

LEGISLATIVE COUNCIL BRIEF

ATTACHMENT OF INCOME ORDER (APPLICATION TO GOVERNMENT AND MISCELLANEOUS AMENDMENTS) BILL 2007

INTRODUCTION

A At the meeting of the Executive Council on 5 June 2007, the Council ADVISED and the Chief Executive ORDERED that the Attachment of Income Order (Application to Government and Miscellaneous Amendments) Bill 2007 at **Annex A** be introduced into the Legislative Council (LegCo).

JUSTIFICATIONS

2. On divorce, either party to the divorce who is in need of continuing financial support may apply to the Court for an order requiring payment by the other party towards the maintenance of himself/herself or his/her children or both. In the past, where the maintenance payer defaulted in payment, the maintenance payee had to go through time-consuming and complicated court proceedings to enforce the maintenance order. The Attachment of Income Order (AIO) Scheme, introduced in 1998 which enables a maintenance payee to receive punctual maintenance payments specified in the maintenance order, addresses this problem.

3. Under the AIO Scheme, the Court can make an AIO under the AIO legislation¹ enacted in 1997, requiring an income source² to deduct a specified amount (which may be the whole or part of the amount payable under a maintenance order) from a maintenance payer's income, and pay

¹ An AIO may be made under Section 20 of the Guardianship of Minors Ordinance (Cap. 13), Section 9A of the Separation and Maintenance Orders Ordinance (Cap. 16) or Section 28 of the Matrimonial Proceedings and Property Ordinance (Cap. 192). These three provisions are collectively known as the AIO legislation.

² "Income source" is defined in Rule 2 of the Attachment of Income Order Rules (Cap. 13A) as a person by whom the income of the maintenance payer is payable.

the deductions direct to a maintenance payee. For instance, the employer of a maintenance payer is the income source of an AIO directed against the wages of the maintenance payer. Hence, the maintenance payer whose salary is subject to an AIO will only receive salary net of the attachable amount from his employer since the latter, as ordered by the Court, has to pay maintenance to the maintenance payee direct. The following must be satisfied before an AIO can be made by the Court -

- (a) a maintenance order has been made by the Court against a maintenance payer; and
- (b) (i) the Court is satisfied that the payer has without reasonable excuse failed to make maintenance payment as required; or
(ii) the 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; or
(iii) the payer and the designated payee agree to the making of an attachment order; and
- (c) there is any income capable of being attached payable to the payer.

4. The policy intent of the AIO legislation is to make the earnings of a maintenance payer attachable and the AIO legislation would apply to the income source of the maintenance payer, irrespective of whether the source of income is the Government or not. In this connection, the Government is the income source of civil servants, staff employed by the Government on non-civil service terms, judges, judicial officers, officers of the Independent Commission Against Corruption (ICAC) and staff of the Hong Kong Monetary Authority (HKMA). The existing AIO legislation, however, contains no express provision stating that it applies to the Government as an income source. While the legislation specifically provides that an AIO may be made despite Section 66 of the Employment Ordinance (Cap. 57) which prohibits the attachment of wages of an employee, no similar provision exists to override proviso (a) to Section 23(1) of the Crown Proceedings Ordinance (CPO) (Cap. 300) which prohibits the attachment of wages or salary payable by the Government.

5. In the absence of an express provision to apply the AIO legislation to the Government and to override the relevant prohibition provision in the CPO, prior to December 2006 the relevant provisions have been subject to different interpretations by judges in the Family Court. Some judges have refused AIO applications against wages paid by the Government on

grounds of the prohibition under the CPO, while some have granted AIOs against wages of Government employees. The Government has complied with AIOs issued by the Court against it as an income source. As at 31 May 2007, the Director of Accounting Services was handling 64 AIOs against the wages of Government employees.

6. On 7 December 2006, the Court of Appeal handed down a judgment which gave a clear ruling that no attachment order can be made in respect of any wages or salary paid by the Government in view of the proviso to Section 23(1) of the CPO. As the Court of Appeal's decision has binding effect, the Family Court could no longer issue any AIO against the wages paid by the Government. There is an urgent need for the Government to enact an express provision applying the AIO legislation to the Government as an income source, and to override the relevant prohibition provision in the CPO.

7. We propose to introduce the Attachment of Income Order (Application to Government and Miscellaneous Amendments) Bill 2007 at Annex A into the LegCo to –

- (a) amend the existing AIO legislation to make it apply to the Government as an income source by explicitly stipulating that an AIO can be made against the wages or salary payable to a maintenance payer by the Government, notwithstanding proviso (a) to Section 23(1) of the CPO; and
- (b) validate all AIOs already made against wages or salary paid by the Government to ensure that past payments to maintenance payees would be free from any possible challenge.

8. This amendment proposal does not create new obligations for maintenance payers subject to maintenance orders, who are obliged to pay the maintenance payees. The existing implementation arrangements relating to the AIO Scheme applicable to persons whose income source is the Government will continue to apply.

THE BILL

9. The Amendment Bill seeks to make the AIO legislation apply to the Government as an income source insofar as attachment of wages or salary is concerned. The main provisions of the Bill are –

- (a) **Clauses 3(1), 5(1) and 7(1)** define the term “income source” to include the Government;
- (b) **Clauses 3(3), 5(3) and 7(3)** add a new subsection (3A) to the AIO legislation to expressly provide that wages or salary payable to a

maintenance payer by the Government can be attached for AIO purpose notwithstanding proviso (a) to section 23(1) of the CPO; and

- (c) **Clauses 3(6), 5(6) and 7(6)** add the new subsections (9) and (10) to the AIO legislation to validate attachment orders made in respect of the wages or salary payable to a maintenance payer by the Government before the commencement of the Amendment Ordinance.

LEGISLATIVE TIMETABLE

10. The legislative timetable will be –

Publication in the Gazette	15 June 2007
First Reading and commencement of Second Reading Debate	27 June 2007
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

B 11. The financial and civil service implications of the Amendment Bill as well as the binding effect of the legislation are set out in **Annex B**. The Amendment Bill is in conformity with the Basic Law, including the provisions concerning human rights. It has no economic, productivity, environmental or sustainability implications.

PUBLIC CONSULTATION

12. We have consulted major stakeholders affected by the amendment proposal, including civil servants, staff employed by the Government on non-civil service terms, judges, judicial officers, officers of the ICAC and staff of the HKMA, mostly through the relevant staff consultative channels. They have not raised any objection to the amendment proposal.

13. We consulted the LegCo Panel on Home Affairs on 13 April 2007. The Panel supported the amendment proposal.

PUBLICITY

14. A press release will be issued on 13 June 2007. A spokesman

will be made available for handling media and public enquiries.

ENQUIRIES

15. Enquiries on this Brief can be directed to Miss Joanna C H Choi, Principal Assistant Secretary for Home Affairs (2), at 2835 1383.

Home Affairs Bureau

13 June 2007

**ATTACHMENT OF INCOME ORDER (APPLICATION TO
GOVERNMENT AND MISCELLANEOUS AMENDMENTS)
BILL 2007**

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A BILL

To

Amend the Guardianship of Minors Ordinance, the Separation and Maintenance Orders Ordinance and the Matrimonial Proceedings and Property Ordinance to –

- (a) provide for the application of attachment of income orders to the Government as an income source;
- (b) provide that paragraph (a) of the proviso to section 23(1) of the Crown Proceedings Ordinance (Cap. 300) does not preclude the court from making an attachment of income order in respect of the wages or salary payable by the Government;
- (c) validate any attachment of income order made in respect of the wages or salary payable by the Government before the commencement of this Ordinance;
- (d) make clerical amendments to certain provisions; and
- (e) provide for matters necessary for the purposes in paragraphs (a), (b) and (c) and for consequential amendments.

Enacted by the Legislative Council.

PART 1

PRELIMINARY

1. Short title

This Ordinance may be cited as the Attachment of Income Order (Application to Government and Miscellaneous Amendments) Ordinance 2007.

PART 2

AMENDMENTS TO GUARDIANSHIP OF MINORS ORDINANCE

2. Interpretation

Section 2 of the Guardianship of Minors Ordinance (Cap. 13) is amended, in the Chinese text, in the definition of “贍養”, by repealing “內。” and substituting “內；”。

3. Attachment of income to satisfy order

(1) Section 20(1AA) is amended by adding –

““income source” (入息來源) means a person by whom the income of the maintenance payer is payable and includes the Government;”.

(2) Section 20(3) is repealed and the following substituted –

“(3) An attachment order is an authority to an income source to make the payment in accordance with the order, and the receipt of the specified payee is a good discharge to that income source.”.

(3) Section 20 is amended by adding immediately before subsection

(4) –

“(3A) Without limiting the generality of subsection (1), that subsection applies to income that is wages or salary payable to a maintenance payer by the Government, and accordingly paragraph (a) of the proviso to section 23(1) of the Crown Proceedings Ordinance (Cap. 300) is not to be construed as precluding the court from making an attachment order in respect of such wages or salary.”.

(4) Section 20(4) is repealed and the following substituted –

“(4) Without limiting the generality of subsection (1), that subsection applies to income that is wages payable to a

maintenance payer by a person other than the Government, and accordingly section 66 of the Employment Ordinance (Cap. 57) is not to be construed as precluding the court from making an attachment order in respect of such wages.”.

(5) Section 20(6)(c) is repealed and the following substituted –

“(c) the obligations on the part of the income source;”.

(6) Section 20 is amended by adding –

“(9) Any attachment order made by the court before the commencement of the Amendment Ordinance in respect of the wages or salary payable to a maintenance payer by the Government is deemed to be valid as if the Amendment Ordinance had commenced before the order was made unless the court, whether before or after the commencement of the Amendment Ordinance, discharges the attachment order or declares it to be invalid.

(10) In subsection (9) –

“Amendment Ordinance” (修訂條例) means the Attachment of Income Order (Application to Government and Miscellaneous Amendments) Ordinance 2007 (of 2007).”.

PART 3

AMENDMENTS TO SEPARATION AND MAINTENANCE ORDERS ORDINANCE

4. Interpretation

Section 2 of the Separation and Maintenance Orders Ordinance (Cap. 16) is amended, in the Chinese text, in the definition of “慣性酗酒者”, by repealing “人。” and substituting “人 ; ”.

5. Attachment of income to satisfy order

(1) Section 9A (1AA) is amended by adding –

““income source” (入息來源) means a person by whom the income of the maintenance payer is payable and includes the Government;”.

(2) Section 9A(3) is repealed and the following substituted –

“(3) An attachment order is an authority to an income source to make the payment in accordance with the order, and the receipt of the specified payee is a good discharge to that income source.”.

(3) Section 9A is amended by adding immediately before subsection

(4) –

“(3A) Without limiting the generality of subsection (1), that subsection applies to income that is wages or salary payable to a maintenance payer by the Government, and accordingly paragraph (a) of the proviso to section 23(1) of the Crown Proceedings Ordinance (Cap. 300) is not to be construed as precluding the court from making an attachment order in respect of such wages or salary.”.

(4) Section 9A(4) is repealed and the following substituted –

“(4) Without limiting the generality of subsection (1), that subsection applies to income that is wages payable to a maintenance payer by a person other than the Government, and accordingly section 66 of the Employment Ordinance (Cap. 57) is not to be construed as precluding the court from making an attachment order in respect of such wages.”.

(5) Section 9A(6)(c) is repealed and the following substituted –

“(c) the obligations on the part of the income source;”.

(6) Section 9A is amended by adding –

“(9) Any attachment order made by the court before the commencement of the Amendment Ordinance in respect of the wages or salary payable to a maintenance payer by the Government is deemed to be valid as if the Amendment Ordinance had commenced before the order was made unless the court, whether before or after the commencement of the Amendment Ordinance, discharges the attachment order or declares it to be invalid.

(10) In subsection (9) –
 “Amendment Ordinance” (修訂條例) means the Attachment of Income Order (Application to Government and Miscellaneous Amendments) Ordinance 2007 (of 2007).”.

PART 4

AMENDMENTS TO MATRIMONIAL PROCEEDINGS AND PROPERTY ORDINANCE

6. Interpretation

Section 2(1) of the Matrimonial Proceedings and Property Ordinance (Cap. 192) is amended, in the Chinese text, in the definition of “管養、管養權”, by repealing “視。” and substituting “視；”.

7. Attachment of income to satisfy order

- (1) Section 28 (1AA) is amended by adding –
 ““income source” (入息來源) means a person by whom the income of the maintenance payer is payable and includes the Government;”.
- (2) Section 28(3) is repealed and the following substituted –

“(3) An attachment order is an authority to an income source to make the payment in accordance with the order, and the receipt of the specified payee is a good discharge to that income source.”.

(3) Section 28 is amended by adding immediately before subsection

(4) –

“(3A) Without limiting the generality of subsection (1), that subsection applies to income that is wages or salary payable to a maintenance payer by the Government, and accordingly paragraph (a) of the proviso to section 23(1) of the Crown Proceedings Ordinance (Cap. 300) is not to be construed as precluding the court from making an attachment order in respect of such wages or salary.”.

(4) Section 28(4) is repealed and the following substituted –

“(4) Without limiting the generality of subsection (1), that subsection applies to income that is wages payable to a maintenance payer by a person other than the Government, and accordingly section 66 of the Employment Ordinance (Cap. 57) is not to be construed as precluding the court from making an attachment order in respect of such wages.”.

(5) Section 28(6)(c) is repealed and the following substituted –

“(c) the obligations on the part of the income source;”.

(6) Section 28 is amended by adding –

“(9) Any attachment order made by the court before the commencement of the Amendment Ordinance in respect of the wages or salary payable to a maintenance payer by the Government is deemed to be valid as if the Amendment Ordinance had commenced before the order was made unless the court, whether before or after the commencement of the Amendment

Ordinance, discharges the attachment order or declares it to be invalid.

(10) In subsection (9) –

“Amendment Ordinance” (修訂條例) means the Attachment of Income Order (Application to Government and Miscellaneous Amendments) Ordinance 2007 (of 2007).”.

PART 5

CONSEQUENTIAL AMENDMENTS

Attachment of Income Order Rules

8. Interpretation

(1) Rule 2 of the Attachment of Income Order Rules (Cap. 13 sub. leg. A) is amended by repealing the definition of “income source” and substituting –

““income source” (入息來源) means a person by whom the income of the maintenance payer is payable and includes the Government;”.

(2) Rule 2 is amended by repealing the definition of “wages” and substituting –

““wages” (工資) has the meaning assigned to it by section 2(1) of the Employment Ordinance (Cap. 57), whether the wages are payable by the Government or any other person.”.

9. Verification of signed statement

Rule 5(2)(a) is amended by adding “the Government,” before “a public body”.

10. Forms

The Schedule is amended, in Form 3, in the fourth paragraph –

- (a) by adding “the Government,” before “a public body;
- (b) in the Chinese text, by adding “特區政府、” before “貴機構”。

Explanatory Memorandum

Background

Under section 20 of the Guardianship of Minors Ordinance (Cap. 13)(“GMO”), section 9A of the Separation and Maintenance Orders Ordinance (Cap. 16)(“SMOO”) and section 28 of the Matrimonial Proceedings and Property Ordinance (Cap. 192)(“MPPO”) (collectively referred to as “the relevant provisions”), the court has power to make an attachment of income order (“attachment order”). An attachment order requires an income source of a maintenance payer to deduct the amount of maintenance from the income of the maintenance payer and pay it directly to the specified payee. At present, the relevant provisions do not expressly provide whether they apply to income payable by the Government.

The Bill

2. The object of this Bill is to provide that the relevant provisions apply to the Government where it is an income source. As a result, the wages or salary payable by the Government is income capable of being attached.
3. The Bill is divided into 5 parts. Part 1 provides for the short title. Part 2 amends sections 2 and 20 of GMO. Part 3 amends sections 2 and 9A of SMOO. Part 4 amends sections 2(1) and 28 of MPPO. The amendments in Parts 2, 3 and 4 are substantially the same. Part 5 contains the consequential amendments.
4. Clauses 2, 4 and 6 rectify a minor error relating to punctuation.
5. Clauses 3(1), 5(1) and 7(1) add a definition of “income source” to the relevant provisions.

6. Clauses 3(2), 5(2) and 7(2) amend subsection (3) of the relevant provisions to replace “the person by whom the income is payable” by “income source”, which is defined to include the Government.
7. Paragraph (a) of the proviso to section 23(1) of the Crown Proceedings Ordinance (Cap. 300) prohibits any attachment of wages or salary payable by the Government. Clauses 3(3), 5(3) and 7(3) adds a new subsection (3A) to expressly provide that the relevant provisions prevails over paragraph (a) of that proviso and as a result, that paragraph does not preclude the court from making attachment orders in respect of wages or salary payable by the Government.
8. Clauses 3(4), 5(4) and 7(4) amend subsection (4) of the relevant provisions to provide that it applies only to any employee whose income source is not the Government.
9. Clauses 3(5), 5(5) and 7(5) amend subsection (6)(c) of the relevant provisions to replace “the person by whom the income is payable” by “income source”.
10. Clauses 3(6), 5(6) and 7(6) adds the new subsections (9) and (10) to the relevant provisions to validate any attachment order made in respect of the wages or salary payable by the Government before the commencement of the Bill (when enacted). The validation gives legal effect to these orders and reflects the fact that the Government has been complying with these orders before the enactment of the Bill.
11. Clauses 8, 9 and 10 make consequential amendments to the Attachment of Income Order Rules (Cap. 13 sub. leg. A) to give effect to the purpose of the Bill.

IMPLICATIONS OF THE PROPOSAL

Financial Implications

The Government has been complying with AIOs served on Government employees. There would in general be sufficient protection for the Government's financial interest if the balance of a civil servant's salary after AIO payment is not enough to fully meet his debts to the Government (e.g. salary advances, housing loans). The Government, for example, could lengthen the repayment period so that the civil servant concerned could pay up his debts to the Government in a smaller monthly amount, but through a longer period. Any difference that cannot be settled through flexibility in repayment arrangement could be recovered through the Government's claim over his pension or contract gratuities, where applicable.

Civil Service Implications

2. A maintenance payer is obliged to pay maintenance to a maintenance payee pursuant to a maintenance order. An AIO is but a means to enforce the maintenance order by requiring the income source of the maintenance payer to deduct the amount of maintenance from the income of the maintenance payer and pay it direct to the maintenance payee. The position of the maintenance payer is no worse than it would have been if no AIOs were handed down in respect of the relevant maintenance order. The Government has been complying with AIOs served on it in the past and there has not been any adverse reaction so far from the staff concerned. We did not receive objection to the amendment proposal when we consulted civil servants (including staff employed on non-civil service terms) through the civil service central consultative councils.

Binding Effect of the Legislation

3. The policy intent of the AIO legislation is to make the earnings of a maintenance payer attachable, irrespective of whether the source of income is the Government or not.