

**Bills Committee on Attachment of Income Order
(Application to Government and Miscellaneous Amendments) Bill 2007**

**Scope of Income Source and the Handling of Existing Attachment of
Income Orders issued to the Government**

At Bills Committee meeting held on 23 July 2007, Members asked the Administration to –

Scope of income source

- (a) consider whether the drafting of the definition of “income source” reflected the policy intent, in particular whether it would give rise to uncertainty about the scope of persons to be included/excluded from the Attachment of Income Order (AIO) legislation;
- (b) advise whether the AIO legislation would be applicable to local employees of consulates established in Hong Kong and offices of multinational corporations operating in Hong Kong and if not, the reasons why it was not necessary to stipulate this in the legislation;

Handling of existing AIOs

- (c) review the lawfulness of the existing arrangement in handling the 64 AIOs; and
- (d) review whether the Bill should seek to validate all AIOs already made against wages or salary payable to a maintenance payer by the Government

This paper sets out the consolidated response from the Administration to the issues raised.

The scope of “income source”

2. Under the Bill, “income source” is defined as a person¹ by whom the income of the maintenance payer is payable and includes the Government. The definition is broad enough to cover income source whether it is the Government or not. If the income source is the Government, the new section 20(3A) of the Guardianship of Minors Ordinance (GMO), new section 9A(3A) of the Separation and Maintenance

¹ The term “person” is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) to include “any public body and any body of persons, corporate or unincorporate, and this definition shall apply notwithstanding that the word “person” occurs in a provision creating or relating to an offence or for the recovery of any fine or compensation”.

Orders Ordinance (SMOO) and new section 28(3A) of the Matrimonial Proceedings and Property Ordinance (MPPO) will be applicable as they deal with attachment of income that is payable by the Government as an income source. If the income source is a person other than the Government, the revised section 20(4) of the GMO, revised section 9A(4) of the SMOO and revised section 28(4) of the MPPO will be applicable as they deal with attachment of income that is payable by an income source which is not the Government.

3. Regarding members of consular posts in Hong Kong, their income source is usually the States concerned, whether or not they are employed locally or sent from overseas (unless there is a different employment arrangement for certain staff, for example, employment through a local service company which may be the income source for such staff). Having consulted the Department of Justice (DoJ), the Administration considers that it is not appropriate to provide that the AIO legislation applies to Foreign States as Foreign States are entitled to state immunity under common law, and state immunity is a recognized principle under customary international law which should not be derogated from.

4. As regards the position of an income source which is an overseas company, we need to point out that overseas companies operating in Hong Kong **are** covered by the AIO legislation. All overseas companies which establish a place of business are required to register under Part XI of the Companies Ordinance (CO) (Cap. 32). They are required to keep registered the name and address of a person resident in Hong Kong who is authorized to accept service of process or notice on its behalf (section 333A of CO).

5. We recall that the situation relating to section 76(1) of the Inland Revenue Ordinance (Cap. 112) was raised at the Bills Committee meeting. Section 76(1) provides that where a person defaults a payment of tax, the Commissioner of Inland Revenue may give written notice to a third party (who holds money for or who is going to pay the default tax payer) requiring him to pay the amount in default. Similar to the AIO legislation, this provision does not apply to third parties outside Hong Kong.

Existing AIOs issued to the Government

6. In the light of comments made by Members at the Bills Committee, we have again consulted the DoJ. The Administration remains of the view that there is legal basis for the continued compliance with the AIOs already issued to the Government. Indeed, the Government, *as the*

income source, should continue to comply with the AIOs notwithstanding the judgment of Court of Appeal (CA) in L v L, unless and until they are set aside. DoJ advises that a fundamental principle at common law is that any order of the court should be obeyed unless and until it is stayed or set aside. As long as an order remains effective, disobedience to it constitutes a contempt. This is so even where an order is made without jurisdiction, or where an order is made wrongly in the sense that the court in question had no power to make it or even perhaps acted contrary to express provisions of law in purporting to make it, or where an order otherwise ought not to have been made. These have been illustrated in many cases, for example, in Johnson v Walton [1990] 1 FLR 350 (CA) (which concerned an undertaking given by the defendant), the court held that “It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, **it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted or accepted in the first place.**” (at 352D per Lord Donaldson MR). In Mason v Lawton [1991] 2 FLR 50 (CA) (which concerned an order, **the terms of which were found to have exceeded the jurisdiction of the court**), it was held that “however, apart from helpfully drawing attention to this point, [counsel for the defendant] ... has quite rightly placed no reliance upon it, since there was no appeal from the orders, and **the orders of a court have to be obeyed unless and until they are varied or set aside.**” (at 52A per Lord Donaldson MR)

7. Members also raised concern on whether there might be a case for successful claim against Government for wrongful deduction of wages or salary from the Government employees concerned. DoJ’s advice is that any act done in compliance with an AIO when it is still in force cannot be faulted, even if it is later set aside for whatever reason. The fact that the deduction was made under a court order provides a very good defence to any such claim.

8. As the truly affected parties of maintenance payments and AIOs are the maintenance payers and payees, we consider that the proper course of action is for the Government officer concerned (as the aggrieved party), if he considers appropriate, where an AIO is yet to be made, to contest the application for an AIO (like the appellant-husband in L v L of CA), or where an AIO has been made, to apply to the court to set it aside. On the other hand, the Government, *as the income source*, would, if Government receives notice of any new application for AIO, inform the parties involved of the CA judgment in L v L.

9. On the validation of AIOs, the proposed section 20(9) of the GMO, section 9A(9) of the SMOO and section 28(9) of the MPPO seek to

validate the AIOs made by the court before the commencement of the Amendment Bill in respect of wages or salary payable to a maintenance payer by the Government. Members are concerned whether the retrospective validation of the AIOs would give rise to challenges.

10. Retrospective validation of the AIOs is legally in order and is justified. Retrospective validation avoids possible detriment to the maintenance payees brought by, for instance, actions taken by the maintenance payer to set aside AIOs concerned. If such actions are successful, the maintenance payees may have to re-apply for AIOs upon passage of the Amendment Bill, or take out other actions (e.g. apply for judgment summons) to claim maintenance payment and this means inviting them to visit that bitter experience again. At the end of the day, we must have regard to the well being of the maintenance payees, which is the main concern of this Bill and, in fact, the entire AIO Scheme.

11. More importantly, the validation provision does not add legal burden to maintenance payers. Provisions validating the existing AIOs only make it clear that civil servants are treated in the same way as other people in Hong Kong as far as the enforcement of a maintenance order is concerned. This is in line with the policy intent of the AIO legislation and is in the public interest. It needs to be emphasized that an AIO is a means to enforce a maintenance order. A maintenance payer's duty or obligation is imposed by the maintenance order. An AIO does not impose additional obligation on the maintenance payer to pay maintenance but imposes an obligation on the income source of the maintenance payer to make deductions and payments, to fulfill the maintenance payer's obligations ordered by the court. Retrospective validation only confers a benefit on the maintenance payee (by securing the payment of maintenance under the AIOs) without causing detriment to the maintenance payer (as it merely recognizes or confirms arrangements for the payment of maintenance that are already in operation).

12. Furthermore, validation provisions are not unprecedented. For instance, Adoption (Amendment) Ordinance 1987, among other things, provided for the court to dispense with parental consent under certain circumstances in issuing adoption orders. It also validated previous adoption orders that had previously been made by court without parental consent (section 5C of Cap. 290).