

# LAW SOCIETY SUBMISSION

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**SUBMISSION TO THE CHILD MAINTENANCE REVIEW GROUP**

**MARCH 2021**

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#### ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

## Introduction

The Law Society of Ireland ('the **Society**') makes this submission as part of the public consultation on child maintenance which is being conducted by the Child Maintenance Review Group ('the **Group**').

It is understood that the Group will consider and make recommendations on the following topics (with additional issues to be considered under each heading):

1. Current treatment within the Department of Social Protection ('the **DSP**') of child maintenance payments;
2. Current provisions relating to the liable relatives regarding child maintenance; and
3. Establishment of a State Child Maintenance Agency (**CMA**).

## Overview

In any consideration of child maintenance issues generally, it is instructive to consider the broader social policy issues which underpin the support and maintenance of children, rather than simply focusing on child maintenance as a matter of financial contributions from one parent to another.

Child maintenance is generally defined as a regular contribution from a non-resident parent towards the financial cost of raising a child, usually paid to the parent with whom the child lives most of the time. For the purposes of this submission, we refer to the primary care parent ('the **PCP**') to whom maintenance would be paid, and to the non-resident parent ('the **NRP**') who would be liable to pay maintenance to the PCP.

It is recognised in all EU countries, and many international jurisdictions, that both parents have an obligation to contribute financially to the support and maintenance of their child. In an Irish context, this can extend beyond the biological parents of a child to relatives. For the purposes of this submission, this category of person is referred to as "liable relatives" which encompasses any person who may have an obligation to maintain a child under Irish law.

In an Irish context, child maintenance has largely been viewed as a matter of private obligation between parents where the onus falls on parents to seek to agree maintenance arrangements between themselves, failing which there is recourse to the Courts. The involvement of the State is restricted to circumstances where the PCP seeks to avail of State supports for themselves and their children. In addition, the State provides certain free support services for the resolution of maintenance disputes (e.g. the Family Mediation Service) and the provision of free legal aid to financially qualified persons – either through the Legal Aid Board ('the **LAB**') or private practitioner schemes funded by the LAB - in order to access the Courts. For persons who do not qualify financially for such supports, the entire burden of resolving disputes falls on the parents themselves. That is true not only for maintenance disputes but also for all other issues involving children.

What is largely absent from the current system is a consideration of the independent rights of children. This absence has been brought into particularly acute focus since the passing of the Children's Rights Referendum and the insertion of specific rights for children into the Constitution. It is suggested that a system which places the overwhelming burden of resolving disputes generally in relation to children (and specifically in relation to child maintenance) on parents, is at odds with the State's recognition that children have rights, independent of their parents or caregivers. The State cannot entirely abdicate its role in the vindication of those separate rights of children by placing almost the entire obligation on

parents to vindicate those rights. That is particularly the case where that burden is placed upon parents who objectively do not have the financial or other resources to enable them to vindicate those rights in an effective manner. Further, the State cannot entirely ignore the fact that the rights of children are not always aligned to the positions of any of their parents or caregivers.

The adoption of a children's rights approach to the issue of child maintenance would necessarily involve considering crucial issues affecting children which include:

- the link between child maintenance and the alleviation of child poverty;
- the inter-play between payment of child maintenance and contact between a child and the NRP; and
- the importance of reducing the exposure of children to parental conflict.

As regards child poverty, it is widely recognised that lone parent families suffer far greater from child poverty than children in coupled families. Further, research shows that parents disproportionately enter lower skilled occupations which are typically lower paid, less secure and often involve short term contracts. (See *2017 CSO Survey on Income and Living Conditions*; *UK DWP reports on households below average income*; *UK ONS report on persistent poverty in the UK and EU*; *Ritakallio and Bradshaw, 2006*; *Gornick and Jantti, 2009*). As such, lone parents are very often the most vulnerable financially and the least financially capable of pursuing/enforcing the payment of child maintenance against the NRP.

In an Irish context, the State seeks to address this in a limited way by the universal payment of children's allowance which can be viewed as a limited form of child poverty alleviation. In other countries (particularly in Scandinavia), there is a system of guaranteed child maintenance payments through the social welfare system. In Ireland, the universal children's allowance payment is supplemented by further means tested social welfare payments together with housing, fuel, food and other allowances.

### **Current treatment (within the DSP) of child maintenance payments**

At present, payments by the DSP are means tested and variable. This includes One Parent Family payment ("OPF") up to age 7 since 2013, thereafter the parent moves to Job Seekers Transition payment ("JST") and then to Jobseekers Allowance ("JA") when the child is aged 14. This system appears to be founded on the assumption that lone parents may be in a better position to take up employment when children are at a certain age. However, it ignores the fact that all children are legally dependent on their parents up to the age of 18 years and dependency, in a family law context, extends to the age of 23 years if a child is in fulltime education. Accordingly, the current system is not focussed on the needs of individual children and the requirements of the PCP to meet those needs.

The situation for lone parents is further worsened by the PCP being obliged to seek maintenance from the NRP i.e. to demonstrate "efforts to seek maintenance" from "liable relatives". Failure to do so can result in social welfare payments being suspended, refused or cancelled. As noted above, this obligation to make "efforts to seek maintenance" is imposed on the most financially and socially vulnerable, who often do not have the resources, financial and otherwise, to undertake such efforts. It may also arise in circumstances where the PCP has been a victim of domestic violence or abuse at the hands of the NRP. The current system may therefore impose an obligation on a victim of abuse to pursue maintenance from the very person who perpetrated that abuse.

For social welfare recipients, the DSP's Maintenance Recovery Unit ('the **MRU**') may be involved in seeking the payment of maintenance from the NRP, irrespective of whether it is to be paid to the PCP directly or via the DSP. Further, in circumstances where lone parents are eligible for legal aid, other State agencies (such as the LAB) may be engaged in legal efforts to enforce and/or recover maintenance from the NRP. This can result in a number of State agencies being involved in efforts to secure maintenance payments from the NRP but does not provide an over-arching system to ensure the adequate recovery of maintenance payments while still leaving a significant burden on the lone parent, in particular where they are a social welfare recipient.

At present, the receipt of maintenance payments will reduce the level of social welfare payments being received by the PCP (commensurate with the maintenance being received). However, if maintenance payments are stopped or go into arrears, the PCP may suffer a loss of income and may be required to go to Court to enforce payment of maintenance and their social welfare payments may be reassessed accordingly. In that situation, a PCP may have to apply for a supplementary welfare allowance, which is a means tested payment.

Under the current regime, the PCP is therefore exposed to the risk of non-payment, or under payment, of maintenance which directly impacts on the ability of the PCP to provide for their child. That, in turn, has a direct and negative impact on a child which is contrary to what should be the overriding objective of policies around social welfare and child maintenance i.e. to ensure that the basic needs of all children are met, irrespective of their circumstances. Children should not suffer because a parent chooses to ignore their obligations to provide for their basic needs.

While the primary obligation for the maintenance of children rests with their parents, the issue must also be viewed in light of the right of a child to a reasonable level of financial support and maintenance. It is a matter for the State to take reasonable steps to ensure that this right is vindicated and to eliminate or, to the best extent possible, to alleviate child poverty. The State does this through social welfare supports. The system of social welfare and other supports for lone parents must ensure that every child receives the required minimum level of financial support. That minimum level of support should not be reduced due to the NRP's failure to provide maintenance. Further, it should not be dependent on the PCP taking steps to recover maintenance from the NRP.

It is suggested therefore that, in respect of social welfare recipients, the basic level of social welfare to which a lone parent is entitled should be maintained at all times and should not be reduced, even temporarily, due to the refusal or failure of the NRP to pay maintenance, in whole or in part.

If maintenance is being paid, then social welfare payments should be adjusted accordingly, as at present. Where a default in maintenance payments arises, the PCP should continue to receive all social welfare entitlements without an obligation on the PCP to seek to re-instate maintenance payments or to recover maintenance arrears. This is best achieved by a system whereby the recovery of child maintenance in respect of social welfare recipients is dealt with through a dedicated State agency (which is further addressed below).

## **Current provisions relating to the liable relatives regarding child maintenance**

This submission is not intended to address, or comment on, the law around who does/does not have a maintenance obligation which, in the vast majority of cases, will be the biological parents of a child. Under Irish law, certain persons who are not the biological parents, may have a maintenance obligation. That category of persons was expanded by the Children and Family Relationships Act, 2015. Again, for the purposes of this submission, the term “liable relatives” relates to any person who may have an obligation to maintain a child under Irish law.

It is suggested that the current system - whereby the DSP interacts with the PCP and liable relatives - is not working for either the welfare recipient or the liable relative (generally the NRP) from whom maintenance is being sought. The Society believes that all parties would benefit from a dedicated State agency which would assist in the voluntary assessment and subsequent payment of maintenance. Such an agency could also assist the parties on an on-going basis with reviews of maintenance in a voluntary and non-contentious manner. That would also benefit the NRP e.g. in circumstances where they suffer a reduction in income or loss of employment. Ease of access to an independent agency to assist with on-going maintenance issues would benefit all parties. It would also be more efficient and responsive than the current model, thereby reducing disputes and referrals to Court processes.

The interaction between the DSP and the proposed CMA would be crucial in terms of developing a streamlined, efficient system of ensuring that appropriate child maintenance payments are being made by liable relatives. However, the Society believes that it would further enhance efficiency if all issues relating to voluntary maintenance agreements, the assessment of appropriate contributions from liable persons and the recovery of maintenance arrears, were dealt with by a singular agency.

Currently, if an application is made to the DSP for OFP, the applicant must demonstrate to the DSP, “efforts to seek maintenance” which may require them to personally pursue the other party by way of personal engagement/mediation/Court process. When a person obtains OFP, the DSP may then seek a maintenance contribution from the liable relative through the MRU. The function of that unit is to determine whether and how much of a contribution the liable relative should make, as well as monitoring and enforcing the contributions due. This system may be seen to rank the DSP ‘above’ the parties and/or to place the parties at odds with each other, even in circumstances where an amicable resolution of maintenance may be possible. Further, and in cases of a failure to pay maintenance, the enforcement functions of the MRU are - in reality - largely ineffective. Whilst the MRU is empowered to apply to the District Court to ensure payments are made by a liable relative, it is unclear how widely this power is utilised, if at all, or how effective any outcomes from such use really are.

The Society believes that the role of the DSP should be to provide supports for persons entitled to social welfare payments. It is suggested that the DSP is not best placed to undertake the role of determining/enforcing the payment of maintenance by liable relatives to social welfare recipients and that such functions could be better undertaken by a specialist CMA in order to ensure continuity across all possible pathways to deliver appropriate maintenance from liable relatives. Such pathways could start with systems to assist parents to make voluntary maintenance arrangements, all the way through to enforcement (whether directly or via a third-party agency) of maintenance payments and the collection of arrears.

It is suggested that a CMA would offer a far more efficient model for all social welfare recipients to obtain maintenance payments. The CMA would take the parties through its processes, aiming initially at securing a voluntary arrangement (to include assisting in the calculation of an appropriate level of child maintenance).

Careful consideration must be given to how the payment of maintenance would be affected. In cases of voluntary arrangement between the parties, this could be registered with the CMA and communicated to the DSP with social welfare payments being adjusted accordingly. In other cases, it may be more appropriate for the maintenance payment to be made through the CMA for onward transmission to the PCP. What is vital is that any failure to pay maintenance would result in an immediate re-instatement of full social welfare payments to the PCP. The CMA would then be tasked with recovering any maintenance arrears from the NRP. In this way, children would not be impoverished by a failure to pay maintenance (as can currently be the case) and the burden would fall on the CMA to recover maintenance arrears.

In cases where the PCP is not in receipt of social welfare payments, the CMA could still assist parties to negotiate a voluntary arrangement and, in doing so, determine an appropriate level of maintenance. In such cases, consideration might be given to a system where, if default arises, the PCP could have direct recourse to the Courts or alternatively, they could use the CMA to effect enforcement by:

- a) charging an appropriate fee, and/or
- b) recouping costs from the maintenance debtor, and/or
- c) taking a specified portion of maintenance recovered.

### **Establishment of a State Child Maintenance Agency**

Ensuring that the NRP provides maintenance and support to their children should not be left solely to the PCP. That is particularly so in circumstances where lone parents are already recognised as being amongst the most vulnerable in society, both financially and otherwise. As a consequence, it is neither reasonable nor realistic to expect that lone parents should bear the primary burden of seeking maintenance from the other parent. This is particularly so where, very often, they simply do not have the resources or capacity to do so. It is suggested that a dedicated agency should be established for the purpose of assisting in issues relating to child maintenance and, more specifically, to:

1. Provide guidance in relation to the calculation of appropriate levels of maintenance;
2. Assist parents in reaching agreed arrangements in relation to maintenance;
3. Assist in (or, where appropriate, bring) Court applications to determine maintenance when in dispute;
4. Act as the collecting agent for maintenance payments in appropriate cases; and
5. Engage in the enforcement of maintenance and the collection of arrears (whether directly or in concert with other State agencies).

### **The Calculation of Maintenance**

Where other jurisdictions already have maintenance agencies, different approaches are taken to the determination/calculation of appropriate maintenance contributions. These include providing guidelines to assist in ascertaining appropriate maintenance levels and adopting rules which actually determine maintenance. In the context of the existing Irish family law framework, it is suggested that it would be more appropriate to adopt guidelines, rather than rules. This would sit more easily with the discretionary approach to family law

which is adopted by the Irish Courts. In the case of persons with average financial means, it may be possible to develop broad guidelines which may assist in the resolution of maintenance issues.

Careful consideration must be given to when it is appropriate to use such guidelines, the scope of same and the extent to which they must take into account the varying circumstances of parties as well as any impact on the role of the Courts as the final arbiter in maintenance disputes. These are complex issues which will require due consideration and comparative analysis with other jurisdictions to determine the most appropriate approach to be taken. Issues to be considered include whether maintenance should be based on the gross or net income of the NRP, the extent to which the income of the PCP is considered, the extent to which particular expenses of both parents are considered (including costs associated with the child). Other issues which have arisen during the course of the Society's consideration of these matters include the extent to which income and expenses associated with second families are considered and assessed. It is noted that the DSP operates a system to determine appropriate contributions from liable relatives and the experience of the DSP in the operation of its system would be a valuable source of practical information in devising appropriate models.

A comparative analysis of approaches in the UK versus those in Australia and New Zealand is included at Annex A. This highlights the types of issues which will require to be considered in a more comprehensive review.

### **Assisting Parties in Reaching Maintenance Agreements**

In Ireland, ultimate authority to determine maintenance disputes currently rests with the Courts and that should continue to be the case. However, any consideration of how maintenance issues should be dealt with must be viewed in the context of the proposed reforms of the Family Court system. Specifically, it is proposed that one of the primary objectives of a reformed Family Law Court system must be to ensure that as many cases as possible are dealt with outside the Courts. This can only be achieved by the adequate resourcing of services which are designed to assist parties in the amicable resolution of disputes, including disputes around maintenance.

The precise mechanisms and processes for such a reformed system require detailed consideration however, the processes established must deliver defined pathways for the resolution of disputes prior to any escalation to the Courts. Such pathways could include:

- Save in specific cases such as those involving domestic abuse, a mandatory requirement to go through processes aimed at the resolution of maintenance disputes before parties can bring proceedings;
- The party seeking maintenance would be required to engage initially with the CMA which would provide information to both parties in relation to the obligation to pay maintenance, guidelines as to the calculation of maintenance and other appropriate information to assist the parties in reaching a voluntary agreement;
- Either party would have the option of registering any voluntary arrangement arrived at with the CMA;
- In the event that the parties could not reach a voluntary arrangement, the CMA would facilitate mediation between the parties (e.g. through the Family Mediation Service or otherwise);



- The services of both the CMA and mediation would have to be provided in a timely and efficient manner so as to ensure no prejudice to either party in circumstances where access to the Court is dependent on the parties initially going through mandatory processes aimed at voluntary resolution. It would be necessary to define timelines for engagement by each party, the provision of necessary financial information and related matters to ensure that these mandatory processes are not subject to abuse;
- Failure to comply with the requirements of the CMA and/or engagement with mediation would result in the other party being released from the requirement to go through the processes aimed at agreed resolution (similar to the certification provided by the Personal Injuries Board where claims are not resolved through the Board);
- Consideration should be given to assigning power to the CMA to make a preliminary determination in relation to the appropriate level of maintenance where agreement cannot be reached between the parties;
- If such power of preliminary determination is provided to the CMA, it should be subject to appeal (by either party) to the District Court and consideration should be given as to whether there should be no further right of appeal from the District Court;
- Cases released from the CMA would then be given priority hearings in the District Court for the purposes of a Court determining maintenance (again, to ensure that no prejudice is suffered by either party due to delay); and
- Consideration should also be given to whether parties to judicial separation or divorce should be exempt from the requirement to fully engage with the CMA (on the basis that such cases generally involve wider financial issues which extend beyond child maintenance).

While it is acknowledged that significant additional cost will arise in funding both the formation of the CMA and ancillary support services such as mediation, the Society anticipates that the delivery of robust and efficient processes by the CMA will mean that a large proportion of cases will no longer be required to be determined by the Courts, particularly the District Court. In that regard, the Courts Service Annual Report for 2018 recorded that 8,935 maintenance applications had been made which included initial applications and applications to vary/recover maintenance arrears. In 2019, the figure was marginally lower at 8,383. The focus of both the CMA and the reformed Family Law Court system should be to ensure that as many cases as possible are resolved and agreed on an amicable basis. This will free up the resources of the Courts Service to focus on those cases which require judicial input, which is particularly important in circumstances which involve repeated breaches of maintenance agreements or Court orders.

### **Assisting Parties in Bringing Maintenance Applications**

The Society believes that the CMA should have the resources and powers to assist all persons who are seeking a maintenance contribution from an NRP. Consideration should be given to the CMA having statutory powers to engage with other State organisations (e.g. An Garda Síochána, Revenue etc.) for the purposes of tracing liable relatives and obtaining information in relation to same in order to assist in the determination of maintenance, whether by the CMA or by the Courts.

Such a multi-agency approach is vital if the CMA is to be effective in achieving its objective. The CMA would be the co-ordinating agency to deal with all issues relating to the payment of maintenance and would operate as the link to the resources of other agencies, thereby removing the obligation on the person seeking maintenance to engage with separate agencies. Such an approach already exists in respect of the State's obligations which arise from the EU Maintenance Regulation and the enforcement of Maintenance Orders made in other EU jurisdictions. On foot of those obligations, the State's Central Authority (currently the Department of Justice) is tasked with enforcement where requested by the Central Authority of another EU State. The Central Authority undertakes all functions of enforcement, including tracing of the maintenance debtor (utilising the services of An Garda Síochána) and taking Court proceedings (utilising the services of the LAB). This poses the question – perhaps the CMA (and not the Department of Justice) would be the appropriate entity to act as the Central Authority for the purposes of the Maintenance Regulation?

The Society considers that, in cases involving social welfare recipients and other qualified persons, the CMA should be tasked with bringing maintenance applications to Court where it is not agreed or otherwise determined. Consideration should also be given to whether that would be done directly by the CMA or by engaging the services of the LAB? The proposed multi-agency approach may suggest that the CMA would utilise the existing services of the LAB? That could include situations where the assessment of maintenance was appealed by the NRP to the District Court. The logic of this approach is that a) social welfare recipients (and other persons) will already be eligible for free legal aid and b) the CMA should be able to provide streamlined processes for applications to Court through dedicated and specialist teams.

Consideration should also be given to the other persons being entitled to engage the services of the CMA in seeking maintenance through the Courts, at an appropriate cost. The logic of that approach is, again, that the CMA could develop cost efficient processes for such Court applications.

### **Acting as the Collecting Agent for Maintenance Payments in Appropriate Cases**

The primary objective of any maintenance system should be to encourage and facilitate the making of voluntary maintenance arrangements. That, in turn, would ordinarily involve the payment of maintenance directly from the NRP to the PCP (at the outset, in any event). Different considerations arise in the context of any default of payment.

The Society considers that, wherever possible, maintenance should be paid directly and without the CMA acting as a receiver of maintenance payments. That would certainly apply in relation to voluntary arrangements involving a PCP who is not in receipt of social welfare payments. For cases involving social welfare recipients, the current model allows for the payment of maintenance directly to the lone parent (with a consequent deduction in social welfare payment) or to the DSP, with the appropriate payment being made to the lone parent.

Careful consideration must be given to the payment mechanisms in relation to social welfare recipients. As outlined above, the priority in such cases is that the PCP would always receive, at a minimum, full social welfare entitlements from the DSP even where there is a default in the payment of maintenance by the NRP. That would be easier to administer if all maintenance payments were routed through the CMA, with onward payment to the PCP. However, it is desirable, both from a cost perspective for the CMA and as a matter of good policy, that maintenance would be paid directly, wherever possible.

In cases of default of payment of maintenance (irrespective of the status of the PCP), there is provision for different payment methods e.g. attachment of earnings with payment directly from the NPR's employer or payment through the District Court. As detailed below, these enforcement remedies need to be retained and strengthened. However, in circumstances where it is suggested that the CMA would be the co-ordinating authority for all issues relating to maintenance, it follows that that the CMA would act, in appropriate cases, in the collection of maintenance and that neither the DSP nor the Courts would continue to have a role in that regard.

An important factor to be considered in any maintenance collection role for the CMA would be the cost of administering such a service. In the UK, there is provision for collection arrangements subject to a cost. The cost is 4% for the recipient (deducted from the maintenance paid) with an additional levy of 12% of the maintenance payable (paid by the maintenance payor). These costs are intended to act as a disincentive to the use of this collection service however, it is likely that a similar service will be required in some cases here.

Further consideration must be given to the nature and extent of the maintenance collection function that the CMA might exercise.

### **Enforcement and Collection of Maintenance Arrears**

The singular most difficult issue in relation to child maintenance is that of enforcement and recovery of maintenance. In the UK, the Child Maintenance Service ("the UK CMS") (formerly the Child Maintenance Agency) had substantial issues with arrears of maintenance which had accumulated under the CMS. The arrears arose, in part, in circumstances where the CMS operated significantly as the primary maintenance collector. The child maintenance system in the UK has undergone significant reform since 2012 which was predicated on the belief that a cultural change was needed to encourage separating parents to make voluntary arrangements or, at the very least, to have direct maintenance payments between the parents (as opposed to the parents relying largely on facilities provided by the UK CMS). This system applied to all maintenance arrangements registered with the UK CMS, not just those involving social welfare recipients. Learning from those difficulties, the starting point of any maintenance system in Ireland should be to encourage, facilitate and enable parties to reach agreement around the provision of maintenance.

A further lesson from the UK experience is that enforcement of maintenance and recovery of arrears is hugely problematic. The issue of enforcement requires very detailed analysis, including a comparative analysis of systems operating in other jurisdictions. Attached at Annex B is a review of maintenance enforcement provisions operated in including Canada, Australia and the UK as well as a high-level overview of operations in various EU Members States.

Any system of enforcement must be sufficiently robust to act as a deterrent to maintenance defaulters. Very careful consideration must be given to which agency may be tasked with the recovery of maintenance arrears which should include consideration of whether the function should be assigned to Revenue, acting in concert with the CMA. Given the unparallel experience of Revenue in investigating and recovering tax, it is suggested that its involvement (as the collecting agency for maintenance arrears) may in and of itself operate as an adequate deterrent for potential defaulters. What is clear is that, absent a robust system of enforcement, child maintenance arrears will continue to be massively problematic and will continue to result in on-going losses to the State, to lone parents and – most importantly – to children.

In the event that the CMA is designated as the co-ordinating authority for all maintenance issues, it is essential that it would be provided with the necessary powers to enforce maintenance payments. Consideration also needs to be given to the nature and extent of those enforcement powers, where the CMA is acting either directly or in concert with other State agencies such as Revenue. Such powers to be considered include:

- Attachment of earnings orders, either directly or via Court application;
- The power to deduct maintenance directly from social welfare payments paid to the NRP. Consideration also to be given to the minimum amount a person can live on while noting that local authority rent arrears are often repaid directly from social welfare entitlements;
- To what extent should the Courts be part of the enforcement of payments? Should the Courts be the last port of call and only if other enforcement provisions are unsuccessful? That could involve the CMA (or other State agency, having been directed by the CMA) taking direct enforcement action; and
- What powers should the court have to enforce orders? Costs orders, garnishee orders, fines and imprisonment are all remedies which are currently in use. Court enforcement powers are, at present, highly inadequate in many cases and in practice, there is often very little done to enforce many orders made.

In overall terms it is suggested that the existing models of enforcement are largely ineffective. By way of example, Courts have powers to commit maintenance defaulters to prison however, this does nothing to provide maintenance to the PCP. To the contrary, it can actually reduce the capacity of the maintenance debtor to pay the maintenance. The Society believes that additional and more effective enforcement models are required, which should include punitive measures to deter potential defaulters. In this regard, consideration should be given to the following:

- A robust regime of powers so that potential defaulters are aware that, if they have income or assets (now or in the future), maintenance arrears will be collected. This regime may include:
  - i. provision for no statute of limitations on maintenance arrears i.e. a lifetime liability extending to a charge on a maintenance debtors' Estate (this could also include a requirement to obtain specific clearance from the CMA when seeking to administer Estates);
  - ii. provision that, where the maintenance debtor has passed way, the arrears become payable to the CMA; and
  - iii. the imposition of penalties and interest on arrears, similar to those applying to tax arrears.
- Sanctions which are likely to impact meaningfully on the maintenance defaulter (as against sanctions which, while objectively punitive, may have little practical effect e.g. the threat of imprisonment) and might include:
  - i. withholding of a passport or driving licence; and
  - ii. powers to recoup maintenance from future assets, including pensions.

- Collection of arrears to be delegated to an agency best equipped to undertake the task e.g. Revenue acting on the direction of the CMA with powers of investigation to include:
  - i. direct access to a defaulter's bank and other accounts;
  - ii. power to obtain information directly from other State agencies;
  - iii. use of the Sherriff's Office and other direct enforcement action such as sequestration of assets; and
  - iv. appointment of a receiver to the debtor's assets

## **Responses to Questions Posed**

### **The current treatment within the DSP of child maintenance payments**

- 1. How do you believe that income from maintenance should be treated in the means test?**

While maintenance should be taken into account, recipients of social welfare should never lose benefits below the minimum level provided by the State where maintenance is not recovered or maintenance payments are reduced or stopped.

- 2. What are your views on the inclusion of child maintenance payments in the means assessment?**

See reply above.

- 3. Should there be a disregard for housing costs (as outlined above) in the assessment of income from maintenance payments)?**

No, the reasonable accommodation costs of the NRP should be considered.

### **The current provisions relating to the liable relatives regarding child maintenance**

- 1. What are your views on the obligations of an applicant for OFP and JST to make “efforts to seek maintenance” and its impact in applicants?**

As above, the Society believes that this is an unfair burden on such applicants and one which should be undertaken by the CMA.

- 2. What is your understanding of the term “efforts to seek maintenance”?**

As above, this is an obligation on lone parent social welfare recipients to seek to obtain maintenance for a “liable relative” which may involve a) tracing that person, b) engaging with that person to request maintenance and c) making a Court application to obtain maintenance.

- 3. What do you think is the impact of the liable relatives provisions on applicants?**

Such applicants are often vulnerable, both financially and otherwise, and therefore should not be subject to the current obligations. Further, it is vital that children do not suffer financially due to the failure of the NRP to pay maintenance.

- 4. What do you think is the impact of the liable relatives provisions on liable relatives?**

It is submitted that the proposed new measures will benefit liable relatives, in particular by providing assistance in the determination of appropriate maintenance and facilitating an amiable resolution of potential disputes.

**5. To what extent do you think these provisions may or may not lead, encourage, or oblige, people to go to Court in relation to maintenance issues?**

The current provisions often result in someone having to go to Court which, in many cases, may be unnecessary. As above, the CMA should provide systems for people to reach voluntary arrangements with Court being the last resort.

**The establishment of a State Child Maintenance Agency (“CMA”)**

**1. What are your views as to whether the establishment of a Child Maintenance Agency would be a good idea?**

The establishment of a CMA is critical - both to assist parents in resolving maintenance disputes and to take on the burden of pursuing and/or enforcing maintenance payments.

**2. If such an agency were established - to what extent, (if any), should it interact with the social welfare system?**

Interaction between the CMA and the social welfare system should be an absolute priority to ensure that lone parents continue, at all times, to receive full social welfare payments where there is maintenance default. As pursuing maintenance default in cases involving social welfare recipients would rest with the CMA, the CMA would make up any shortfall to the DSP from any arrears of maintenance recovered from maintenance defaulters.

**3. If such an agency were established - to what extent, (if any), should it interact with the Court system?**

Maintenance default in cases involving social welfare recipients would rest with the CMA. The CMA would therefore engage directly with the Courts to enforce maintenance arrears or to instruct another agency (e.g. Revenue) to act in the enforcement.

**4. What powers do you think such an agency should have?**

It is suggested that the CMA would be the co-ordinating agency for all maintenance related matters. Save in certain cases, engagement with the CMA would be mandatory for parties seeking to resolve maintenance disputes, with the CMA having sufficient powers to refer the matter on to mediation or to the Courts. The CMA may also be given the power to make recommendations around levels of maintenance, subject to appeal to the District Court. The CMA would also have very wide powers of enforcement.

**5. What enforcement powers (if any) do you think such an agency should have?**

The CMA would either have direct powers of enforcement or the facility to engage third-party agencies to effect enforcement. The CMA would be the centralised agency for monies collected through enforcement. It would then be responsible for refunding arrears recovered and due to the DSP with any balance of arrears paid to the person entitled to receive the maintenance. As above, robust and meaningful powers of enforcement would be absolutely essential.

See also at Annex C below, possible processes through the CMA depending on whether the applicant is a social welfare recipient or otherwise.

## **Conclusion**

It is suggested that there needs to be a full review of issues around child maintenance, both from a children's rights perspective and in the context of the elimination of child poverty. The Society believes that this should be pursued in a coordinated manner by the State, rather than a piecemeal basis by various State agencies.

The key and most necessary reform in this area is the establishment of the CMA to act as the co-ordinating agency in the area of child maintenance.

On a broader policy level, consideration should be given to the establishment of a fund to guarantee maintenance payments or to guarantee a minimum level of maintenance payment, where there is default by a maintenance debtor. Maintenance recovered would then be repaid to the fund with any surplus to the PCP. Further funding could come from fees charged by the CMA for recovery of maintenance (in cases not involving social welfare recipients) together possibly with penalties and interest imposed on maintenance debtors. Such a scheme guarantees that the PCP is never without a minimum level of child maintenance support.

The Society hopes that the Group will find these comments to be helpful and will be happy to engage further on any of the matters raised.

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## **ANNEX A**

### **Calculation of Maintenance**

#### **Australia/New Zealand**

- Both parents' income considered
- Net, not gross, income considered
- Allows for consumer index inflation
- Costs of child are taken into account
- Allows for living allowance deduction (one third average wage)
- Allows for dependent child deduction and deductions for multiple child maintenance groups

#### **UK**

- Only the non-resident parent's income is considered - the parent in receipt of children's allowance is deemed to be the parent with care, the other parent is deemed to be the non-resident parent
- Where the non-resident parent can show that they care 50% of the time, they are not liable to pay maintenance
- Gross income is considered
- No inflation calculated
- Costs of child are not taken into account
- Where a non-resident parent fails to provide information, the CMS can apply for default assessment and can assume shared care of one night per week
- Deduction only for other dependent children made prior to assessment (12%, 16% or 19% for 1, 2 or 3+ children)
- Rate of maintenance calculated on fixed percentages of gross income, 12% (1 child), 16% (2 children), 19% (3 children or more) with additional payment for higher income earners
- Maintenance reduced in proportion to amount of overnights non-resident parent has the child

## **ANNEX B**

### **Review of Enforcement Provisions**

#### **Other Jurisdictions**

##### **Canada:**

- Governed by a Maintenance Enforcement Act
- Enforcement Officers have authority to take action to enforce support obligations in arrears
- Maintenance arrears are managed by a Maintenance Enforcement Programme
- Charges may be applied to debtor for late payments and enforcement action being required.
- Deterrent Fee is charged once one month in default and each month thereafter
- Service Fee is charged to creditor according to action required
- This fee is used to help cover costs of operating the programme

##### **Australia:**

- Agency - Child Support Collect
- All parties have a Child Support Online Account
- Parties usually lodge Tax Returns in relation to their income or provisional income is taken into account when determining maintenance payable
- If debtor does not lodge tax returns or lodges late, the child support can be amended with regard to any over/under payment - over payment can be recovered from the creditor
- Financial penalties for late payment of child support debt
- Registrar may collect the debt from a third person who holds money on account of a relevant debtor
- Deductions can be made from social welfare payments, pension, tax refund etc.
- Civil Recovery - Debt action can then be taken through the Courts, which can:
  - summons the debtor,
  - issue a warrant of execution to seize land and goods e.g. cars, electrical equipment, whitegoods
- Family Law Act recovery - the Court can make various types of orders for enforcement of the debtor's obligation which include:
  - ➔ Garnishment of the debtor's assets or income
  - ➔ Payment of arrears
  - ➔ Sequestration of the debtor's estate or appointing a receiver
  - ➔ Seizure and sale of the debtor's personal property
  - ➔ Sale of real property
  - ➔ Contempt of court (including imprisonment for contravention of a parenting order for child maintenance by non-payment)

## Europe:

- With the exception of Italy, parents are always involved in the amount of maintenance agreed/directed
- Different Member States have a mix of agencies which assist in the enforcement of maintenance payments such as, the Courts, police and government agencies who often share jurisdiction in issues around child maintenance payments
- Methods of enforcement of child maintenance orders vary across the Members States and include:
  - ➔ Court Orders
  - ➔ Bailiffs
  - ➔ Seizing/selling assets
  - ➔ Payments advanced by the state
- In cases of non-payment, child maintenance is:
  - **Guaranteed by the State** in:

Austria	Sweden	Estonia
Italy	Germany	Hungary
  - **Guaranteed by special bodies indirectly governed by the State** in:

France	Slovakia	Belgium
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  - **Guaranteed by Local Authorities** in:

Czech Republic	Denmark	Finland
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  - **Guaranteed by special funds** in:

Latvia	Lithuania	Luxembourg
Poland	Portugal	
  - **Guaranteed by special agencies** in:

Netherlands	United Kingdom	
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- In some states (such as France) private insurance companies can cover non-payment. In such cases, the non-custodial parent subscribes to the service by paying a fixed amount and, in event she/he fails to pay the outstanding maintenance, it will be covered by an insurance company (after all legal remedies have been exhausted.)

## United Kingdom:

- Child Maintenance Service (CMS)
  - Fee payable for service to encourage parents to deal with child maintenance arrangements between themselves
  - Custodial parent however must be willing and able to pay the fee

- CMS can deduct money from the debtor's bank account or pension
- Deductions from Earnings Order can be made by the CMS (without the necessity to apply to Court), the CMS can instruct an employer to deduct money from wages/ pension to pay maintenance
 

The employer can take up to £1 every time a deduction is made in order to cover their costs and an employer which does not comply risks being brought to Court by the CMS to secure a Liability Order

A Liability Order only covers arrears owed and can do the following:

  - - ➔ Register an Order with Land Registry or Registry of Deeds against your land,
    - ➔ Obtain an order to seize goods
    - ➔ Freeze bank account (Attachment of Debt or Garnishee)
    - ➔ Receiver Order (if due monies on foot of PI claim, inheritance etc.)
    - ➔ Stubbs Gazette (potential impact on credit rating)
    - ➔ Instalment Order
    - ➔ Attachment of Earnings
    - ➔ Register of Judgments
- If debt remains unpaid, the following enforcement provisions are available:
  1. Payment of legal costs
  2. Forced to sell property
  3. Order of disqualification from driving (for up to 2 years)
  4. Warrant of committal

## IRELAND

- Maintenance is agreed either voluntarily between the parties or by the Court by way of an Order for maintenance
- Governed by the Family Law (Maintenance of Spouses and Children Act), 1976
- Attachment of Earnings Order can be made in accordance with section 10 of the above Act where the maintenance debtor is employed and maintenance can be deducted at source
- Enforcement of attachment of earnings order is governed by section 20 and if false information is provided in relation to the above order, the debtor can be fined and/or subject to a term of imprisonment not exceeding six months
- For non-employed or self-employed persons, payments can be made via the District Court Clerk
- Civil Law (Miscellaneous Provisions) Act 2011 gives the Court power to regard failure to pay as contempt of court to be dealt with accordingly (including by way of imprisonment)
- A bench warrant can be issued for the arrest of the debtor to compel attendance at Court
- Significant issues exist in relation to the effectiveness of the contempt of court provisions

## ANNEX C

### Possible Processes to be Undertaken by the CMA

Description of Process	Social Welfare Recipient	Non-Social Welfare Recipients
Agreeing Voluntary Maintenance Arrangement	<ul style="list-style-type: none"> <li>• Assistance with information and guidelines</li> <li>• Referral to mediation, at no cost</li> </ul>	<ul style="list-style-type: none"> <li>• Assistance with information and guidelines</li> <li>• Referral to mediation, at minimum cost</li> </ul>
Registration of Maintenance Arrangement	<ul style="list-style-type: none"> <li>• Arrangement always registered with CMA</li> </ul>	<ul style="list-style-type: none"> <li>• Option to register Arrangement with CMA</li> </ul>
Determination of Maintenance	<ul style="list-style-type: none"> <li>• Option of seeking determination by CMA, subject to appeal</li> </ul>	<ul style="list-style-type: none"> <li>• Option of seeking determination by CMA, subject to appeal</li> </ul>
Application to Court for maintenance	<ul style="list-style-type: none"> <li>• Undertaken by CMA (via LAB or otherwise), no cost to Applicant</li> </ul>	<ul style="list-style-type: none"> <li>• Option to use services of CMA, at defined cost</li> </ul>
Collection of maintenance where no default	<ul style="list-style-type: none"> <li>• Option for payment through the CMA, at no cost</li> </ul>	<ul style="list-style-type: none"> <li>• Direct between the parties, no CMA involvement</li> </ul>
Collection of maintenance after default	<ul style="list-style-type: none"> <li>• Collection through the CMA, at no cost to the recipient and appropriate cost on payor</li> </ul>	<ul style="list-style-type: none"> <li>• Option to seek payment through the CMA, at defined costs to the recipient and payor</li> </ul>

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Enforcement/Arrears  
Collection

- Undertaken by CMA

- Option to seek enforcement via CMA

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Cost of Enforcement

- Borne by CMA

- Borne by the Applicant, possibly at fixed maximum level
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