September 2007, which would have been the final terminal date in [the son's] case for child benefit. [The mother] considered that this was incorrect and contrasted this with the definition of a "qualifying

child" under the child support legislation, which provided for child support maintenance to be payable only until such child attained the age of 19, even though they continued in full-time education thereafter.

10. The Tribunal confirmed the decision under appeal to the effect that the Secretary of State was correct in continuing the 15% "relevant other child deduction" for [the son]. It approved the reasons for doing so set out in detail on pages 1 – 4 of the Secretary of State's submission to the tribunal.

11. In short, whilst the tribunal can appreciate the point [the mother] is making, the Tribunal is not concerned with the "theology" of the reasons why two separate dates are fixed for the purposes of the termination of child benefit and the termination of the definition of a "qualifying child". These definitions are contained in two separate pieces of legislation, albeit that the child support legislation incorporates the payment of child benefit under the Social Security Contributions and Benefits Act 1992 and the Child Benefit (General) Regulations in its definition of a "relevant other child". It is a matter for Parliament and not the Tribunal to redress any perceived anomaly."

8. Paragraph 11 of the statement of reasons is referring to paragraph 10C(2) of Schedule 1 to the 1991 Act. Sub-paragraphs (1) and (2) of that paragraph provides:

(1) References in this Part of this Schedule to "qualifying children" are to those qualifying children with respect to whom the maintenance calculation falls to be made.

(2) References in this Part of this Schedule to "relevant other children" are to –

(a) children other than qualifying children in respect of whom the non-resident parent or his partner receives child benefit under Pt IX of the Social Security Contributions and Benefits Act 1992; and

(b) such other description of children as may be prescribed.

The appeal tribunal decided that since the father received child benefit in respect of the son up until 3 September 2007 – that being the last date on which it was payable prior to the son attaining the age of 20 – the son fell within paragraph 10C(2)(a) and could be treated as a relevant other child until that date.

9. Pausing there, and before turning to the Secretary of State's submissions to me, I am not sure that the appeal tribunal 's reasoning is, in any event, sound. This is because Part IX of the 1992 Act, which is headed Child Benefit, draws a clear distinction between a "child" and a "qualifying young person". Section 142 of the Act provides:

> 142 (1) For the purposes of this Part of this Act a person is a child if he has not attained the age of 16.
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> (2) In this Part of the Act "qualifying young person" means a person, other than a child, who –
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> (a) has not attained such age (greater than 16) as is prescribed by regulations made by the Treasury, and
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> (b) satisfies conditions so prescribed.

Section 143 of the same Act is the section which provides for entitlement to child benefit.

> 143. A person who is responsible for one or more children or qualifying young persons in any week shall be entitled, subject to the provisions of this part of this Act, to a benefit (to be known as "child benefit") for that week in respect of the child or qualifying young person, or each of the children or qualifying young persons for whom he is responsible.

Given that clearly drawn distinction, and but for the Commission's submissions with regard to section 55 of the Child Support Act 1991, to which I shall come in a moment, once he had attained 16, the son was no longer a "child" in respect of whom the father received child benefit under Part IX of the Social Security Contributions and Benefits Act 1992. Instead, he was a "qualifying young person" in respect of whom the father was receiving child benefit under Part IX. However, this overlooks the definition of "child" in the Child Support Act 1991 itself.

The Commission's submissions

10. The Commission submits that the appeal tribunal wrongly construed the legislation. It submits that Part I of Schedule 1 is an integral part of the Child Support Act 1991, and consequently the definitions contained in that Act apply unless a particular provision clearly indicates that this is not the case. Paragraph 10C(2)(a) begins with the important word "children". For present purposes, the provision reads "children ... in respect of whom the non-resident parent ... receives child benefit ...". In other words, the provision only applies to "children". The Act contains its own definition. Section 55(1), (7) and (8) are as follows.

55(1) For the purposes of this Act a person is a child if –

(a) he is under the age of 16;

(b) he is under the age of 19 and receiving full-time education (which is not advanced education) –

(i) by attendance at a recognised educational establishment; or

(ii) elsewhere, if the education is recognised by the secretary of State; or

(c) he does not fall within paragraph (a) or (b) but –

(i) he is under the age of 18; and

(ii) prescribed conditions are satisfied with respect to him.

...

(7) The Secretary of State may be regulations provide that a person who ceases to fall within subsection (1) shall be treated as continuing to fall within that subsection for a prescribed period.

(8) No person shall be treated as continuing to fall within subsection (1) by virtue of regulations made under subsection (7) after the end of the week in which he reaches the age of 19.

The section 55 definition excludes anyone over the age of 19. Consequently, when paragraph 10C(2)(a) uses the expression "children", section 55(1) operates to exclude anyone who is over 19. There is nothing in Schedule 1 which excludes the operation of section 55(1).

11. I have considered the legislation and accept the Commission's submissions as correct. The appeal tribunal erred in law by adopting the wrong construction. Further, the Commission's submissions avoid the problem, or anomaly, to which the appeal tribunal referred that different terminal ages apply to a "qualifying child" and a "relevant other child".

Conclusion

12. As a result, the mother's appeals succeed. That being so, it is unnecessary for me to consider the other matters which she raises in her grounds of appeal. The father, in his submissions, has put forward a number of considerations. In particular in response to the submissions in reply lodged by the mother and dated 20 December 2008. I agree with him that a great deal of what is said in that reply

relates to matters which are not within my jurisdiction. The father goes into his general situation and urges considerations of fairness upon me. I accept that the views which he expresses are strongly held. However, what he has to say does not touch on the issue of construction or suggest how the submissions put forward by the Commission might be challenged. I therefore allow the appeals and remit both matters to the Commission that the appropriate recalculations can be carried out.

Signed: J.P. Powell
Judge of the Upper Tribunal

Dated: 7th May 2009