Gingerbread
Single parents, equal families

Children deserve more

Challenging child maintenance avoidance

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June 2017

Barrow Cadbury Trust

About Gingerbread

Gingerbread is the national charity for single parent families.

Since 1918, we've been providing single parent families with expert advice, practical support and tailored services, as well as campaigning to make sure single parents' voices are heard.

It has been a longstanding goal of the organisation to help achieve an effective child maintenance system in this country so that children growing up in separated households are not financially disadvantaged as a result, and that both parents contribute their fair share to children's upkeep on a regular and sustained basis.

Acknowledgements

We would like to thank Barrow Cadbury Trust for supporting our 'Maintenance matters' project. Many thanks also to James Pirrie, Rachel Spicer and Robin Weare for their advice and comments on drafts of this report. Any errors or omissions are the author's own.

Most importantly, Gingerbread would like to thank the parents who have shared their stories.

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Introduction

"**Why doesn't he pay any maintenance?** To me, there can be only one answer – he doesn't want to.

It can have nothing to do with my brilliant, witty boy, can it?

How could his father simply not care about how warm his bedroom is in the winter, or what he takes to school for lunch? Why doesn't he care about his day-to-day life, or whether I ever struggled to pay the rent for the roof over his head?

It's not their relationship. My son spends most of the school holidays with his father.

It's not the money. The amount formally owed to me via the Child Maintenance Service…is less than the starting cost of one term's tuition at his younger child's private school.

In fact, it's probably less than the fee charged by his solicitors for defending him at the child maintenance tribunal.

The only answer I can find is that it must be about saying no to me. I believe that for many former couples, withholding maintenance is about holding on to power and control…but I hate the thought that my child would ever be disadvantaged because of me.

This 'game' shouldn't even be possible, should it?"

Lee

This report is about the rules, and the way they are administered by the Child Maintenance Service (CMS), which enable some paying parents to pay levels of maintenance far below their actual ability to financially support their children.

It's easy to portray the paying parents in this report as maintenance dodgers, reneging on the responsibility every parent has to contribute to their child's upkeep. Some are. But others can legitimately argue that they are simply abiding by the government's rules for running the statutory child maintenance system. Deliberately taking advantage of the rules? Maybe. Maybe not. But as Lee asks – why is this even possible?

We follow the experiences of five parents (called 'receiving parents' by the CMS) whose ex-partners were allowed to pay minimal maintenance or avoided it altogether, as a result of the child support system failing to take their true financial circumstances into account. We look at their fight for their children's right to be properly maintained – by both parents. We show how the complex statutory rules and administrative bureaucracy work against receiving parents in this situation and how – even if they succeed in getting a higher recalculation of child maintenance due – the odds can still be stacked against them when it comes to actually obtaining the higher amounts retrospectively awarded.

The statutory child maintenance system is in the throes of major change

The stories of our five parents are played out against a background of major change, where the existing Child Support Agency (CSA) is being gradually shut down. It is being replaced by a new system run by the CMS (see Box 1), with new rules, including how a paying parent's income is counted (see Section 1, p7).

Box 1 A changing statutory child maintenance system

The closure of the CSA is part of a wider series child maintenance reforms. A primary aim is to reduce reliance on the statutory maintenance service. To persuade parents down the route of negotiating their own private agreement, there is a charge of £20 to access the CMS. If the paying parent then fails to pay, they face a charge of 20 per cent extra for the CMS to step in and collect the maintenance due. But receiving parents also face a charge: they lose 4 per cent of every payment collected. This is to encourage them to only consider using the collection service to get maintenance from the paying parent as a last resort.

Some of our parents have gone through the process of switching from the CSA to the CMS. Their cases throw into sharp relief some of the key differences in the treatment of income between the two schemes, and what this has meant in practice (see 2.5, p23).

One feature to note is the almost complete cut-off between the two systems. This means that, when our parents decided to apply to the new CMS, they had to start afresh. No accumulated knowledge about the other parent is passed over from the CSA to the CMS. The only possible transfer is of outstanding arrears of CSA maintenance. The task of collecting these debts passes, in theory at least, to the CMS.

Self-employment is on the increase among the better off

All five cases involve paying parents who have a degree of flexibility as to how they decide to take (or not take) their income and report it for tax purposes. All but one are self-employed. A self-

employed person may decide, for example, to set up an owner-managed limited company. Profits are typically taken as a mix of a small salary, dividends, benefits in kind, pension contributions, perhaps payment to other family members and eventual capital gains (ie left in the company until required). Such arrangements have considerable tax advantages – and indeed, are often the result of standard advice from accountants.

This presents a problem for the default method of calculating statutory child maintenance. A standard CMS calculation ignores a lot of this income, taking account only of earnings from employment or self-employment, plus pension scheme income - as reported to HM Revenue and Customs (HMRC).

In recent years there has been a growth in self-employment. A 2017 report noted that nearly 60 per cent of the growth since 2009 has been in high-skilled, higher-paying 'privileged sectors' – where the tax advantages have been a key driver[1]. Against this background, the standard way income is taken into account for child maintenance purposes looks increasingly problematic. It has left our parents short-changed, with a fight on their hands to get the wider income streams available to the paying parent looked at.

[1] **Tomlinson, D. and Corlett, A. (2017)** A tough gig? The nature of self-employment in 21st century Britain and policy implications. Resolution Foundation.

These are all cases where separation was difficult and painful

In an ideal world, parents who separate would remain amicable and be able to sort out future arrangements for their children by themselves. The government wants more parents to do this. In practice, if the separation was difficult and painful, it can be impossible. Discussions about money and future financial arrangements can become a source of tension where parents are conflicted. It can be particularly hard to negotiate and agree how much one parent can afford to pay for their child, where that parent holds most of the financial cards – and wants to keep those cards face down.

The statutory child maintenance system exists because, in the real world, parents can't always agree. It is there as a safety net to protect the interests of children, by ensuring that both parents contribute fairly to the costs of raising them, even if they now live apart. It does this by assessing a paying parent's income; calculating how much maintenance should be paid (based on statutory rules); and by stepping in to collect and enforce payment of the maintenance if necessary.

Yet while keen to avoid unnecessary use of the statutory system by receiving parents (see Box 1, p5), the government seems less willing to tackle misuse of the statutory system by paying parents determined to penalise the other parent and limit the financial support they offer their children.

As this report shows, when relations are fraught, there can be resistance to paying child maintenance. The Department for Work and Pensions (DWP), which holds the responsibility for government child maintenance policy, has an 'arrears and compliance strategy' to counter non-payment of child maintenance. But it has no strategy in place to deal with another form of resistance by paying parents: that of maintenance avoidance and evasion. This is where parents who could afford to pay more are happy to take advantage of the system to pay as little as possible for their children.

The cases in this report underline why the statutory maintenance system is so important, and why tackling the very real problem of maintenance avoidance and evasion is long overdue.

Section 1 explains how income is currently taken into account for CMS calculations. Section 2 describes the experiences of five receiving parents, who knew that their child maintenance award did not properly reflect the paying parent's financial situation. Section 3 examines the reasons given for the government's reluctance to tackle maintenance avoidance and evasion. Finally, in Section 4 we set our recommendations for change.

Section 1 What income is counted for CMS child maintenance?

Boxes 2-5 set out what income of the paying parent is counted by the CMS, when calculating how much they should pay in child maintenance.

Key points to note are:

- The CMS bases its standard calculation on annually updated data from HMRC giving gross taxable earnings and pension scheme income for the latest tax year. With a few exceptions, if it is not in the HMRC data, a paying parent's income is invisible for child maintenance purposes.
- The threshold for switching from the default calculation based on 'historic' gross income to one using 'current' gross income is set deliberately high at a 25 per cent difference. This is to cut down in-year adjustments to a calculation, saving administrative costs.
- A paying parent's taxable unearned income will not count in a CMS calculation, unless a receiving parent flags it up and requests a 'variation' to the standard calculation on one of the grounds allowed (see Box 4, p9).
- A variation can also be granted where a paying parent has 'diverted' income which could otherwise be available to pay child maintenance. Diversion of income can take many forms. Examples include payment of a salary to the paying parent's new partner, despite lack of participation in a business; the issue of shares to a relative on conversion of a business to a limited company, who holds them in name only; and the payment of excessive amounts into a private pension.
- If the receiving parent's variation application is successful, the paying parent not only has to pay higher child maintenance in future, but faces a retrospective arrears bill. This is because the higher liability will be backdated to the date of the variation application.

Box 2 Income counted for the standard child maintenance calculation

Normally – historic income

The standard child maintenance calculation is based on the following types of gross taxable weekly income belonging to the paying parent:

- Earnings from employment or self-employment
- Payments from occupational or personal pension schemes
- Certain taxable social security benefits

CMS gets this information directly from HMRC. HMRC take it from the PAYE end of tax year returns from an employer, or the completed annual self-assessment returns of a paying parent. The figures provided should be from latest tax year (going back six years) for which HMRC has a complete record. This is called 'historic income'.

Less often – current income

A calculation can be based on a paying parent's current gross taxable weekly income from employment, self-employment and pension schemes, in any of the following circumstances:

- Either parent can show that current income differs by 25 per cent or more from the historic income figure supplied
- The historic income figure supplied by HMRC is nil, and the paying parent has any current
- HMRC cannot supply a figure, and a nil or flat rate (see Box 4) does not apply

Whether historic income or current income is used, a paying parent's gross income will always be reduced by any payments made towards a pension, before a child maintenance calculation is done.

The paying parent's income is reviewed annually, when the CMS requests the latest available tax year information from HMRC, and adjusts accordingly.

Box 3 Where paying parents pay less than the standard rate: the nil rate, flat rate and reduced rate

£0

The **nil rate** is paid automatically in a limited number of circumstances eg where the paying parent is in prison or is a child

£7

The **flat rate** of £7 is payable where a paying parent is in receipt of certain benefits eg state retirement pension, Jobseeker's Allowance or Employment and Support Allowance, or has a weekly gross income of £100 or less per week

£ Reduced

The **reduced rate** is payable where a paying parent has weekly income between £100 and £200. It consists of an amount equal to the flat rate for the first £100, plus a percentage of the remaining income

Box 4 Getting a bigger picture: extra income the CMS can capture

Where the paying parent has other income besides that used in the basic calculation, the receiving parent can **apply for a variation**. If it is considered 'just and equitable,' a variation can be given to take into account the following income of the paying parent:

Taxable 'unearned income'
Such as savings and investment income, property income, and dividend income, which is recorded on the paying parent's annual self-assessment tax return. This information is supplied by HMRC, only once requested by the CMS. Unearned income can be counted if worth at least £2,500 per year.

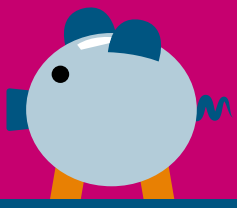
Diverted taxable earned or unearned income
Where a paying parent can control (directly or indirectly) the income they receive or which counts as gross income, and they have "unreasonably reduced" taxable income that would otherwise be counted for child maintenance, by diverting it to someone else or for another purpose.

Taxable earnings, certain benefits and pension scheme payments
Worth more than £100 per week, where the paying parent would otherwise just qualify to pay the nil rate or flat rate of child maintenance (see Box 2).

No variation is possible however where 'default' maintenance is in place. This is a standard amount (eg £30 for one child) applied by the CMS where it has insufficient information about the paying parent's income to make a proper calculation.

Box 5 Outside the picture: resources not counted

There are various types of financial resources a paying parent might have which are not counted for child maintenance purposes. These include:



Any non-taxable income the paying parent has, such as income from ISAs or trust funds

Any overseas income unless it is taxable in the UK as income from employment, self-employment or a pension

Any capital and assets the paying parent owns

And finally, there is 'invisible income' – income which would be counted for child maintenance but which the paying parent does not declare to HMRC.

Section 2 Our children deserve more - five single parents' stories

In this section we tell the stories of five single parents and their fight to get an award of child maintenance that properly reflected the paying parent's ability to pay. It is important to understand just what single parents are up against, when they decide to challenge the system. These five parents are not isolated cases. They are representative of many others who contact Gingerbread, similarly concerned that the amount set by the CMS appears low in relation to the paying parent's financial resources. Occasionally, we refer to the accounts of some of those other parents as well, and draw on wider material.

Meet our five parents.

Emma

Emma and her ex-husband jointly ran a business which gave them a comfortable income and a good family home. They had two children. The marriage ended with considerable bitterness, with Emma facing harassment, stalking and property damage from her ex-husband.

After the divorce, her ex-husband set up a separate business alone. For several years, life was a major struggle for Emma as she tried to balance working with her caring responsibilities – not helped by the non-payment of maintenance. Eventually Emma found a stable job she could manage.

Emma first claimed child maintenance via the CSA. Her ex-husband strongly resisted paying. But after repeated legal enforcement action by the CSA, he finally paid £13,000 in arrears and made regular ongoing payments. This led to a more stable family life for Emma and her children with less stress, for example, in affording decent childcare and managing transport. However, when her CSA case ended in 2016 and she applied to the CMS, her child maintenance troubles began again.

Elizabeth

Elizabeth and her ex-partner have a now teenaged son. The ex-partner is independently wealthy with substantial assets held in a variety of forms, including a company, trusts of which he is a beneficiary, and a large pension fund. After extended and acrimonious legal proceedings and a court order, in 2012 he paid for a flat to house his son during his childhood, with Elizabeth. Later, in 2017, he was ordered by the family court to pay a further lump sum of just over £20,000 to cover the cost of a replacement car, a contribution to various holiday travel costs of their son, and the cost of a new laptop for their son.

Elizabeth, who works as an administrator on a low income, first applied to the CSA for child maintenance in 2007. Later when her CSA case was shut down in 2015, she applied again, this time to the CMS. Her ex-partner has persistently fought against paying child maintenance. He argues he has no income. In the most recent court proceedings, the family court judge observed: "even though he has millions which may properly regarded as his resources, he has paid a mere pittance in child support….the lack of support for day to day living is a most disturbing state of affairs" (EWFC 24, 2017). It has been the ex-partner, rather than Elizabeth, who has repeatedly challenged and appealed every child maintenance calculation.

Elizabeth was feeling very low about the fight about child maintenance. Then she met an adviser who helped unrepresented people in legal proceedings (called a 'McKenzie friend') He offered to help…

Heather

Heather separated from her partner of three years when her daughter was nine months old due to domestic violence. Her daughter is now six. She works full-time as a professional in the property sector. After some delay due to the financial and emotional upheaval of the difficult separation, she applied first to the CSA for maintenance, then, in 2015 when her CSA case was ended, to the CMS.

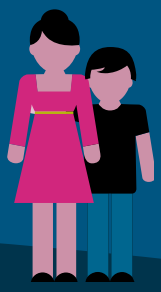
Her ex-partner is a self-employed roofer. For years, his child maintenance award was set at the CSA minimum of £5 a week, later £7 a week under the CMS. Heather had good reason to think this liability did not take account of her ex-partner's true income.

Sandra

Sandra was divorced several years ago. The divorce settlement involved a share of the former matrimonial home, plus a court-endorsed agreement with her ex-husband for child maintenance for their two teenage children. However, when the child maintenance dwindled then stopped after five years, Sandra applied to the CMS for maintenance for her daughter.

Her ex-husband has run a number of businesses including a debt recovery business, and a building services company. In 2015, the amount of child maintenance he was required to pay by the CMS declined sharply due to apparent reductions in income. Whereas, at the end of January, the monthly maintenance due for their 17 year-old daughter had stood at almost £400, by June liability had plunged to £50 per month – a figure which remained largely unchanged thereafter.

Sandra felt the CMS-calculated maintenance simply did not reflect her ex-husband's true financial position. He had an affluent lifestyle, went on expensive holidays abroad, and openly boasted to his children about his deliberate avoidance of paying more maintenance. **Sandra** felt something should be done.



Lee

Lee and her ex-husband have one son, now 12 years old. The break-up of the marriage led to real financial problems for Lee and her son, then a toddler. She survived, and now runs her own business. She has now re-partnered.

Her ex-husband is managing director of his new partner's business – an architecture practice. He also has his own company, where he is the sole director, and has another small online business.

Lee initially claimed child maintenance via the CSA. From 2008 onwards, her CSA assessment was nil. This was because her ex-partner told the CSA he had no income. In 2013, she asked the CSA to look again. The Agency confirmed the nil assessment. Lee decided to try and fight the decision. She did eventually persuade an appeal tribunal that her ex-partner did have an income. Very shortly afterwards, her CSA case was shut down and she had to reapply to the CMS. This meant she had to start all over again…

2.1 It can't be right - but what to do?

> "I am a single, full-time working mother of two young children. I split with the father of my children approximately three years ago after an abusive and controlling relationship. We have two boys together who are now four and six years old.
>
> The boys see their dad and his fiancé regularly. They live in a lovely semi-detached three bedroom house. He regularly goes on overseas holidays (five times so far in 2016 – South Africa, Iceland, Amsterdam (twice) and Greece)
>
> Unfortunately, he and I have a very acrimonious relationship and with him being self-employed, he has managed to figure out a loophole in a way the CMS work out maintenance payments to avoid paying much maintenance for his two boys…I almost single-handedly pay for all the expenses, which includes after-school clubs, food, rent etc.
>
> The overall figure the CMS has worked out amounts to him having to pay just £7 for two children!! That's £3.50 a week per child! I have written to the CMS with my concerns who directed me to HMRC. I wrote to HMRC and have since had no response."

Gingerbread comes across a lot of single parents like the one above. She is at the start of a journey. She can see her ex-partner's expenditure and lifestyle point to a much higher income than the figure used to calculate the weekly child maintenance. But she doesn't know why this is, or what to do to challenge the figures. The CMS are not interested. They tell her to contact HMRC herself. Nothing happens. This parent got so cross she started a petition. She also wrote to her MP. It was only at this stage, that the CMS let the MP know that there was something called a 'variation' she could apply for…

The five parents whose cases are examined in detail in this report are much further along than the parent above in the journey towards getting their ex-partner's true financial situation uncovered, and something done about it. But all found themselves in the same position at the start – knowing the calculation was too low in relation to the paying parent's finances, stumped as to what to do next, and given little help in finding out.

Emma was shocked and horrified to discover that, when her CSA case was shut down and she applied to the CMS, the amount of child maintenance due from her ex-partner dropped from over £220 per week to £29 per week. "I questioned how even though the CMS calculated maintenance in a different way to the CSA, this amount could differ so wildly. I was told, 'We are not the CSA'…I asked what could be done and was told 'nothing'".

Heather protested that she knew her ex-partner was earning more than £100 per week as a roofer, because – when they lived together – she had been encouraging him to start submitting tax returns to HMRC rather than working cash in hand. She had collected his invoices and receipts to assist him, so knew full well his earnings were higher. She was told "We can only go on what he says. There is nothing we can do." It was only when she complained to her MP two years later, that things began to move.

Lee was put off pursuing what she knew was wrong for five years."He was assessed on the nil rate. Although he was openly working for his partner's architecture business it was clear he didn't intend to pay anything, and I couldn't see how I could get past the paperwork, so I dropped it."

The fundamental problem for many single parents is that they simply don't know what to do, and the CMS (just like the former CSA) is seldom forthcoming in telling them.

2.2 Challening income - battling the bureaucracy

The CMS does not make it easy for receiving parents who want to challenge the income figure used in the calculation of their child maintenance. Applying for a variation, for example, (see Box 4, p9) is a bit of a hidden secret within the CMS (just as it was under the CSA), with parents often having to find out about the rules by first going elsewhere.

Emma had been told by the CMS that there was nothing it could do about the dramatic fall in her child maintenance when she transferred from the CSA to the CMS. She discovered for herself that she could apply for a mandatory reconsideration and a variation of the standard calculation she had been given.

"I found this out by speaking to various organisations and doing a vast amount of research. After this [once she knew what to ask for], I received a leaflet from the CMS detailing the action that could be taken."

Emma later complained to her MP at what appeared to be the withholding of information on her options: "Tasks on my case do not move forward unless I telephone and write and research as much as I can to ensure that I am adequately abreast of the facts to ask the relevant questions which invariably prompts further information from the caseworkers…I should not have to become an expert on the workings of the CMS just to be able to secure maintenance for the children…I am raising my children alone…as well as working and running a home, [I am] micromanaging this situation which should be effectively moving through the relevant processes guided by workers at the CMS."

Some CMS staff have said to Gingerbread that they are told not to tell parents about variations. Other CMS staff dispute this. One variation team specialist said she thought the problem was that other teams in the CMS simply did not know enough to recognise when an issue arises.
While most parents who approach Gingerbread appear to have been left in the dark about the scope for a variation in their case, there are examples of individual good practice. **Lee**, who initially gave up on challenging her 'nil' child maintenance assessment, noting "the CSA presented a bit of a brick wall at times", did find a caseworker determined to be helpful:

"One person in particular at the CSA took great care to explain to me how to go about the process of applying for a variation, without actually telling me what to do (as they were not allowed to). She told me where on the website to look for the leaflet that would spell out the different criteria, and explained the process of having to apply for a variation in order to have it rejected, which would then allow me to take the case to a higher tribunal, as this was the only way for me to make progress. Without her input I'd have struggled…"

It is also impossible to report on the battles our five parents faced without drawing attention to the more general frustration they, like many others, experience when dealing with the CMS and CSA administrative machine. "I am quite tired of being spoken to by the CMS like I am some sort of fool who is in the wrong. If I was in a position to forgo any child maintenance I would very happily never have anything to with the CMS again however this is not the case and the children's father has an obligation to provide for the children financially". **Emma**

The CMS and CSA prefer to do business by telephone rather than in writing. This in itself can be a problem, given that the majority of single parents work and when at home, conversations can end up having to be made against the background clamour of children needing attention. **Emma** also tried sending queries through the online account provided to CMS parents. No-one replied: "I was told 'oh no, don't write a letter, ring us' but it is hard to get through on the phone and I have spent so many hours trying to get this case sorted out. It is easier for me to write letters when

the children are in bed or settled for the evening, when I have time to think and can record facts correctly."

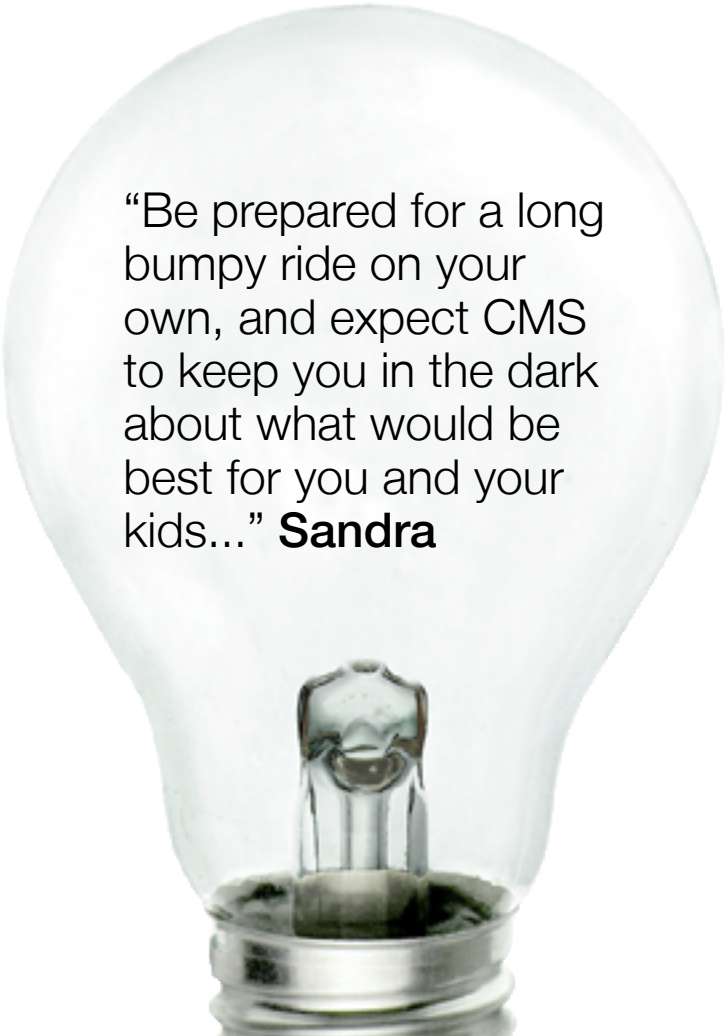
Then there is the fact that the official on the other end of the phone keeps changing, so that parents have to tell their story and explain things all over again. "I telephoned and have yet another new caseworker and have had to start from the beginning. Frustrating does not begin to explain… Different information is given when speaking to different caseworkers… CMS caseworkers are not forthcoming with subsequent action, timescales or my rights… I had to ask three times for a supervisor to phone me back and lo and behold when they did I was unable to answer as was at work…" **Emma**

"You have to answer the same questions over and over and over again, and if your case is anything like mine, you'll go through innumerable phone calls, letters, forms and tribunals and still go…without child maintenance." **Lee**

It can seem as though action will be taken but, somehow, nothing materialises – so it's back to ringing up again, with all the costs of doing so. "Individually, on the phone, staff can sound like they are helpful and doing their best, and listening; what they won't tell you is that their hands are tied, and when you put the phone down, it will all go wrong." **Sandra**

"…Every person I spoke to at the CSA and CMS believed my claim that the calculation wasn't accurate, but their hands seemed to be tied by red tape. …even after some [CMS operators] have responded enthusiastically, their efforts seem to fade away and someone else who knows nothing about the case takes the next call." **Lee**

From much further along the journey, **Sandra** warned others thinking of embarking on the same route.



2.3 Finding out about finances - the odds stacked against receiving parents

> "For each case, HMRC will provide a single figure of the relevant taxable income at the time of the [CMS] request …. The [CMS] will be able to obtain a breakdown of that figure where it is necessary to help resolve a parent's enquiry about a maintenance calculation. To meet data protection principles, that breakdown will not be passed on to the parent with care." **CMEC (2011) Technical consultation on the draft Child Support Maintenance Calculation Regulations 2012**

Within the new CMS scheme, the receiving parent faces a number of almost insurmountable obstacles when it comes to querying the income taken into account for a maintenance calculation.

First off, as was made clear in the government consultation on its new proposals for calculating maintenance (see above), whilst a paying parent can use the CMS to find out more about the income figure provided by HMRC, receiving parents hit a brick wall when asking for the same information. In a matter which so directly affects the outcome of the receiving parent's application, they do not have access to the HMRC data on which the calculation is based. This puts them at a severe disadvantage if they have a reason to suspect the data does not give the full picture. In fact, it is only if they get as far as lodging an appeal that this information will eventually be made available to them via the appeal papers.

If a receiving parent complains the income figure used is too low, the standard CMS response is to wash its hands of the problem by advising them to report the other parent to HMRC for tax evasion. But for every paying parent dodging tax by not declaring their true earnings, there are many more that have – perfectly legally – organised their finances in a way that minimises the income counted for child maintenance purposes. Reporting the latter to HMRC is a complete dead end. Although seldom brought to receiving parents' attention by CMS staff, other options to challenge the income figure include applying for the calculation to be reviewed on the basis that a paying parent's current income is substantially higher (see Box 2, p8); or, making a variation application (see Box 4, p9).

But whether it is non-declaration of income to the tax authorities (evasion) or income minimisation when it comes to a child maintenance calculation (possibly, but not necessarily done expressly for maintenance avoidance), a receiving parent's search to find out about an ex-partner's true financial position can be a long and frustrating exercise.

Tax evasion – getting HMRC to investigate

> "If someone thinks that someone has under-declared their self-employment income to HMRC, that information needs to go to HMRC. If HMRC changes its assessment as a result of that, we will change our assessment. We will not have two parallel processes of assessing the same person's self-employment income. That would make no sense." **Minister for child maintenance, 2014**[3]

Where a receiving parent thinks their child maintenance is too low because the other parent is hiding their true income from the tax authorities, they can find themselves lost in limbo. On the one hand, the CMS tells them to contact HMRC. On the other hand, HMRC seldom seems interested. Indeed, as correspondence with the Work and Pensions committee revealed, HMRC keeps no records of CMS referrals.[4] The government may want to avoid two parallel processes, but the reality for many receiving parents is that they are caught in the middle between the CMS and HMRC, with neither department prepared to investigate.

[3] **DWP Minister Steve Webb (03/02/2014)** Parliamentary debate on Child Support Fees Regulations

[4] **Work and Pensions Committee (2017)** Letter from Jon Thompson, Chief executive (HMRC) to Frank Field MP, Chair (Work and Pensions committee)

Sandra described the process of being told to contact HMRC about her ex-partner's suspiciously low earnings as "another wild goose chase that the CMS send you on". She did as she was told, and reported her ex-partner to HMRC. The CMS later asked her how far she had got with HMRC. She tried to find out for them. But HMRC told her they were governed by the law of confidentiality. "This…does not allow us to disclose to you any information about the affairs of a particular individual or company".

As far as she knows, nothing has been done by HMRC. She is not alone in feeling frustrated at being kept in the dark. Another single parent reported to Gingerbread in similar terms: "I printed and posted the variation form about [the paying parent's] rental income only to find it was not declared to HMRC. I then discovered that CMS do not pursue investigation where HMRC do not have records and the single parent has to be the one to report this to HMRC – even though I have made a formal declaration and advised that the properties are listed on the Land Registry. As a single parent I am not able to pursue this with HMRC."

One caller to Gingerbread's helpline even reported that, when she rang the HMRC's tax evasion hotline as directed by the CMS, she was told by the operator that they were inundated with similar calls from parents, and that they simply could not look at all reported cases as they did not have the resources.

Heather was able to prove that her ex-partner was submitting false tax returns, but – in fighting both the CSA and CMS systems – her battle casts a light on how the CMS rules make it harder to do this.

After two years of being told by the CSA that they had to believe her ex-partner when he said he earned less than £100 per week as a roofer, Heather finally decided to challenge her assessment of just £5 per week in maintenance (which was not being paid), when she saw him working on a roof near her workplace. He was also spotted working on another occasion by a friend. She wrote to her local MP, complaining at the refusal of the CSA to take action, and enclosing photographs of her ex-partner at work and his van. The MP's intervention led to the CSA carrying out a financial investigation in 2014. They were able to inspect her ex-partner's bank account which clearly showed he was earning far more than he had told the Agency.

As a result, her child maintenance increased almost five-fold to £24 per week, and back payments worth £800 were ordered. But her ex-partner still refused to pay and appealed, disputing the amount of earnings the CSA said he had. Meanwhile, as the appeal lumbered at a snail's pace through the process (see Section 2.4), in 2015 Heather's CSA child maintenance case was shut down. This meant she had to start again with a CMS case.

This time, the rules were different. Now the CMS automatically relied on the tax returns her ex-partner had now submitted to HMRC for 2014/15. These showed he earned less than £100 a week. So, despite the CSA investigation, she was again back to the minimum liability – now £7 a week.

Heather's ex-partner's CSA appeal meant that, in the papers sent to her before the hearing, she was given access to his tax returns. As a result, she was able to conclusively demonstrate that they were fabricated – not least because he had relied on false invoices from an address he did not occupy until two years later. Heather obtained records from the Land Registry to prove this. The tribunal found the ex-partner's evidence not credible, and confirmed the earnings figure used by the CSA. Having exposed her ex-partner's tax returns as false, Heather then wrote to HMRC to tell them. There was no response. Following the tribunal, her ex-partner sent in adjusted tax returns.

Heather's CMS maintenance was eventually adjusted to £105 per month to take account of the revised tax returns. She suspects he is still under-reporting his earnings.

Passing the buck to HMRC to identify parents who are evading tax and hence child maintenance might have seemed an easy and cheap solution to the DWP. But in practice, HMRC have other priorities. In fact, despite the DWP bringing HMRC into child maintenance policy, HMRC admit they don't spend any additional resource to support the service.[5] The result is that paying parents who are cheating on their children as well as the taxpayer are allowed to get away with it. This is discussed in more detail in Section 3.

[5] Work and Pensions Committee (2017)

Maintenance avoidance and minimisation – receiving parents as reluctant private investigators

> "I'd much rather not have to have done any of it. If felt unfair to have to do so much on my own…" **Lee**

Far more common than tax evasion, is the situation where a paying parent – often to avoid tax, but sometimes also to reduce maintenance – chooses to take income in forms which are not counted in the standard child maintenance calculation but which are perfectly lawful for UK tax purposes. The initial 'historic' gross earnings figure provided to the CMS by HMRC (see Box 2, p8) may be only a small part of a bigger financial picture. The big challenge for a receiving parent is to try to uncover the reality of a paying parent's financial affairs in this situation. Unsurprisingly, it is a formidable hurdle for many.

Emma couldn't understand the dramatic drop in the maintenance due when she had to switch from the CSA to the CMS, from over £220 to £29 per week. She eventually found out that the CMS had based its assessment in mid-2016 on her ex-partner's gross taxable profits from his business as provided by HMRC for the tax year 2014/15. No later tax returns had been submitted. In that year, his gross earnings were just over £190 per week. The figure was so low that only a reduced rate of child maintenance applied. The CMS said they would only get a new figure from HMRC in a year's time, in mid-2017.

The challenge for Emma was that she had lived apart from her ex-partner for ten years. She did know that, in the year in question, despite apparently earning under £10,000, her ex-partner had paid her £15,000 in CSA child maintenance payments alone. She also found out via the Vehicle Operator Licensing Service that her ex-partner's business was sufficiently large to operate several vehicles. She could find no record of him at Companies House. So what was going on? Emma commented, "I just didn't want to have to do all this digging again. If I was flush and having an easy time it wouldn't bother me but I am not. I know I am not alone in what I am experiencing and just don't want to let my children down." Her application for a reconsideration of the calculation and also for a variation due to diversion of income was rejected.

In **Elizabeth**'s case, her ex-partner's assets were hidden by what were described by a family judge as "all-too-familiar manoeuvres to try and insulate his resources from the reach of the mother and the court."[6] It was only when she applied to the family court to obtain a lump sum payment to provide accommodation for her son and herself that details of the ex-partner's finances, including his substantial assets, did emerge. This was information that he had not been required to give to either the CSA or CMS. It was mainly the financial details obtained through the court proceedings that enabled Elizabeth to build up a picture of her ex-partner's extensive resources. One obstacle in her path was that such information can only be passed on to the CSA or CMS if the court gives its permission – she had to obtain this. At present, in connection with an appeal to a tribunal - which is independent of the CSA/CMS – that information disclosed in court proceedings can be shared without prior permission. In 2008, parliament passed legislation to remove the need for prior court approval before information obtained in family proceedings could be passed on to the CSA or CMS. Unfortunately, however, successive governments have chosen not to implement this provision.

[6] EWFC 24 (2017)

In theory, the new CMS rules should make getting a variation easier for receiving parents in one respect. Whereas, under the CSA rules, an application could only succeed if the receiving parent could actually prove that their ex-partner had extra resources, under new CMS rules, the CMS can itself simply ask HMRC for evidence about a paying parent's unearned income, if "it *appears*… that consideration of further information or evidence may affect its [variation] decision"[7] (emphasis added).

[7] **Child Support Act (1991)** Section 28D (2B), as amended

The new system, said the government would "enable actual HMRC data to be used as evidence… ensuring a fairer, simpler and less-time-consuming system which reduces the stress on parents to provide the necessary evidence and on the [CMS] to administer variations."[8]

[8] **DWP (2012)** Child Support Maintenance Calculation Regulations 2012 Final Impact Assessment

In practice, the burden on receiving parents remains considerable. When the current calculation rules were debated in parliament, the Minister in charge made clear it would not be open to receiving parents to automatically seek a variation, in order to get access to details of a paying parent's unearned income:

"To make a successful variation application, a parent with care would be required to state what type of unearned income the non-resident parent is receiving and why they believe this. There is also a threshold of unearned income of £2,500 per annum and anything under this will not succeed." **Letter from Lord Freud, Minister for Welfare Reform to Lord McKenzie of Luton 12/10/2012**

Where a receiving parent has been separated from the other parent for some time, the former may not know, for example, that their ex-partner who appears to just be have a minimal salary is in fact now trading through a company which they own, and paying themselves largely in dividends. Nor may it be obvious that a paying parent has acquired a property or properties, and has rental income. Although HMRC should have this information (because it will appear in the paying parent's self-assessment tax return), the CMS will not ask for it unless the receiving parent has found out enough to request it. Getting even to this stage prevents many parents from making a successful variation application to take account of unearned income.

Similarly, where an older paying parent receives a state pension and hence is automatically charged only the weekly £7 flat rate of child maintenance, the receiving parent has to know about the former's earnings or a personal/occupational pension, in order to request the CMS to ask HMRC for the data it holds on this.

The investigative burden placed on receiving parents is perhaps greatest when seeking a variation on the grounds that a paying parent has unreasonably reduced income they would have received (and which would have counted for child maintenance) by diverting it to someone else or for some other purpose. Here, the CMS expects the receiving parent to make the case and prove it, and will do no investigation of its own. Unsurprisingly, variation applications on the grounds of diversion are routinely turned down by the CMS citing lack of evidence.

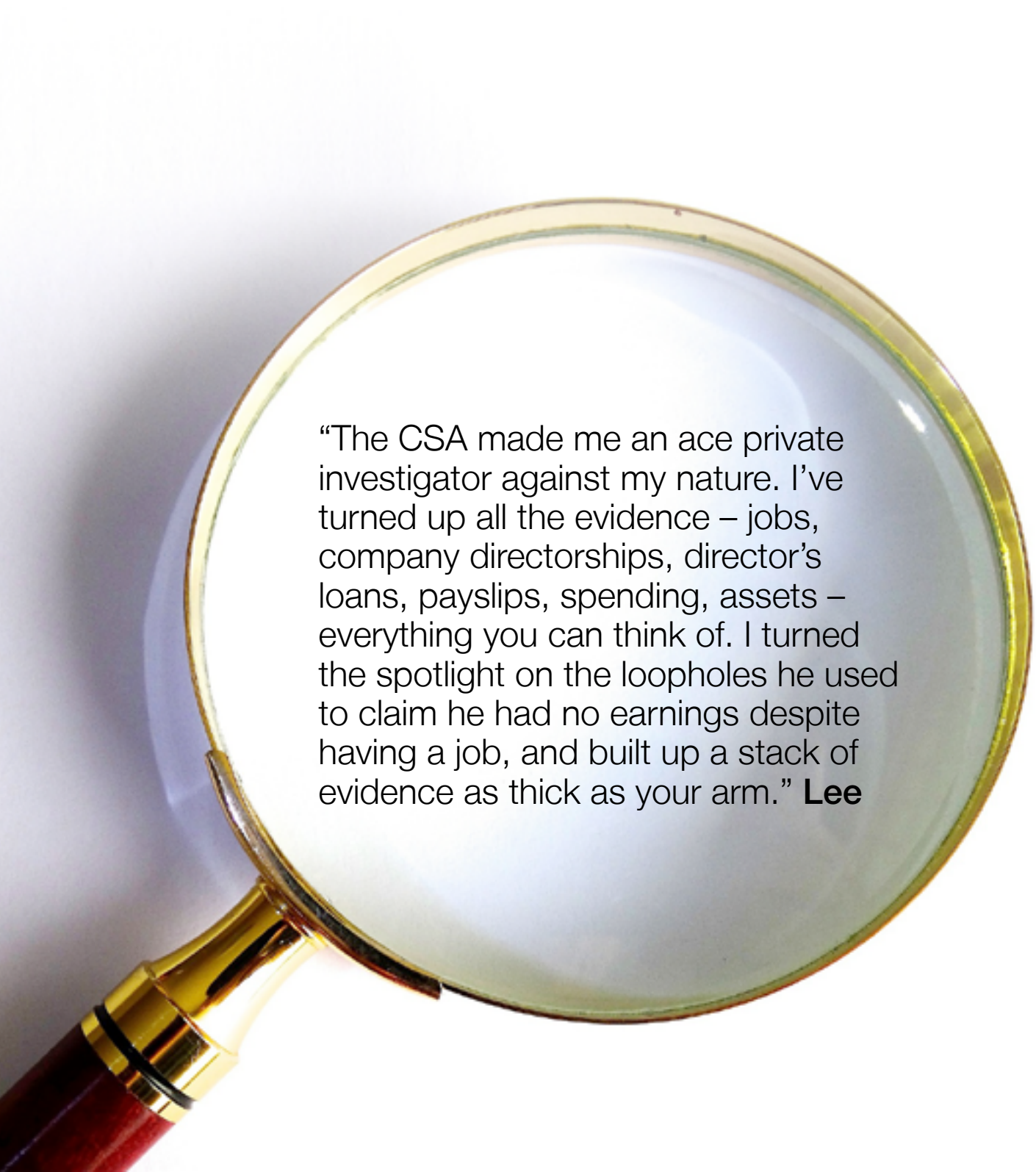
In **Sandra**'s case, when she raised concerns with the CMS that her ex-partner was seeking deliberately to reduce his child maintenance liability, she was told that the CMS was not an investigatory service and that they required proof before they could act. Where to begin? It took a long time, determined effort, and initially some expense, to search Companies House records and the Land Registry before she found out that that her ex had set up a collection of limited companies, with different (and changing) business partners for each enterprise, and had acquired property.

One company had her ex-partner's father as a director, although he had never been a company director before, worked full-time elsewhere and had no background in the relevant business. Her application for a variation to take account of the income her ex-partner received from his various companies was turned down by the CMS. Despite her evidence, the CMS based their

decision on the gross earnings figure provided by HMRC and said £50 per month was the correct figure for maintenance.

Both **Emma** and **Sandra** decided to fight on against the CMS refusal to consider a reassessment of their ex-partner's income. **Elizabeth** had no choice – it was her ex-partner who was arguing he had no income and took the case to an appeal.

Lee, who had to reapply for a variation to the CMS after her CSA case ended, looked back at the struggle she had already gone through to prove diversion in her former CSA case, and which she now faced having to do again.



"The CSA made me an ace private investigator against my nature. I've turned up all the evidence – jobs, company directorships, director's loans, payslips, spending, assets – everything you can think of. I turned the spotlight on the loopholes he used to claim he had no earnings despite having a job, and built up a stack of evidence as thick as your arm." **Lee**

2.4 The long decision making and appeals process

> "The way the system works, he is still controlling me and I am still a victim six years after leaving him. I just want to be a Mum, just to live." **Heather**

The decision making and appeals process is hard to navigate, requires persistence and determination in the face of rejection, and takes many months and sometimes years to complete. The mental and physical toll on receiving parents, who are mostly unsupported, can be immense.

"The process was complex, which would definitely dissuade most parents. It simply causes too much stress for most parents to engage with…I did resent having to spend my time looking at his life, as I'd rather not have had to." **Lee**

"I have been fighting so much for so long that I wasn't taking sufficient care of my own health… I lost the energy to fight my CMS case so well – and the CMS don't do much for those who are not chasing them every other week…It has all been so, so difficult that I have been, and actually remain, overwhelmed by it." **Sandra**

"You feel really, really alone" **Elizabeth**

"I wish I was able to support the children wholly by myself and have done with this very trying situation." **Emma**

The DWP has pointed to the lack of use of the variations procedure by receiving parents and the small number of appeals as a sign that the system is working. Arguably the reality is different. Many receiving parents just give up because it is all too hard. Unfortunately the DWP does not keep figures on the number of variation applications made by receiving parents, and the decisions made on those applications by the CMS. Similarly unknown is the number of applications (and the outcomes) made by receiving parents asking for their ex-partner's maintenance to be reassessed using 'current' not 'historic' income.

Inevitably, even lower will be the number of parents who, if their application is turned down, decide to fight the decision. (No-one knows just how few, because the DWP does not count). Rejection by the authorities can be daunting. **Lee** admitted that, had she not been warned by a caseworker to expect a refusal of her variation application and to just carry on anyway (see Section 2.2), she would have faltered: "…receiving the rejection was difficult despite knowing it had to be rejected. If I hadn't had her help, it would have been almost insurmountable."

Certainly, the CSA worker who spoke to **Lee** was spilling the beans on an uncomfortable truth, which appears not to have changed under the CMS. Receiving parents' applications for a variation to the standard maintenance calculation are almost always turned down. The only real prospect of success is to press on, even when further rejected (as inevitably happens) at the further 'mandatory reconsideration' stage. Ignoring these refusals is a necessary part of the process to get to a proper hearing before an independent appeal tribunal. Few realise this.

In a challenge about the income used in a child maintenance calculation, the importance of a case going to an appeal tribunal is rarely made clear to receiving parents. This is often the first occasion that detailed expert scrutiny of a paying parent's financial resources takes place, carried out by independent adjudicators. In advance of the hearing, more information is likely to be made available in the appeal papers about the paying parent's financial circumstances than a receiving parent can find out alone. For example, **Heather** discovered her ex-partner was faking his invoices. **Emma** was able to examine her ex-partner's self-assessment returns which opened up

a number of significant questions on his expenditure. A tribunal panel can include a chartered or certified accountant, with skills in examining financially complex cases. Often for the first time, the paying parent can be questioned in detail about their finances, and be directed to provide further information, for example, bank statements, company and partnership accounts, and invoices.

But the journey to get to a tribunal can – in **Heather**'s words – be "one hell of a long hard slog". Long delays are currently endemic in the appeals process. **Emma** has so far waited six months for a tribunal hearing, with more homework needed to understand the financial information emerging in the run up to an eventual hearing. In **Sandra**'s, **Lee**'s and **Heather**'s cases, the process took over well over a year. **Elizabeth**'s case took almost six years, after her ex-partner appealed against an appeal tribunal's decision that he must pay child maintenance, and the case slowly wound its way up to the Upper Tribunal and then back down again to a new First-tier Tribunal.

Few receiving parents have access to advice or representation during the appeals process. The challenge they face is not only to understand the complex child maintenance rules, but also to decipher the financial information available to them concerning other parent, which can include, for example, complex company accounts. **Elizabeth** was lucky to have her McKenzie friend, but the others – like most receiving parents in their situation – had to manage as best they could alone.

Sandra was bitter that, during the long process of getting an appeal hearing, no-one warned her that she had to challenge every subsequent CMS decision changing the maintenance calculation, if she wanted the chance to get those subsequent decisions looked at by the tribunal. She had to represent herself at the tribunal. Her ex-partner brought along his accountant with whom he shared business interests.

How did our parents, after their long struggle, eventually fare with their appeals?

In **Elizabeth**'s case, an appeal tribunal found that that her wealthy ex-partner, despite arguing he had no income, had control of assets worth around £830,000. Under the CSA rules, it therefore deemed he had income based on those assets at an interest rate of 8 per cent. He was ordered to make back payments of child maintenance amounting to over £40,000 going back six years.

In **Heather**'s case, as discussed (see p17), the tribunal did not accept her ex-partner's evidence of his earnings. He was ordered to make back payments of CSA child maintenance totalling around £2,000. The subsequent backdated recalculation of CMS maintenance eventually resulted in a further £800 of outstanding maintenance to be paid.

In **Sandra**'s case, the tribunal found that her ex-partner ran three companies and controlled them all at the relevant times. It dismissed her ex-partner's claims that, in respect of one company, he was merely a "front", and found he had been unreasonably reducing income available to support his daughter by diverting it into undistributed profits in one company, and by appointing his father as a 50 per cent shareholder in another, despite the latter having no interest and no participation in the company. As a result, the ex-partner's CMS child maintenance liability was increased from just over £12 per week to over £95 per week, plus charges. He was ordered to pay over £12,000 in back payments.

In **Lee**'s case, the appeal tribunal found that her ex-partner, working as managing director in his new partner's firm, had earnings of just under £150 per week. He was ordered to pay CSA arrears of just over £2,000, as a result of the backdated reassessment.

These parents eventually had some success, against all the odds. But this is by no means the end of the story…

2.5 The shock of the new - CSA case closure and the transfer to the CMS

> "Unfortunately, the change from the CSA to the CMS has made it a lot easier for non-paying, non-resident parents to hide in the loopholes. This doesn't just affect our families; it affects our entire society". **Lee**

Several of the parents in this study have found themselves adversely affected by the process which began in mid-2014, to gradually close down all current CSA cases. Unsurprisingly, when their CSA case ended, they chose to apply to the new CMS instead.

An immediate problem faced is the lack of information sharing between the two systems. This has meant that receiving parents, who finally succeeded in getting a variation under the CSA, have had to begin the process for a second time with the CMS.

"…it felt even worse to have to start all over again with the CMS, under the new rules, after winning my appeal at a tribunal". **Lee**

The switch between the two statutory schemes has meant a stark loss of child maintenance for some parents. The cases below throw a light on some of the differences between the two schemes, and how – in some respects – it has become harder to tackle cases where the standard maintenance calculation bears little relation to the paying parent's ability to pay.

Abolition of the 'assets' and 'lifestyle' variations

Elizabeth succeeded in the child maintenance appeal concerning her CSA maintenance because the tribunal found evidence her ex-partner had control of assets of around £830,000. She was able to benefit from the CSA rules, which allowed a 'notional income' to be assumed where a paying parent was found to have assets worth over £65,000. But by the time of the tribunal's decision, her CSA case had ended and she was into a new reality. Under the CMS rules, the 'assets variation' has been scrapped. Now, only actual income from assets counts. HMRC had no record of income for her ex-partner. This meant that, despite her ex-partner's substantial wealth, under the CMS he was given a maintenance liability of 'nil', later changed to the £7 flat rate when he qualified for the state retirement pension.

In the separate and subsequent court proceedings to obtain a lump sum payment for a replacement car and other needs, the family judge Mr Justice Mostyn commented on the "extraordinary state of affairs arising from recent amendments to the child support legislation… [where] it is possible, as in this case, for a father to live on his capital, which may be very substantial indeed, and to pay no child support at all. The father was only required to pay the pitiful sum of £7 a week from the early part of this year because it was then that he received his state pension. In my opinion the government needs to consider urgently the reinstatement of the 'assets' ground of variation."[9]

[9] EWFC 24 (2017)

Elizabeth asked her MP to take up the matter with the Minister in charge. The Minister's reply explained that, compared to under the CSA, the scope of income which could be captured by a possible variation had been widened to include almost all sources of gross income identified in the self-assessment process. "This will make it harder for wealthier individuals, with income from other sources, to avoid their responsibilities by minimising the amount of child maintenance they pay." This did not help Elizabeth at all because her ex-partner had chosen to be income-poor, but asset-rich.

Under the CSA it was also possible for a receiving parent to ask for a 'lifestyle inconsistent'

variation, if they could show that the paying parent's declared income for child maintenance purposes was substantially lower than that needed to support their actual lifestyle. If they knew about it, this 'lifestyle' ground was very helpful. It offered a route to challenge a calculation, where – at the start of the process – a receiving parent could see that there was a big gap between supposed income and lifestyle, but could not identify why. It was this ground that propelled **Lee** to persist with her CSA case and take her variation application to a tribunal.

In practice, where 'lifestyle inconsistent' was alleged, it was often the case that, in the process of arriving at a final determination, evidence emerged which led to a variation on one of the other grounds which still apply under the CMS eg unearned or diverted income. But the ground also allowed, for example, income not declared to HMRC to be taken into account. It meant that – if successful – the CSA, or more likely an appeal tribunal, could examine the paying parent's lifestyle; work out how much it was likely to cost; and assume an income to match – resulting in more maintenance to be paid.

For reasons discussed in Section 3, this ground for a variation – like the 'assets' variation above – has been scrapped under the CMS.

CMS reliance on historic gross income data declared to HMRC

Under the CSA, the child maintenance calculation depended on the evidence supplied by a paying parent to confirm their current average net earnings after deductions for tax, national insurance, and any pension contribution. Under the CMS, child maintenance is based on a paying parent's gross annual taxable income as provided by HMRC, using the last latest year for which the Revenue has complete information. The CMS go back to HMRC on an annual basis to get an update. While the new process is undoubtedly simpler and easier for the CMS, our cases reveal a number of problems from the receiving parent's perspective.

In **Heather**'s former CSA case, where her ex-partner was failing to declare his full earnings, she was a full participant in the dispute about how much maintenance was due – able to not only submit evidence of under-declaration of earnings but to participate in the subsequent appeal hearing. The child maintenance tribunal could recognise her ex-partner's tax evasion to determine for themselves a more appropriate income – and hence child maintenance – figure. Under CMS rules, the fixed HMRC figure is all that counts – possible tax evasion and any action taken rests almost entirely with HMRC behind closed doors (see p16).

This is not the only problem, when it comes to CMS reliance on HMRC's record of gross taxable profits in a particular tax year to determine a paying parent's available income to pay child maintenance. When **Emma** applied to the CMS in mid-2016, it looked at her ex-partner's gross taxable trading profits for the tax year 2014/15. This led to two problems.

The first and most major was that, in the tax year in question, her ex-partner had bought a truck. As a result, due to the tax reliefs given for capital equipment, the paying parent's normal taxable profits from the business were reduced by nearly £60,000 for the year. It was this which led to Emma's children losing over 80 per cent of their child maintenance – with the amount not due to be revisited for twelve months. Emma observed "I know in business that you have to invest to keep moving forward. However my query is, shouldn't support for children come first?"

The second problem was getting the CMS to look at her ex-partner's more recent financial circumstances. The rules allow either parent to request that CMS child maintenance be adjusted to reflect a paying parent's current income, but only where it differs by at least 25 per cent from the 'historic' figure provided by HMRC. In practice, this rule tends to favour paying parents, who are only likely to use it if their current income has substantially reduced, with obvious access to the evidence to prove this. In contrast, a receiving parent who wishes to argue that the other parent's

current income is 25 per cent higher, can - for understandable reasons - be in a difficult position when it comes to uncovering hard proof of this.

In **Emma**'s case, the CMS said it could consider switching to a 'current income' calculation, but only when her ex-partner got round to submitting his 2016 self-employed accounts to HMRC, which he had until the end of January 2017 to do. Even then, it warned her that HMRC could take several months to update their records - by which time, it might almost be time for her normal annual review, due mid-2017. By March, Emma was really struggling financially, desperately worried how to make the mortgage payments on the former family home: "I have to ring the mortgage company on Monday and face the music…I have been so stressed, my back went so badly and I [am] in a lot of pain, tired and pretty worried…."

Fortunately, she was then informed by the CMS that her ex-partner had filed his tax returns for the year 2015/16, which showed that his gross taxable profits were over £70,000 higher than the previous tax year. This led the CMS to agree a switch to a 'current income' calculation for child maintenance – but only from February 2017 when it had received this information. Good news for Emma going forward, but no relief for the past period of severely reduced child maintenance, when she had been forced to borrow money to survive, and which had led to the family being on the brink of losing their home.

2.6 After 'winning' - still fighting to get the money due

Elizabeth, **Heather**, **Lee** and **Sandra** ultimately succeeded – with varying degrees of success – in persuading an appeal tribunal to increase their child maintenance to better reflect their ex-partner's true financial resources. All are now owed considerable back payments of child maintenance, made larger by the sheer length of time it took to get their cases properly considered.

But having won their cases against the odds, the system is still stacked against them when it comes to ensuring that the paying parent pays the maintenance now due.

In **Sandra**'s case, three months on from her successful appeal, her ex-husband had made no attempt to pay the higher maintenance ordered by the tribunal nor the arrears now outstanding. The CMS told her that it was unable to take any action to chase him. This was because, some weeks after the tribunal's decision, the CMS had carried out its annual review of the paying parent's income and had made a new calculation. It had wrongly ignored the tribunal's findings regarding additional 'diverted' income available to him. This meant Sandra had to request a 'mandatory reconsideration' of the erroneous new calculation. Until this was resolved, the CMS said it was unable to pursue either the non-payment of ongoing maintenance, or collection of the almost £12,000 in past CMS payments arising from the tribunal's decision. Sandra complained to the CMS, "it seems very cruel that [my daughter] and I have had to go without the CMS making efforts to obtain even the lower, incorrect amount of child maintenance during this time. This is not fair; I have fought a long tribunal process for years, during which time [my daughter] has received little meaningful support from her father…It is time for the CMS to be making … efforts to collect child maintenance from [her ex-husband], and so far it is failing."

Meanwhile, **Elizabeth** faces an ex-partner still determined not to pay child maintenance. He has announced his intention to appeal against the latest tribunal's decision to the Upper Tribunal – for a second time. She is therefore unlikely to receive the £40,000 of arrears determined by the tribunal for the foreseeable future.

When it comes to the collection of maintenance arrears, Gingerbread has already drawn attention to the worrying signs that the CMS is following the poor record of its predecessor the CSA.[10] With performance measured by the numbers of paying parents who have made at least some payment towards their current liability in the last three months, and no targets set for arrears collection, the CMS devotes far less staff time and resources to chasing amounts for children that have gone unpaid.

[10] **Gingerbread (2016)** Missing Maintenance

For those who have fought a long, often lonely, battle to expose a paying parent's true ability to pay, it can come as a further blow to realise that – even though the paying parent's avoiding behaviour is now clear – the CMS attach little urgency in ensuring that the children benefit as soon as possible from the maintenance that it has been proved the paying parent can afford.

Heather's experience shows how the low priority given to collecting maintenance debts works in favour of maintenance avoiders and evaders. After her ex-partner had been found to have been falsifying his earnings as a roofer, recalculation of his CSA and CMS maintenance produced a bill of nearly £3,000 – two-thirds of which were CSA arrears.

To her immense frustration, the CMS refused to take enforcement action to get her ex-partner to clear the arrears owed for her six year-old daughter, including continuing under-payment of the CMS liability set. Instead, it has set a rate for repayment of the arrears which she calculates gives her ex-partner seven years to pay off the child maintenance debt incurred as a result of his deceit. "I was told by the CMS that I should be grateful as I was getting something as some people don't

get anything at all!!! Well I know all about that as I didn't get anything at all for the first 6 years of my child's life which is…why I am chasing them…"

In choosing to collect the arrears in this way, rather than insisting that **Heather**'s ex-partner pay off the debt upfront, the CMS chose its own administrative convenience over the welfare of Heather's daughter. This is money that could make a big difference to her daughter's life during crucial years of development. Heather had no doubt her ex could raise the money if required to do so.

Another strong letter from her MP has led to Heather's case being referred to the CMS legal enforcement team. Six months on, nothing further has happened. In her view, the only enforcement action likely to make her ex-partner pay is the threat of losing his driving licence. But the legal enforcement team have told her, that's a long way off.

Lee encountered a further problem. She won a variation appeal in respect of her CSA child maintenance, on the grounds that her ex-partner had diverted his earnings as managing director of his new partner's firm into the business. This led to a retrospective arrears bill of over £2,000 which the paying parent has failed to pay. In her case, upon her transfer to the new statutory scheme, the CMS had seemed willing to start enforcement action for the arrears. But, when she sought a variation of the standard CMS calculation on the same 'diversion' grounds as had applied under the CSA, she was told that all enforcement action would stop. She was told nothing would now be done until the outcome of this new variations request. Lee was exhausted, so when her further variation request was predictably refused by the CMS, she decided not to pursue it but to try to get the CMS legal enforcement team to take action on the arrears bill. In May 2017, almost two years after winning her tribunal, her ex-partner finally paid off the CSA debt. However, he is still fighting a further CMS arrears bill of over £900…

Our cases show that the determination of some paying parents to avoid and evade paying maintenance for their children doesn't necessarily cease, even once exposed by an appeal tribunal. What is also clear is the failure on the part of the CMS to have any strategy to identify and deal with such behaviour – even in cases where the receiving parent has done all the hard work to bring the availability of funds to their attention.

Section 3 Why the reluctance to confront maintenance avoidance and evasion?

The current rules which govern standard child maintenance calculations are signally failing to capture the financial resources available to some paying parents to support their children. They also make it relatively easy for those wishing to minimise the financial support they give, to do so. Conversely, the current system makes it as difficult as possible for receiving parents to uncover the truth, make their case and get a fair hearing. And even where a paying parent is ordered to pay more, getting the CMS to enforce this can be difficult.

So why are the government and the DWP, charged with the responsibility of ensuring children in separated families get child maintenance, so reluctant to engage with the problem of maintenance avoidance and downright evasion?

It's too costly

In her first reply to **Elizabeth**'s MP (see Section 2.5), the Minister for child maintenance did not answer the question why income-poor but asset-rich parents should not be required to pay child maintenance. Pressed for a second time, the Minister said: "[the child maintenance scheme] does not attempt to provide a unique, bespoke solution in respect of the care of each child whose parents live apart, as it would be prohibitively expensive and time-consuming to do so."

The current method of calculating standard CMS maintenance, based only on gross earnings from employment and self-employment plus pension scheme income, is at the other extreme. It is cheap, fast and simple - working largely on the basis of the automated annual feeds of HMRC gross income data to the CMS, with little financial expertise required on the part of CMS processing staff. It is only if a receiving parent finds out enough - and knows how to ask for it - that the CMS will go back to HMRC for a second look, this time at 'unearned income'.

It is estimated that this simplified system saves the DWP £93m a year compared to the CSA.[11] However, one consequence is that the system is increasingly failing to engage with today's reality and the way growing numbers of the self-employed and those with independent means organise their finances. It puts an almost impossible burden on receiving parents to find out. The cost is being paid by tens of thousands of children growing up without financial support which could make such difference to their lives. But importantly, there is also a wider cost to society, in creating a culture where financial responsibility for children can be so easily shirked and where single parent families face more financially precarious and stressful lives as a result.

[11] **DWP (2012)**

It's a problem for HMRC

When the current rules were passed in parliament, the issue of concealed income was raised. The Minister in charge confirmed the DWP approach was to put effort into ensuring that HMRC went after people who are "significantly under-declaring". He acknowledged, however, that "for marginal differences in declared income, the HMRC may judge it not to be cost-effective."[12]

But this approach is failing the very people who need child maintenance the most. For hard-pressed single parents where every penny counts, those marginal differences in declared income – seen as not cost effective by HMRC – can be the difference between keeping a child warm, well-fed and happy, and living with the stress of bills you cannot pay.

[12] **DWP Minister Steve Webb (11/09/2012)** Commons debate on draft Child Support Maintenance Calculation Regulations 2012

More fundamentally, taking HMRC gross taxable income figures as the final measure of available income for child maintenance can lead to deeply unfair outcomes. The treatment of income and expenditure for tax purposes is governed by a range of government objectives which have nothing

to do with child maintenance. Allowances can reduce gross taxable income, for example, to encourage particular types of business activity or investment, or to improve competitiveness.

In **Emma**'s case, standard capital allowances given to her ex-partner to offset against gross profit, and designed to encourage capital investment, meant that his choice to buy a truck drastically reduced his support for his children. Whatever the motivation, this worked to his long-term commercial advantage, whilst plunging his children and their mother into financial turmoil.

The government's decision to base child maintenance calculations on HMRC gross taxable data without qualification means that a paying parent's financial responsibility for their child is treated as secondary to the economic and business priorities of the tax system. This cannot be right.

It's too difficult

In justifying why the wealthy ex-partner of **Elizabeth** did not have to pay child maintenance for his teenage son, the Minister for child maintenance argued: "under the [CMS] scheme child maintenance is more accurately assessed in relation to a person's gross income, not their capital 'wealth,' as determining this would involve a degree of subjectivity in the decision-making process…A calculation based on gross income data allows for more certainty year to year for both the paying parent and the receiving parent."

The certainty of a nil assessment (later a pitiful £7) may have suited the paying parent, but it did not put food on the table for Elizabeth and her son. She did not want the certainty of a nil or flat rate child maintenance assessment. She wanted a proper appraisal of her ex-partner's considerable ability to pay towards their son's living costs.

The reluctance of the CMS to venture into what the Minister calls "subjectivity" can be seen in the government's only grudging acceptance of the need to keep the variation ground which allows the capture of income within a child maintenance calculation that the payment parent has 'diverted' elsewhere (see Section 1). When consulting about the new rules, it complained this ground was "more complex and will still be a challenge to process …because there is not a readily available independent information source."[13] **Sandra**'s case shows how, despite government acknowledgement of that challenge, CMS staff seem to be woefully ill-equipped to deal with it. Receiving parents are at a severe disadvantage as a result.

It was "to speed up and simplify the process of calculating child maintenance"[14] that the government scrapped the 'inconsistent lifestyle' and 'asset' variations (see Section 2.5) which, under the CSA, allowed a paying parent to be treated as having an income, even though it wasn't visible. The government abolished both provisions, saying they were "difficult to administer, are complex for caseworkers and clients to understand and that actual information obtained from HMRC will be more meaningful to parents."[15]

Yet, by getting rid of these two provisions, the government has cut out a key safety net which gave the child maintenance system the means to tackle paying parents not caught by the normal income rules but who – like the asset-rich wealthy ex-partner of **Elizabeth** – clearly can and should be paying more to support their children.

They also include, for example, parents who have income invisible to HMRC because they are the beneficiary of tax free income, parents who have transferred their wealth offshore, and those who fund their lifestyle, not from income but from capital gains.

The decision to turn a complete blind eye to such financial resources has made it easy for some well-off parents to take advantage of the '12 month rule'[16] which permits the transfer of cases from the court system to the CMS, when a year or longer has passed since a court order. Whereas a court will scrutinise a paying parent's financial affairs as a whole before making a consent order

[13] **CMEC (2011)**

[14] **CMEC (2012)** The government's response to consultation on draft Child Support Maintenance Calculation Regulations 2012

[15] **CMEC (2012)**

involving child maintenance, the CMS do not.

Paying parents who have earlier agreed a 'consent order' in the family courts to make substantial child maintenance payments, can get their child maintenance liabilities drastically reduced by transferring to the CMS. The matter was recently raised before the Work and Pensions select committee, when a family lawyer told MPs about a case where a paying parent, ordered to pay £3,500 per month child maintenance under a court order, had had his maintenance liability slashed to £11 per week under the CMS as a result. He said he was seeing similar cases every week.[17]

[16] **Child Support Act (1991)** Sections 4(10)(aa) and 7(10)(b), as amended

The statutory child maintenance scheme has to work for the many not the few

The Minister's final defence to **Elizabeth** was that the child maintenance rules "cannot provide the best possible outcome in every single scenario, but instead [aim] to provide the best overall outcome for all our clients."

[17] **Work and Pensions Committee (2016a)** Oral evidence: Child maintenance services, HC 587. Q49

The standard model works reasonably for the majority of child maintenance cases, where an annual 'take' on the paying parent's gross taxable income from employment gives a reasonably accurate reflection picture of the money they have available to support themselves and their children. So is the system rightly focused on 'what works' for this majority?

One issue is that the minority of children not served by the standard maintenance calculation may be significantly more than the government wants to admit. According to official figures, around 8 per cent of the CMS caseload (nearly are known to be self-employed (the DWP admits it cannot validate employment records for 20 per cent of the CMS caseload).[18] To this figure must be added the children of parents who the CMS regards as employed, but who, unknown to the CMS, are in fact the owner of a limited company or companies, perhaps paying themselves a small wage as an employee but taking most of their profits in other forms. The reality is that, unless brought to its attention by the receiving parent, the CMS is simply not aware of paying parents with a business who take income in forms other than earnings.

[18] **Commons Written Answer (02/03/2017)** No. 64979

Also absent from the picture are the children of paying parents with an opaque financial hinterland, held in such a way that their resources do not appear in HMRC gross taxable income data, and so are outside the CMS calculation entirely.

Elizabeth and her son seem to be regarded as unfortunate minor 'collateral damage'. Children whose parents have their own businesses, are company directors, or who are wealthy enough to live off their assets may be a minority, but their numbers are not insubstantial. Moreover, Gingerbread challenges the view that the needs of such children should be sacrificed in order to make the current system work for the many. The model itself is wrong if paying parents with ample means to support their children are allowed to escape contributing their fair share. After all, where parents cannot agree their own child maintenance arrangements, there is nowhere else to turn.

Except in very exceptional circumstances, the family courts are now only open to parents seeking endorsement of a private agreement for maintenance. As discussed above, any consent order obtained through the courts ceases if one parent chooses to apply for a CMS calculation after a year. In theory, the courts can also give 'top up maintenance' where a paying parent's annual gross taxable income, reported to HMRC, exceeds £156,000.[19] But, it must be clear by now that there are perfectly lawful ways a paying parent can present their income to keep below this figure.

Given the lack of alternatives, Gingerbread would argue that the UK state maintenance system has a responsibility towards for all children in need of child maintenance. That responsibility has to include ensuring that all parents with the ability to financially support their children do so, in a way commensurate with their actual means.

[19] **Child Support Act (1991)** Schedule 1, paragraph 10(3)

Section 4 Recommendations for change

"I sat at the sewing machine in a freezing house wearing my winter coat and boots, making bags to sell at craft markets…**I struggled to find a job that could support us** without any family to help with childcare, and for years I could never have paid the rent without benefits…

I was losing my mind from stress at times."

Lee

"**If only this had been managed correctly from the beginning I would not have been through this,** the children would not have missed out, I would have not had the threat of losing our home, sleepless nights, short fuses and the taxpayer would not be stumping up for time-wasting procedures."

Emma

The stories of Lee, Emma, Elizabeth, Sandra and Heather are not unique. They are typical of many other single parents who contact Gingerbread who have an ex-partner who is self-employed, or who finance their way of life other than simply through earnings. Almost inevitably, they involve cases where relations are acrimonious or non-existent, where non-payment of maintenance for a child has got caught up with issues of power and control. At present both the statutory rules and the way the CMS system is administered make it far too easy for some separated parents to shirk their obligations with impunity. Receiving parents are left to take on not just the other parent but the CMS system itself, to get proper financial support for their children.

For these parents and their children and many others, the new CMS system is not working and needs to change.

At a time when self-employment particularly among the better-off is growing,[20] the standard method of calculating child maintenance fails to take account of the different ways an increasing number of paying parents organise their finances and – whether by default or design – minimise their child maintenance payments in the process. The system may work for the government in terms of being cheap and easy to run, but it is leading to too many children going without proper financial support from paying parents who can afford to pay more.

[20] **Tomlinson, D. and Corlett, A. (2017)**

With the right will, there is no reason why the current CMS model could not be fixed in a way that – whilst well short of the 'bespoke solution' for every child deplored by the Minister as too expensive – delivers mechanisms which allow better account to be taken of a paying parent's true resources.

In a belated attempt to improve the system, and too late for our parents, in late 2016 it was announced that a specialist Financial Investigation Unit (FIU) had been brought into the CMS. Due to be fully rolled out by June 2017,[21] CMS teams dealing with cases from the application stage right through to enforcement would then be able to refer cases to the FIU, if paying parent's income appeared suspicious.[22] The FIU (which had previously dealt only with CSA cases) was being expanded from 35 to 50 staff.[23]

[21] **Commons Written Answer (20/03/2017)** No. 67802

[22] **Commons Written Answer (21/11/2016)** No. 53984

[23] **Work and Pensions Committee (2016b)** Oral evidence: Child maintenance services, HC 587. Q98.

This is a positive step. It is right that the CMS begins to develop its own investigative capacity to deal with the significant minority of parents whose ability to pay child maintenance in not reflected by the standard 'gross taxable income' figure routinely supplied by HMRC. Just telling receiving parents in this situation to contact HMRC is an abrogation of the DWP's own responsibility for child maintenance, particularly when the Revenue clearly has other priorities.

However, it remains to be seen how accessible the new unit will be to receiving parents. At present, CMS staff appear unprepared to engage with and assist those parents who complain their ex-partner has more resources than have been declared. Too many receiving parents are left in the dark about the scope to get a paying parent's 'other income' or diverted income counted for child maintenance purposes. At present, the existence of the FIU is unknown to most of those who need its services. With CMS staff acting as gatekeepers to the FIU, the danger is that only the most vociferous and persistent receiving parents will get through.

It is also unclear whether the FIU has sufficient resources and expertise to properly scrutinise the financial affairs of paying parents with suspected hidden income. The Minister responsible for child maintenance explained to MPs in December 2016 that the FIU had powers to demand banks provide individuals' up-to-date bank statements, to look at how they are running their businesses and to search records, for example, at the Land Registry. MPs were told that, if tax fraud was revealed, a paying parent could either be referred to HMRC for fraud action, or the Department itself could prosecute the paying parent for misrepresentation: failing to provide accurate information on request.[24] Those powers have long existed but have seldom been exercised. The real issue is the FIU's ability and willingness – unlike the CSA in the past – to actively deploy its extensive investigative powers to examine paying parents' financial affairs.

So far, information on the work of the FIU is limited. The latest figures show that, by March 2017, formal investigations to confirm representations on income had been carried out on 678 CMS cases. This had led to 38 cases being referred to HMRC because of evidence of fraud. There had been no DWP prosecutions for misrepresentation, although 10 interviews had been conducted under caution, with 25 more scheduled.[25]

[24] Work and Pensions Committee (2016b)

The figures suggest there is still some way to go before the FIU proves its effectiveness. As the FIU takes on more work, it will be important to keep its performance under close review.

An active FIU, once full operational and working at the capacity needed, could significantly improve the ability of the CMS to properly scrutinise the incomes of paying parents. However, other changes are needed if the CMS scheme is to work better in ensuring that child maintenance liabilities take proper account of a paying parent's means.

[25] Commons Written Answer (20/03/2017) No.67807

A comprehensive strategy to tackle maintenance avoidance and evasion

Gingerbread recommends that the DWP develop and publish a comprehensive strategy to combat child maintenance avoidance and evasion.

While many separated parents willingly continue to support their children, others are reluctant to pay towards their children's day to day care. The DWP has a comprehensive arrears and compliance strategy to deal with paying parents who fail to pay. But it has no overall strategy in place to combat maintenance avoidance and evasion by paying parents, seeking to minimise their obligations. Rather than leaving it to receiving parents to identify and challenge this behaviour, the DWP itself should have a proactive strategy in place to address the problem. We've outlined below some priority and longer term recommendations, which a comprehensive and proactive anti-avoidance and evasion strategy should include.

Immediate recommendations

1. Include 'other income' data from HMRC as part of the standard calculation

The CMS should **routinely access data from HRMC on all a paying parent's taxable income sources when making a standard maintenance assessment**. This repeats a recommendation made by the Commons Public Accounts Committee in 2012.[26]

It is absurd that the burden is placed on receiving parents to identify income a paying parent may have, other than taxable earned income or taxable profits, before the CMS is prepared to go back again to HMRC to access the 'other income' data contained in the relevant tax return. Too few receiving parents are even made aware that this possibility exists, let alone are in a position to identify the existence of such income, in order to prompt the CMS to get full details from HMRC.

[26] Public Accounts Committee (2012) Child Maintenance and Enforcement Commission: Cost Reductions

2. Restore anti-evasion and avoidance safeguards

The 'lifestyle inconsistent' and 'assets' variation grounds which applied under the previous CSA scheme should be restored.

As discussed in Section 2.5, the scrapping of two previous grounds for a variation - where a paying parent's lifestyle was inconsistent with declared income; and where a paying parent had assets in excess of £65,000 - removed two important safeguards to prevent wealthy paying parents and those with clever accountants from exploiting the loopholes in the child maintenance rules to escape paying realistic amounts for their children.

The government argues that these provisions were hard for parents and caseworkers to understand and difficult to administer. These difficulties can be overcome by better information to receiving parents (see below) and recruiting specialist staff with the requisite financial expertise to apply them. The provisions provided essential anti evasion and avoidance protection and need to be reinstated.

3. Address the information deficit on how to challenge a standard calculation

Where a receiving parent tells the CMS that the calculation does not reflect the paying parent's true income, **the CMS must take active steps to fully explain the options open to that parent and provide printed information** on:

i. The grounds upon which a variation might apply in these circumstances, how to make an application and what to do if initially turned down by the CMS

ii. The circumstances when a paying parent's "current income" can be substituted for "historic income" in a calculation, and what to do if initially turned down by the CMS

iii. The role of the FIU and how to get a case referred for investigation.

A receiving parent who believes the standard maintenance calculation does not reflect the paying parent's true income, cannot rely on the CMS to properly explain the options open to them to challenge the calculation, and how best to go about this. Mounting a challenge in these circumstances is a difficult and daunting proposition. As a result, it is made easy for self-employed paying parents to take advantage of the limitations of the current standard calculation and escape child maintenance at a rate reflective of their true income.

Longer-term recommendations

4. Review the role played by HMRC in determining child maintenance

A joint DWP/HMRC review, involving external stakeholders, should be carried out to examine the implications of the use of annual gross taxable data to determine levels of child maintenance, looking at:

i. Whether the correct balance has been struck between the primary obligations a paying parent has to maintain their child, and the various reliefs given against profit intended to support a business

ii. The respective roles of HMRC and the CMS in investigating tax evasion by parents who also have an obligation to pay child maintenance

iii. How HMRC data protection rules can be reconciled with the basic right of a receiving parent who has made an application for child maintenance to be given a full explanation of the basis on which liability has been determined, including a breakdown of the income used in the calculation.

Whilst the government was right to use gross taxable income data held by HMRC as the starting point for a child maintenance calculation, five years after the new CMS was introduced the time is right to review what role HMRC should play in determining the amount of child maintenance a paying parent should pay.

The rules which allow various tax reliefs against gross profit are neither designed nor intended to produce an indicative figure for the amount of income a parent has available to support a child. Self-employed parents should have to strike a balance between maintaining a long-term viable and successful business (important for all concerned) and providing a reasonable income stream to meet a child's day to day living costs. At present, the child maintenance calculation rules are not constructed to give that balance.

Meanwhile the lines of responsibility between the CMS and HMRC for the investigation of paying parents suspected of both tax evasion and child maintenance evasion are far from clear, with receiving parents - referred by the CMS to HMRC - caught in the middle, unable to get answers due to data protection rules.

5. Make better coordination with the family court system

i. Allow disclosure to the CMS of financial information obtained in family proceedings, bringing section 39 of the Child Maintenance and Other Payments Act 2008 be into effect.

As is apparent in Elizabeth's case, the family courts have stronger powers to require full disclosure of a parent's financial circumstances. At present, this information can only be made available to the CMS with the court's permission. This is an unnecessary stumbling block. In 2008, parliament voted to permit a parent to disclose relevant information relating to family proceedings to the statutory child maintenance authorities, without the need for court permission. However the provision has never been put into effect. Gingerbread believes implementation is long overdue.

ii. Consider amendments to Sections 4 and 7 of the Child Support Act 1991 to prevent an existing consent order previously agreed to by a paying parent from being replaced by a statutory maintenance liability, in circumstances where the paying parent's material circumstances remain substantially unaltered.

It should not be possible for a wealthy paying parent, who has agreed to pay child maintenance under a consent order made in the family courts and based on full disclosure of income and assets, to undermine that consent order by later applying to the statutory maintenance scheme after an interval of 12 months or more, in circumstances where the financial resources available to them remain substantially unchanged.

iii. If the assets variation is not restored, consider an amendment to Section 8 of the Child Support Act 1991 to allow the family courts to determine child maintenance in circumstances where a paying parent has substantial capital resources.

If the DWP is not prepared to amend the statutory child maintenance scheme to allow a paying parent's capital resources to be considered, it should be made possible for receiving parents to have access to the family courts so that paying parents with ample means to pay for their children's support are required to do so.

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