

立法會

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Paper for the House Committee meeting on 2 November 2007

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

Purpose

This paper reports on the deliberations of the Bills Committee on Attachment of Income Order (Application to Government and Miscellaneous Amendments) Bill 2007.

Background

2. Under the Attachment of Income Order (AIO) Scheme introduced in 1998, the Court can make an AIO under the AIO legislation¹ 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 the deductions direct to a maintenance payee.

3. The existing AIO legislation contains no express provision stating that it applies to the Government as an income source. While the AIO 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.

4. On 7 December 2006, the Court of Appeal handed down a judgment on the case of *L v L*³ which gave a clear ruling that no attachment order can be

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.

³ *L v L* was concerned with an appeal by the husband, a civil servant, in an ancillary relief proceedings under the Matrimonial Proceedings and Property Ordinance.

made in respect of any wages or salary paid by the Government in view of the proviso (a) to section 23(1) of CPO. As the Court of Appeal's decision has binding effect, the Family Court can no longer issue any AIO against the wages paid by the Government.

The Bill

5. The Bill seeks to amend the Guardianship of Minors Ordinance (GMO) (Cap. 13), the Separation and Maintenance Orders Ordinance (SMOO) (Cap. 16) and the Matrimonial Proceedings and Property Ordinance (MPPO) (Cap. 192) to –

- (a) provide for the application of AIOs to the Government as an income source;
- (b) provide that paragraph (a) to the proviso to section 23(1) of CPO 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 AIO made in respect of the wages or salary payable by the Government before the commencement of the Amendment 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.

The Bills Committee

6. At the House Committee meeting on 6 July 2007, members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon CHOY So-yuk, the Bills Committee held four meetings with the Administration. The membership of the Bills Committee is in **Appendix I**.

Deliberations of the Bills Committee

Scope of "income source"

7. Under the Bill, "income source" is defined as a person by whom the income of the maintenance payer is payable and includes the Government.

8. Some members have expressed concern about the scope of application of the proposed definition of "income source" in the Bill, and whether the proposed amendment will be able to cover all types of income source.

9. The Administration has assured members that under the present drafting of the Bill, if the income source is the Government, it will be covered by the new section 20(3A) of GMO, new section 9A(3A) of the SMOO or new section 28(3A) of MPPO. If the income source is not the Government, it will be covered by the revised section 20(4) of GMO, revised section 9A(4) of SMOO and revised section 28(4) of MPPO. Following the enactment of the Amendment Ordinance, the AIO legislation will apply to the income source of the maintenance payer, irrespective of whether the income source is the Government or not, and whether the income is in the form of wages/salary or otherwise.

10. On the applicability of the AIO legislation, the Administration has explained that the AIO legislation does not have extra-territorial effect, and does not apply to an income source outside Hong Kong. Regarding members of consular posts in Hong Kong, their income source is usually the States concerned, irrespective of whether or not they are employed locally or posted to work in Hong Kong from overseas. 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, the Administration considers it inappropriate to provide that the AIO legislation applies to Foreign States.

11. As regards the position of income source which is an overseas company, the Administration has advised that these 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). These companies are the income source of employees of the companies and are subject to the AIO legislation. Under rule 11(2) of the AIO Rules (Cap. 13A), an income source who fails, without reasonable excuse, to comply with an AIO commits an offence and is liable to a fine at level 2. Court documents may be served on these companies' authorized representations in Hong Kong in accordance with the provisions in the Rules of High Court (Cap. 4A) or the relevant provisions of CO.

Existing AIOs issued to the Government

12. Members note that as at 31 May 2007, the Director of Accounting Services was handling 64 AIOs against the wages of Government employees. Some members have raised queries about the grounds for enforcing the 64 AIOs against Government employees after the Court of Appeal had handed down the judgment on the case of *L v L* on 7 December 2006, which held that

no attachment order could be made in respect of any wages or salary paid by the Government in view of the proviso (a) to section 23(1) of CPO. They consider that the enforcement of the 64 AIOs in question may give rise to a claim against Government for wrongful deduction of wages or salary from the Government employees concerned. These members are concerned with whether the Administration should cease to enforce AIOs against Government employees pending the enactment of the Amendment Ordinance.

13. The Administration has explained that it has consulted the Department of Justice (DoJ) who advises that there is legal basis for continued compliance with the AIOs already issued to the Government. The Government, as the income source, should continue to comply with the AIOs notwithstanding the judgment of the Court of Appeal in *L v L*, unless and until they are set aside. DoJ also 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 has no power to make it or even perhaps acts contrary to express provisions of law in purporting to make it, or where an order otherwise ought not to have been made.

14. As for the concern as to whether there may be a case for successful claim against the Government for wrongful deduction of wages or salary from the Government employees concerned, the Administration has informed the Bills Committee that 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.

15. The Administration has pointed out that as the truly affected parties of maintenance payments and AIOs are the maintenance payers and payees, it considers that the proper course of action is for the Government officer concerned (as the aggrieved party), if he considers appropriate, when an AIO is yet to be made, to contest the application for an AIO, or where an AIO has already been made, to apply to the court to set it aside. On the other hand, the Government, as the income source, would, if the Government receives notice of any new application for AIO, inform the parties involved of the Court of Appeal judgment in *L v L*.

Validation of AIOs

16. Clause 3(6) of the Bill amends section 20 of GMO, clause 5(6) of the Bill amends section 9A of SMOO and clause 7(6) of the Bill amends section 28 of MPPO. Each of the clauses adds a provision in the respective ordinance to validate any AIO made in respect of wages or salary payable by the Government before the commencement of the Amendment Ordinance. These clauses are collectively called the validation provision below.

17. Members are generally of the view that validation provision should not be introduced as a matter of principle. Some members have also raised the concern that the maintenance payers will be deprived of the right to challenge the validity of the AIOs in the light of the decision in *L v L*. Some members consider that the maintenance payees may get an order for the payment of maintenance by way of judgment summons without the need to validate the AIOs already made against wages or salary payable to maintenance payers by the Government. Some members consider that, alternatively, the Administration may obtain written consent from the maintenance payers concerned, who are civil servants, for the continued enforcement of the AIOs already issued to the Government.

18. The Administration has pointed out to the Bills Committee that validation of the AIOs made by the court before the commencement of the Amendment Ordinance would avoid possible detriment to the maintenance payees by ensuring that payments to maintenance payees under the issued AIOs would not be disrupted. The Administration explained out that in the absence of the validation provision and in case the maintenance payers take successful actions to set aside the AIOs concerned, the maintenance payees may have to re-apply for AIOs, upon enactment of the Amendment Ordinance, or take out other actions, such as applying for judgment summons, to claim maintenance payment. This meant inviting them to visit the bitter experience again. Also, it would take some time, and in the process, the interest of the maintenance payees would likely be adversely affected.

19. The Administration has also advised that retrospective validation of AIOs is legally in order and is justified. The validation provision does not add legal burden to maintenance payers, but only makes 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. The Administration has pointed out that a maintenance payer's duty or obligation is imposed by the maintenance order. Therefore, 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.

20. The Administration has stressed that retrospective validation only confers a benefit on the maintenance payee (by securing the payment of maintenance under 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.

21. The legal adviser to the Bills Committee has pointed out that though it is within the legislative competence of the Legislative Council to enact a validation provision where it considers appropriate, policy justifications for enacting a validation provision vary from case to case.

22. Notwithstanding the Administration's explanation, and while recognizing that the retrospective arrangement would avoid possible detriment to the maintenance payees brought by a successful challenge of the validity of the AIOs in question, some members maintain their reservations about the validation provision. To address members' concern, Ms Miriam LAU suggests to replace the retrospective validation provision by a provision that would only validate the AIOs issued on a prospective basis, from the commencement date of the Amendment Ordinance. Further deductions and payments under the AIOs will hence be secured, although those already made before the commencement of the Amendment Ordinance may still be subject to challenge. It will be for individual maintenance payers who are Government employees to decide whether to apply to the court to set aside the AIOs concerned in the light of the Court of Appeal's decision in *L v L*, and to claim against the Government for "wrongful" deduction of wages or salary before commencement of the Amendment Ordinance.

23. The Administration has subsequently advised that it will take on board members' suggestion and propose an amendment accordingly. The Bills Committee considers the Administration's proposed amendment acceptable.

Transitional arrangement

24. To cater for situations where proceedings for AIOs have commenced but have not yet been completed before the commencement of the Amendment Ordinance, members note that the Administration will move an amendment to add a transitional provision to the effect that where before the commencement of the Amendment Ordinance, an application for an AIO in respect of the wages or salary payable to a maintenance payer by the Government has been made but has not yet been determined, the application is to be determined in accordance with section 20 of GMO, section 9A of SMOO or section 28 of MPPO as amended by the Amendment Ordinance.

Committee Stage amendments

25. The Committee Stage amendments to be moved by the Administration and agreed by the Bills Committee are in **Appendix II**.

Resumption of the Second Reading debate

26. The Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting on 14 November 2007.

Advice sought

27. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 2
Legislative Council Secretariat
31 October 2007

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

Membership List

Chairman	Hon CHOY So-yuk, JP
Members	Hon Albert HO Chun-yan
	Hon Margaret NG
	Hon James TO Kun-sun
	Hon CHAN Yuen-han, SBS, JP
	Hon Miriam LAU Kin-yee, GBS, JP (since 23 July 2007)
	(Total : 6 Members)
Clerk	Miss Betty MA
Legal adviser	Mr Stephen LAM
Date	23 July 2007

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

COMMITTEE STAGE

Amendments to be moved by the Secretary for Home Affairs

<u>Clause</u>	<u>Amendment Proposed</u>
3(1)	<p>By adding before the proposed definition of “income source” –</p> <p>““Amendment Ordinance” (《修訂條例》) means the Attachment of Income Order (Application to Government and Miscellaneous Amendments) Ordinance 2007 (of 2007);”.</p>
3(6)	<p>By deleting the proposed section 20(9) and (10) and substituting –</p> <p>“(9) Any attachment order –</p> <p>(a) made by the court before the commencement date of the Amendment Ordinance in respect of the wages or salary payable to a maintenance payer by the Government; and</p> <p>(b) which has not been discharged or declared invalid by the court as at that commencement date,</p> <p>has effect from that commencement date as if it were made under subsection (1) as read with subsection (3A).</p> <p>(10) An application –</p> <p>(a) for an attachment order in respect of the wages or salary payable to a maintenance</p>

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payer by the Government;

(b) that is pending immediately before the commencement date of the Amendment Ordinance; and

(c) in which an attachment order has not been made as at that commencement date,

is to be determined in accordance with this section as amended by the Amendment Ordinance.”.

5(1) By adding before the proposed definition of “income source” –

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

5(6) By deleting the proposed section 9A(9) and (10) and substituting –

“(9) Any attachment order –

(a) made by the court before the commencement date of the Amendment Ordinance in respect of the wages or salary payable to a maintenance payer by the Government; and

(b) which has not been discharged or declared invalid by the court as at that commencement date,

has effect from that commencement date as if it were made under subsection (1) as read with subsection (3A).

(10) An application –

(a) for an attachment order in respect of the wages or salary payable to a maintenance payer by the Government;

(b) that is pending immediately before the

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commencement date of the Amendment Ordinance; and

- (c) in which an attachment order has not been made as at that commencement date,

is to be determined in accordance with this section as amended by the Amendment Ordinance.”.

7(1) By adding before the proposed definition of “income source” –

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

7(6) By deleting the proposed section 28(9) and (10) and substituting –

“(9) Any attachment order –

- (a) made by the court before the commencement date of the Amendment Ordinance in respect of the wages or salary payable to a maintenance payer by the Government; and

- (b) which has not been discharged or declared invalid by the court as at that commencement date,

has effect from that commencement date as if it were made under subsection (1) as read with subsection (3A).

(10) An application –

- (a) for an attachment order in respect of the wages or salary payable to a maintenance payer by the Government;

- (b) that is pending immediately before the commencement date of the Amendment Ordinance; and

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(c) in which an attachment order has not been made as at that commencement date, is to be determined in accordance with this section as amended by the Amendment Ordinance.”.