

**EXPLANATORY MEMORANDUM TO THE
CHILD SUPPORT (MISCELLANEOUS AMENDMENTS) REGULATIONS 2005**

2005 No.785

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Description**

This is a package of miscellaneous amendments to various pieces of legislation relating to child support maintenance payments. Some amendments apply to the new child support scheme as introduced for cases with an effective date (as determined under specific provisions) on or after 3rd March 2003 and certain linked cases, and others amend regulations which relate to the old child support scheme. The detailed description of the policy background is set out at Annex A.

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

3.1 This is a set of affirmative Regulations made under powers in the Child Support Act 1991 (“the 1991 Act”) both prior to and following their amendment by the Child Support, Pensions and Social Security Act 2000 (“the 2000 Act”)

3.2 Some of the amendments to the 1991 Act by the 2000 Act are fully in force, whilst others have so far been brought into force for the purposes of specified cases only. The relevant commencements are in article 2(1) and (2) of the Child Support, Pensions and Social Security Act 2000 (Commencement No.3) Order 2000 (S.I. 2000/2994 (C.94)), article 2 of the Child Support, Pensions and Social Security Act 2000 (Commencement No. 5) Order 2000 (S.I. 2000/3354 (C.112)) and the Child Support, Pensions and Social Security Act 2000 (Commencement No. 12) Order 2003 (S.I. 2003/192 (C.11)), as amended by the Child Support, Pensions and Social Security Act 2000 (Commencement No.13) Order 2003 (S.I. 2003/346 (C.21)).

3.3 In this Memorandum, the child support scheme in force prior to the amendments to the 1991 Act made by the 2000 Act is referred to as “the old scheme” and the child support scheme in force following the amendments to the 1991 Act made by the 2000 Act is referred to as “the new scheme”.

Commencement

3.4 The new scheme has been brought into force in relation to applications for child support maintenance which have an “effective date” (as determined under specific provisions) on or after 3rd March 2003. When the new scheme is working well in relation to those cases, it will be brought into force on a later date in relation to maintenance assessments made under the 1991 Act before its amendment by the 2000 Act. The commencement arrangements for the remaining maintenance assessment

cases in the old scheme will be provided for in future commencement orders. In the meantime, the old scheme remains in force in respect of such cases. Some such old scheme assessments will move into the new scheme before that date, where a case has a link to another case which falls into the new scheme (article 3(1)(b) and (c) of the Child Support, Pensions and Social Security Act 2000 (Commencement No.12) Order 2003 refers).

3.5 These Regulations amend various sets of Regulations, some of which relate to the old scheme and others which relate to the new scheme. The Child Support (Transitional Provisions) Regulations 2000 (S.I. 2000/3186) (“the Transitional Regulations”) relate to the conversion of cases from the old scheme to the new scheme.

3.6 Regulation 1(2)(a) provides that these Regulations come into force on the day after the date that they are made, except where the commencement provisions of regulation 1(2)(b) or (c) apply. Regulation 1(2)(b) applies (in relation to regulation 2) where the Regulations which are amended by these Regulations are not yet fully in force for the purposes of certain cases, the amendments made by these Regulations will come into force as described above and will take effect for the purposes of those cases when those sets of Regulations come into force for the purposes of those cases, which will be when relevant sections of the 2000 Act are brought into force by future commencement orders as described above. Regulation 1(2)(c) provides that regulation 8(2), (4), (5) and (6) come into force on 6 April 2005.

Powers

3.7 At Annex B to this Memorandum is a table indicating the powers exercised in making these Regulations. The powers which make this instrument subject to the affirmative resolution procedure are marked "*" in the table. The final column of the table indicates whether powers in the 1991 Act are those prior to its amendment by the 2000 Act (which relate to the old scheme) or following its amendment by the 2000 Act (which relate to the new scheme).

Use of affirmative procedure

3.8 The use of the affirmative procedure is required by section 52(2) of the 1991 Act prior to its amendment by the 2000 Act and by section 52(2) of the 1991 Act as amended by section 25 of the 2000 Act. Regulations 4 and 8 make amendments which are subject to the affirmative resolution procedure. The remaining regulations in these Regulations are made using powers which, were they being used separately, would not attract the affirmative procedure. Section 52(2) of the 1991 Act allows provisions made under these powers to be used in an affirmative instrument.

Regulations of particular interest

3.9 Regulation 2 inserts a new regulation 8A into the Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992 (“the MAJ Regulations”) for the new scheme. This regulation provides that, where a maintenance calculation has been made and, at the time it was made, a maintenance order was in force which has, in consequence of the provisions of regulation 3 of the MAJ Regulations, ceased to have effect, any payments of maintenance due and made by the non-resident parent under that order after the maintenance calculation took effect shall be treated as payments of child support maintenance.

3.10 Regulation 3(5) inserts new paragraphs (21) and (22) into regulation 23 of the Child Support (Maintenance Assessment Procedure) Regulations for the old scheme. This amendment has been made in response to a Child Support Commissioner's decision. It makes provision, where a person has ceased to be a person with care in relation to a qualifying child to whom the assessment relates, for the decision to take effect from the first day of the maintenance period in which that person with care ceased to be such a person with care.

3.11 Regulation 4(2)(a) amends paragraph 2A(3)(a) of Schedule 1 to the Child Support (Maintenance Assessments and Special Cases) Regulations for the old scheme. This amendment has been made in response to another Child Support Commissioner's decision. It provides that when calculating the personal allowance to be deducted from self-employed earnings it may be calculated as if it were equivalent to any personal allowance which would be applicable to the earner under the Income and Corporation Taxes Act 1988. An equivalent amendment is made for the new scheme by regulation 6(5).

3.12 Regulation 6(4) amends regulation 11 of the Child Support (Maintenance Calculations and Special Cases) Regulations 2000 ("the MCSC Regulations") for the new scheme. This regulation amends regulation 11(1) of those Regulations to provide that where an application for child support maintenance is made and such an application cannot be made in respect of a different child under the 1991 Act but the non-resident parent is liable for maintenance under a court order or legislative scheme outside Great Britain or a legislative scheme outside the United Kingdom, it is a special case for the purposes of the 1991 Act. Regulation 11 sets out the calculation to be made in such a special case.

3.13 Regulation 7(3) amends regulation 27 of the Child Support (Transitional Provisions) Regulations 2000 which makes provision for the conversion of cases from the old scheme to the new scheme. This regulation inserts new paragraphs (7A) and (7B) into regulation 27 of those Regulations to clarify that where at the time a subsequent decision (a revision or supersession) is made there is more than one person with care in relation to the same non-resident parent and as a result of that subsequent decision there is only one person with care in relation to that non-resident parent, the provisions of paragraphs (1) to (5) of that regulation apply as if references in those paragraphs to the new amount and the transitional amount were to the amount apportioned to the person with care in respect of whom the subsequent decision is made and the references to subsequent decision amount are to the full amount payable under the subsequent decision.

3.14 Regulation 8(5) amends regulation 19 of the Child Support (Variations) Regulations 2000 for the new scheme. This regulation inserts a new paragraph (1A) into regulation 19 of those Regulations, to extend the categories of cases where a variation may be given on the ground of "income not taken into account". This new case applies where a non-resident parent has the ability to control the income he receives from his company or business whether from employment or self-employment, and the Secretary of State is satisfied that he is receiving income from that company or business which would not be taken into account under the MCSC Regulations.

4. Legislative Background

4.1 In this instrument each amendment relates to assessment (old scheme) or calculation (new scheme) of child maintenance payments under The Child Support Act 1991. Further information on the legislative background may be found in paragraphs 3.1 to 3.3 above.

4.2 Several sets of regulations were made in December 2000 and January 2001 to provide the detail of the new scheme. Subsequent miscellaneous amendments were made in April 2002, February 2003, November 2003 and September 2004.

5. Extent

5.1 These Regulations apply to Great Britain.

6. European Convention on Human Rights

The Parliamentary Under-Secretary of State, the Rt. Hon Baroness Hollis of Heigham, has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Child Support (Miscellaneous Amendments) Regulations 2005 are compatible with the Convention rights.

7. Policy background

See Annex A.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 This instrument imposes no new costs on the public sector.

9. Contact

The lead official is:

Adrienne Bashford
Department for Work and Pensions
Child Support Policy Division
5th Floor, The Adelphi
020 7962 8374
E-mail: ade.bashford@dwp.gsi.gov.uk

2 February 2005

ANNEX A

POLICY BACKGROUND

Child maintenance is an amount of money that parents who do not normally live with the children concerned (the “absent” or “non-resident parent”) pay as a contribution to the upkeep of their children (referred to as “qualifying children”).

In the old child support scheme, a formula is used to work out how much child maintenance is payable by the absent parent. It takes into account the number and ages of the children. The ability of both parents to contribute towards child maintenance is calculated unless the parent with care (the main provider of day to day care of the qualifying children) is in receipt of benefit. Ability to pay is calculated by looking at the income available to parents after making allowances for their basic day-to-day expenses. Absent parents are normally expected to pay at least a minimum amount of maintenance for their children (currently £5.60 per week), but there are some exceptions, including those in receipt of certain sickness and disability benefits.

In the new scheme the child maintenance calculation is based on a simple system of rates depending on the non-resident parent’s net income or benefit status. The amount of child maintenance depends on:

- the number of qualifying children the child maintenance is for;
- the non-resident parent’s income and circumstances; and
- the number of children living with the non-resident parent (these are called “relevant other children”).

In most cases the amount of maintenance is worked out as a percentage of the non-resident parent’s income – 15% for one child, 20% for two children and 25% for three or more children. For non-resident parents who do not earn very much or who are in receipt of certain benefits, the reduced rate or flat rate is used.

The bulk of the old scheme cases will be brought in to the new scheme when we are sure that it is working well. However, cases which already have a link to a new scheme application will transfer early. We recognise that parents who already pay or receive maintenance under the old scheme will need time to adjust to their new liability. Therefore most changes to new scheme liability will be phased in over a maximum period of five years. The amount of the financial phasing will depend on the income of the non-resident parent and range between £2.50 a week, for the lower paid, to £10.00 a week for better-off parents.

The draft Child Support (Miscellaneous Amendments) Regulations 2005 make amendments to a number of the sets of regulations which cover child support. The provisions amend regulations governing both the new and old schemes, as well as amending the transitional provisions which provide for the conversion of cases from the old to the new scheme.

Regulation 2 – Amendment of the Maintenance Arrangements and Jurisdiction Regulations

Regulation 2 inserts a new regulation 8A into the Maintenance Arrangements and Jurisdiction Regulations.

In the new scheme, parents, or children in Scotland, who have a court order made on or after 3 March 2003, are able to apply for a maintenance calculation under sections 4 or 7 of the Act once the order has been in force for a year. Previously they were prevented from doing so.

In these cases, maintenance liability starts two months and two days after the date of the application, and the court order ceases to have effect from this date. But in some cases it may not be possible to calculate child support maintenance within this timescale, and the non-resident parent may have already paid maintenance under the order beyond this date. The new Regulation provides that such payments are to be treated as payments of child support maintenance.

Regulation 3 – Amendment of the Maintenance Assessment Procedure Regulations

Regulation 3(2) inserts definitions of “family” and “partner” into these Regulations.

Regulation 3(5) provides that where maintenance for a qualifying child ceases because a person with care no longer has care of that child, the decision changing the maintenance assessment takes effect from the first day of the maintenance period following such a change. An equivalent amendment was made for the new child support scheme by the addition of regulation 7B(17A) to the Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1991/991). However, a corresponding amendment was not made for old scheme child support cases. This amendment rectifies that situation.

Regulation 4- Amendment of the Maintenance Assessments and Special Cases (“the MASC”) Regulations

The MASC Regulations set out the detailed rules by which assessments of child support maintenance are made under the old child support scheme, including the treatment of income. The starting principle is that all payments of income are taken into account, but specific rules provide the treatment of a particular form of income. For example, earnings to be taken into account will be net earnings after deducting amounts for items such as Income Tax and National Insurance Contributions.

Regulation 4(2)(a) clarifies the policy intention that in calculating the income tax liability against the earnings of a self-employed person the amount of “tax-free” earnings (the “personal allowance”) to be allowed should not be based on the individual’s actual personal allowance which is available to be set against self-employed earnings. Instead it is a notional amount, based on the standard personal allowances which would in general apply to a person in the individual’s circumstances. (These can include the higher or additional allowances for a person aged 65 or over, persons aged 75 or over, married couples born before 1935, and registered blind people.)

The Armed Forces Compensation Scheme is to be introduced by MoD from 6 April 2005. From that date, it replaces compensation offered under the War Pensions Scheme, although those pensions will continue for those already receiving them and will also apply to any new awards for injuries or deaths occurring before 6 April 2005. Regulation 4(3)(a) to (b) provides that any Armed Forces Compensation Scheme payments will be treated in the same way as payments under the War Pensions Scheme, when calculating net income. This means that in most cases £10 a week will be ignored as income.

DfES plans to introduce a new form of care of children known as special guardianship later this year. Although legally it does not go as far as formal adoption, special guardianship is broadly similar to those arrangements [for example, a person granted a special guardianship order for a child has parental responsibility for that child.] Regulation 4(3)(d) provides for allowances paid to a person who has been granted special guardianship to be treated as income in the same way as existing adoption support payments.

Child support maintenance is not payable where an absent parent who would otherwise be liable to pay the minimum amount of child support maintenance receives a payment or award specified in Schedule 4. Regulation 4(4) adds periodical payments in respect of disability made under the Armed Forces Compensation Scheme to that Schedule, mirroring the treatment of similar payments made under the War Pensions Scheme.

Regulation 5- Amendment of the Maintenance Calculation Procedure Regulations

Regulation 5 is a clarifying amendment, inserting a definition of family into regulation 10 of the Maintenance Calculation Procedure Regulations

Regulation 6- Amendment of the Maintenance Calculations and Special Cases (“the MCSC Regulations”) Regulations

The MCSC Regulations provide further rules for the calculation of child support maintenance in the new scheme in addition to those rules contained in Schedule 1 to the 1991 Act as amended by the 2000 Act. The rules provide for a calculation of child support based on a percentage of the net weekly income of the non-resident parent. The percentage which applies in particular case depends on the number of children for whom they will have to pay child support. Non-resident parents with lower levels of income or who receive a specified form of income (mainly social security benefits) are liable to pay a flat rate of child support (usually £5 a week). The MCSC Regulations also contains rules for the treatment of special cases.

As explained for regulation 4(3) above, the Armed Forces Compensation Scheme is to be introduced by MoD from 6 April 2005. Regulation 6(2) provides for the same treatment of a non-resident parent who receives periodical payments from the scheme on account of disability or bereavement as applies to existing War Pensions recipients. Such non-resident parents are to have flat-rate liability.

Regulation 6(3) makes minor drafting amendments to regulation 5 of these Regulations.

The new child support scheme recognises as a special case the fact that a non-resident parent may have responsibility for supporting children other than qualifying children. These are cases where the child is one for whom a child support application could not be made, for example because the child lives outside Great Britain. It treats that child as if it were a child for whom child support could be applied for (a “qualifying child”) to decide which-percentage is to be applied to net weekly income. The sum obtained from this calculation is then apportioned between the qualifying children and those children for whom a child support application could not be made. The child support maintenance due will only be in respect of the qualifying children – no sum is payable as child support for the other children.

Currently the provision only applies to a child for whom a child support application could not be made if the maintenance for the child is paid under a “maintenance order”. The definition of “maintenance order” given in Section 8(11) of the Child Support Act 1991 with further prescribed legislation listed in Regulation 2 of the Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992) only covers legislation of Great Britain. Regulation 6(4) extends this special case provision so that it applies to non-resident parents who pay maintenance for a child for whom a child support application could not be made and the support is given either

- in accordance with the terms of an order made by a court outside Great Britain or
- as required under the child support scheme of another state.

Regulation 6(5) mirrors, for the new scheme, the amendments in Regulation 4(2).

Regulation 7 - Amendment of the Transitional Provisions Regulations

Regulation 7(2) is a minor drafting amendment to regulation 3 of the Transitional Provisions Regulations.

Regulation 7(3) amends regulation 27 of the Child Support (Transitional Provisions) Regulations 2000 which make provision for the conversion of cases from the old scheme to the new scheme. Regulation 27 provides the rules for determining the amount payable where a non-resident parent is being phased to the new scheme liability and a fresh decision (subsequent decision) is made during the phasing (transitional) period. Where a non-resident parent has more than one person with care, the amounts payable in respect of each are calculated by reference to the apportioned amounts applicable in respect of each person with care.

This regulation inserts new paragraphs (7A) and (7B) into regulation 27 to clarify that where at the time a subsequent decision (a revision or supersession) is made there is more than one person with care in relation to the same non-resident parent and as a result of that subsequent decision there is only one person with care in relation to that non-resident parent, the provisions of paragraphs (1) to (5) of that regulation apply as if references in those paragraphs to the new amount and the transitional amount were to the amount apportioned to the person with care in respect of whom the subsequent decision is made and the references to subsequent decision amount are to the full amount payable under the subsequent decision

Regulation 8 – Amendment of the Variations Regulations

Regulation 8 amends the Child Support (Variations) Regulations 2000 (the “Variations Regulations”). These are new scheme Regulations which make provision for a variation from the rules for calculating maintenance in certain exceptional circumstances.

A variation can be allowed where a non-resident parent has “special expenses” arising from the costs of looking after a child who has a long term illness or disability. Paragraph (3) provides that financial assistance such as Disability Living Allowance paid to a member of the non-resident parent’s household is to be taken into account when an application for such a variation is considered.

The way in which some non-resident parents receive their income is reducing their liability for maintenance in the new child support scheme by an unacceptable degree. Regulation 8 provides for a new type of variation in cases where the non-resident parent has the ability to control the income he receives from a business or company. It expands the existing ground for a variation relating to “income not taken into account” at Regulation 19 of the Variations Regulations. This applies where the Secretary of State is satisfied the non-resident parent is receiving such income, which would not otherwise fall to be taken into account as the non-resident parent’s net weekly income under the Child Support (Maintenance Calculations and Special Cases) Regulations 2000. For example, this would include cases where a company director receives his income in dividends. The amount of income received in this way will be

added to the non-resident parent's net weekly income and this figure will be used to calculate his liability.

Paragraph (5)(b) substitutes the existing threshold provision at Regulation 19(2). The new variation will only be given where the income described above is over £100 per week, or an aggregate of over £100 where both the existing provisions at Regulation 19(1) and the new variation apply.

Paragraph (5)(c) provides for a variation where the income described above is diverted to other persons or for other purposes, for example where it is invested in the company. It also removes the provision which only allows a variation on the grounds of "diversion of income" to be given where the diversion has taken place in order to reduce child support liability.

Paragraphs (2), (4) and (6) make consequential amendments which, among other things, ensure that a variation cannot be awarded twice in respect of the same income.

**ANNEX B – TABLE OF POWERS EXERCISED IN THE MAKING OF THE CHILD SUPPORT
(MISCELLANEOUS AMENDMENTS) REGULATIONS 2005**

<u>Regulations</u>	<u>Regulations amended</u>	<u>Power</u> ^{1 23}	<u>Power:</u> <u>Pre-amendment or</u> <u>post-amendment</u> ⁴
2	Maintenance Arrangements and Jurisdiction Regulations (SI 1992/2645)	Section 10(1) and 51(1) of the Child Support Act 1991	Post-amendment
3	Maintenance Assessment Procedure Regulations 1992 (SI 1992/1813)	Sections 17(3) and (5) and 51(1) of the Child Support Act 1991	Pre-amendment
4	Maintenance Assessments and Special Cases Regulations 1992 (SI 1992/1815)	Paragraphs 5(1) and (2) and 6(2), (4) and (6) , 7(3)and 9(d) of Schedule 1 to the Child Support Act 1991*	Pre-amendment
5	Maintenance Calculation Procedure Regulations 2000 (SI 2001/157)	Section 51(1) of the Child Support Act 1991	Post-amendment
6	Maintenance Calculations and Special Cases Regulations 2000 (SI 2001/155)	Section 42(1) of, and paragraphs 4(1)(b), 5(a) and 10(1) of Schedule 1 to, the Child Support Act 1991	Post-amendment
7	Transitional Provisions Regulations 2000 (SI 2000/3186)	Section 29 of the Child Support, Pensions and Social Security Act 2000	N/A
9	Variations Regulations 2000 (SI 2000/156)	Section 28B(2)(c). Paragraphs 2 and 4(1) of Schedule 4B the Child Support Act 1991.*	Post-amendment

¹ Powers cited are those in the Child Support Act 1991, save in relation to regulation 8 and regulation 9, in part.

² The draft Regulations also cite sections 52 (Regulations and Orders) and 54 (Interpretation) of the Child Support Act 1991.

³ Powers marked * are subject to the affirmative resolution procedure

⁴ Some provisions are to be made using powers in the Child Support Act 1991 before amendment by the Child Support, Pensions and Social Security Act 2000, and some using powers in the 1991 Act after amendment by the 2000 Act.