

OUR REF. : HAB/CR/1/19/95 IV
YOUR REF :

1 June 2001

Ms Doris Chan,
Clerk to Bills Committee,
Legislative Council Secretariat,
8 Jackson Road,
Hong Kong.

Dear Ms Chan,

**Bills Committee
on Attachment of Income Order (Amendment) Bill 2001**

Thank you for your letter dated 18 May 2001.

2. My recollections of the Bills Committee's requests and proposals are in some aspects different from those stated in your letter. Nevertheless, I shall respond to them as recorded in your letter.

Para. 2(a) of your letter

3. A progress report on the implementation of the Working Group's recommendations is contained in the Annex attached.

Para. 2(b) of your letter

4. I explained at the meeting held on 17 May 2001 that though no statistics were available, I believed the reasons for the small number of attachment of income orders ("AIO") were first, the maintenance payers concerned might not have incomes capable of being attached (e.g. self-employed persons whose "income sources" cannot be identified in advance) and secondly, an AIO could not be issued unless the maintenance payer had defaulted in payment without reasonable excuse.

5. In response to the Committee's request, I have requested the Judiciary to consider going through the documents of the 904 judgement summonses ("JS") with a view to ascertaining why only a small number of AIOs had been issued. The Judiciary has advised that no statistics are kept on the JS and it would be an uphill task to retrieve and go through all 904 JS files. Moreover, the files would be unlikely to contain information on why the applicants had not applied for also AIOs.

Para. 3(a) of your letter

6. At present, the law already requires a maintenance payer to notify the maintenance payee of any change in address within 14 days and failure to do so without reasonable excuse would constitute an offence (section 10 of Separation and Maintenance Orders Ordinance, section 19 of Guardianship of Minors Ordinance and section 28A of Matrimonial Proceedings and Property Ordinance). A maintenance payer who is discharging his liability to maintenance through an AIO has the additional obligation to notify the maintenance payee of any increase in his income or particulars of any new income source within seven days of such changes *if* the amount specified in the AIO is less than the amount payable by him under the relevant maintenance order (rule 8(3) of Attachment of Income Order Rules).

7. We have carefully considered the proposal to require a maintenance payer to notify a maintenance payee of any change in employment where an AIO is in force in respect of him and to make failure to comply with the requirement an offence.

8. From the legal policy point of view, a criminal offence should not be created unless it is absolutely necessary for achieving the policy objective. In the present case, the policy objective is already achieved by imposing on a maintenance payer the obligations mentioned above, in that :-

- (a) as long as his address is available, recovery actions can be taken against him when he fails to pay. Information on whether or not he has changed employment is unnecessary for the purpose; and
- (b) where an AIO already results in the maintenance payee collecting the maintenance in full, there is no justification to require the maintenance payer to notify any change in his employment.

9. A drawback to imposing any additional legal obligation on either a maintenance payer or maintenance payee is that it would create a cause of possible conflict between the two parties and any animosity caused (e.g. the maintenance payer being prosecuted as a result of a complaint made by the maintenance payee) would adversely affect not only the two parties but also any children of the split family.

Para. 3(b) of your letter

10. As I explained at the last meeting, it would not be appropriate for the court to issue an AIO to a maintenance payer's new income source "automatically". At the very least, the income source must be given an opportunity to verify the particulars as regards the income said by the maintenance payer to be payable by him (the income source) and to make representation, if any, on why an AIO should not be directed at him.

11. We go along with the Bills Committee's objective to have a new AIO made as quickly as possible when a maintenance payer has, for example, changed his employment. This should, however, be achieved without compromising the neutrality of the court and the right of the parties concerned to make representation. With that in mind, we shall consider further whether a new arrangement should be introduced as follows:-

- (a) a maintenance payer, when he ceases to receive any income from an income source to whom an AIO has been issued, shall apply to the court (with a copy to the maintenance payee) for a new AIO to be issued to another income source of his. The application shall be accompanied by his statement of means and the new income source's statement of verification. If there is any reason why he does not wish to apply for a new AIO in respect of his other income, he should, instead of applying for a new order, make a statement to the court, with copy to the maintenance payee, on the reasons;
- (b) if the maintenance payer, following the cesser, does not have any income capable of being attached, he shall file in court (with copy to the maintenance payee) a statement of means together with a statement that he does not have any income capable of being attached;

- (c) the maintenance payer shall take action under either (a) or (b) above, as appropriate, within 14 days after the cesser. If he has taken action under (b), he shall take action under (a) within 14 days after he has acquired any new income capable of being attached (e.g. taken up a new employment); and
- (d) a maintenance payer who fails to comply with (c) without reasonable excuse or knowingly makes a false statement commits an offence.

12. If the above proposed arrangement is agreed by the Administration and the Judiciary, it can be implemented by amending the Attachment of Income Order Rules made by the Chief Justice and no amendment to the primary legislation is required.

Para. 3(c) of your letter

13. In response to the proposal that Immigration Department should notify maintenance payers of any JS being issued against them, I made the following points at the last meeting:-

- (a) for a maintenance payer who evades service of the JS, such notification would not serve any purpose;
- (b) for the notification to be of any use at all, it must reach the maintenance payer well before the date set by the court to hear the JS but he may not pass any immigration control point before that date;
- (c) if such notification does have the intended effect of making the maintenance payer more ready to accept the service of the JS, the same effect can be achieved by sending the notification to him; and
- (d) if the maintenance payee intends the maintenance payer to be stopped at immigration control points, the former can apply for a prohibition order. If the application is approved, the maintenance payer can be stopped at immigration control points.

14. In the light of your letter, I have consulted Immigration Department on the proposal. The Department, after consulting DoJ, has advised that delaying a person's departure for the purpose of serving a letter would amount to an unreasonable restriction, if not imposed by law, upon the individual's freedom to

leave Hong Kong and would result in immigration officers being subject to allegations of unlawful detention.

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Para. 3(d) of your letter

15. A specific suggestion made by Members at the last meeting was that an AIO could be issued where a maintenance payee might be abused by the maintenance payer when collecting or demanding payment. In fact, such abuse can be avoided by the court ordering that maintenance be paid through banks. We understand that the court normally makes such an order in response to application.

16. We have carefully considered the above suggestion in consultation with the bureaux/departments concerned. Our views are as follows :-

- (a) ill feelings, almost inevitably, will exist between a couple who are divorced or separated. It would be in the best interests of both parties and their children (if any) to put such feelings behind them as early as possible. Reliving unpleasant incidents and laying blame against each other in court would prolong and aggravate the conflict between them;
- (b) any abusive language or act by the maintenance payer, depending on its nature and severity, may already be subject to legal - in some cases, criminal - sanctions. On the other hand, what amounts to an abuse may, to an extent, represent the subjective feelings of the persons concerned. It might not be an efficient use of the court's time, nor would it necessarily be beneficial to the welfare of the person alleging the abuse, to impose on the court the task of having to determine whether particular incidents do amount to "abuse" and if so, whether they constitute sufficient grounds for an AIO to be issued; and
- (c) the purpose of AIOs is to ensure full and punctual payment. In view of (a) and (b) above, the making of AIOs should be confined to circumstances where there is doubt about the maintenance payer's willingness to make full and punctual payments. Such circumstances are already adequately covered by the Bill, which proposes that an AIO may be made where "a court is satisfied that there are reasonable grounds to believe that the payer will not make full and punctual payment in compliance with the maintenance order" - clause 2(a), 3(a) and 4(a) of the Bill refer.

17. The Attachment of Income Order Rules, which provide for the procedures in the issue of AIOs, were drawn up in 1998 having regard to the need of the parties concerned to know what they have to do and when. The feedback received during our review suggests that the Rules have served the purpose but there are individual cases where certain steps can be omitted or the time limit may be relaxed in the light of the particular circumstances of the cases. This is why clauses 2(e), 3(e) and 4(e) of the Bill propose a legislative amendment which, if enacted, would enable the Rules to be amended so that the court can exercise discretion to dispense with or relax any procedures or abridge any time specified in the Rules where the court is satisfied that it is fair and reasonable to do so in a particular case.

18. On the Bills Committee's suggestion to review whether affidavits are necessary, we are satisfied, on review, that an affidavit is necessary to support an AIO application. The affidavit cannot be dispensed with because it is a statement providing the evidence required by the court in considering whether there is a prima facie case for an AIO to be issued.

19. At the last meeting, a Member asked whether SWD staff could assist their clients in preparing affidavits. As I explained at the meeting, SWD staff do not possess the necessary legal training to provide such assistance. In any case, I have discussed the matter further with SWD, whose views are that SWD staff are not trained to perform such legal tasks, and collection and presentation of legal evidence are beyond their competence. The guidelines on Code of Practice for Registered Social Workers require that "social workers should make appropriate referral if their clients' problems are beyond the social workers' competence, or the agency's resources or scope of service".

20. Since an affidavit is the first and most important document to be considered by the court in an application for AIO, it is in the applicant's interests and efficient use of the court's time that it be prepared with the professional assistance of a lawyer. A maintenance payee who requires legal assistance to apply for an AIO can obtain legal aid if he passes the means test and merit test. For those who take out proceedings without legal representation, a blank form of an affidavit in Chinese is made available at Judiciary for the general public. A despondent may fill in the form for it to be sworn before the Commissioner for Oath in the court.

Advice sought

21. The above response is for presentation to the Bills Committee at the meeting to be held on 4 June 2001.

Attendance

22. The following will attend the meeting on 4 June 2001:

Mr NG Hon-wah, 吳漢華先生
Principal Assistant Secretary for Home Affairs (2)
民政事務局首席助理局長

Ms Phyllis H Y Poon, 潘漢英女士
Government Counsel, 政府律師

Yours sincerely,

(NG Hon-wah)
for Secretary for Home Affairs

P.S. Owing to the time required for translation, I am afraid the Chinese version of this letter will not be available until the morning of 4 June 2001.