

**Bills Committee on
Employment (Amendment) Bill 2009**

**Administration's Response to Issues Raised by Members
at the Bills Committee Meetings held on
23 November, 9 December and 22 December 2009**

Purpose

This paper provides the Administration's response to the issues raised by Members of the Bills Committee on the Employment (Amendment) Bill 2009 (the Bill) at the Bills Committee meetings held on 23 November, 9 December and 22 December 2009.

The need for offence elements in the proposed section 43P and procedural requirements under the proposed section 43S

2. At the meetings of 23 November and 22 December 2009, the Administration was asked whether there was a need for the elements of "wilfully" and "without reasonable excuse" in the proposed section 43P(1)(b) as well as the written consent by the Commissioner for Labour (CL) and hearing of the accused under the proposed section 43S(1) and (2).

3. The proposed Bill seeks to address the long-standing difficulty faced by employees in enforcing Labour Tribunal (LT) awards on which some employers had defaulted under the civil system. Making non-payment of LT awards a criminal offence has been a measure strongly favoured by the labour sector over the years. However, LT awards are civil judgments in nature and come under the same execution mechanism. Stakeholders including some members of the legal profession have expressed concerns that such a policy of criminalising non-payment of LT awards would need to be prudently considered in view of its possible ramifications for other types of civil awards. The business sector has also indicated that there must be sufficient safeguards to avoid penalising employers who are genuinely unable to pay. Despite such concerns, there is a general consensus among stakeholders to impose criminal sanction on those employers who are able to pay but are so irresponsible as to evade payments even after awards have been made by

the LT.

4. The proposed Bill reflects the Administration's determination to tackle the problem with a new mindset while addressing with care different interests and concerns in the formulation of the offence. As such, sufficient safeguards will have to be built in to ensure that, by design, the proposed offence will target only those wilfully defaulting employers. Similar to wage offences, the proposed offence is intended to carry the same highest level of penalty at \$350,000 and three years' imprisonment under the Employment Ordinance (EO). The elements of "wilfully and without reasonable excuse" in the proposed section 43P and the procedural requirements of CL's consent and hearing of the accused under the proposed section 43S are thus adopted on par with wage offences.

Elements under the proposed section 43P

5. A Member suggested that the mens rea element of the offence, i.e. wilfulness, was not necessary and another Member proposed to remove both elements of "wilfully" and "without reasonable excuse". At the same time, there were Members who took an opposite view and considered it necessary to single out the wilful non-compliance cases for targeted sanction.

6. It is pertinent to note that though all defaulting employers are civilly liable for the judgment debts, whether all of them should be criminally sanctioned is another matter. The elements of "wilfully" and "without reasonable excuse" under the proposed section 43P are to reflect and achieve the legislative intent as mentioned in paragraphs 3 and 4 above, namely, to criminalise only wilful defaults but not those unable to pay. It should also be noted that, if enacted, the proposed offence would already remove one of the current hurdles facing enforcement against wage offences, i.e. the need to prove contractual intention or amount. We are therefore of the view that, to strike a balance between the interests of employers and employees, the proposed offence should be confined to proven wilful default of LT awards.

Requirements under the proposed section 43S

7. The requirements for CL's consent and hearing under section 43S(1) and (2) are made with due consideration to the legal policy and

legislative intent. The requirements are laid down to give the accused an early opportunity to inform the authority of his defences and any special circumstances that would likely mitigate his culpability or even make it unnecessary to bring a prosecution against him. Early knowledge of possible defences is to the benefit of both the employees and the employers involved, as it could help expedite the investigation and prosecution process.

8. We have made reference to existing offences under the EO and other legislation. For sufficient deterrence, the penalty level of the proposed offence is set at a fine of \$350,000 and three years' imprisonment, which is on par with the penalty for wage offence under the EO. In fact, other offences under the EO that can lead to imprisonment, viz offences under section 63B¹ bear the same requirements for CL's consent and hearing under section 64. Thus, the proposed section 43S is consistent with the additional safeguards for EO offences with more serious criminal sanctions. Similar requirements of consent and/or hearing before prosecution of offences are found in other ordinances². Examples include section 42 of the Apprenticeship Ordinance (Cap. 47), section 37L of the Immigration Ordinance (Cap. 115), regulation 118 of the Poultry (Slaughtering for Export) Regulations (Cap. 139, sub. leg. E), sections 9A, 33B and 44 of the Offences against the Person Ordinance (Cap. 212) and section 4A of the Dangerous Drugs Ordinance (Cap. 134).

9. A Member asked the Administration to consider providing a performance pledge or an administrative order on the time within which CL must decide whether to give written consent under the proposed section 43S(1). Unlike an offence that can be detected on the spot by public officers such as traffic offence, the Labour Department (LD) in prosecuting an offence under EO has to rely on evidence from the employee who was owed wages or other statutory benefits. The length of time for the employee and other relevant parties to provide statement and information varies from case to case and is outside the control of LD. Therefore, it is not practicable to provide a definite time limit for CL's consent for prosecution.

¹ Section 63B(1) of EO covers offences for deduction of wages under section 32, failure to comply with a requirement by an officer under section 72(1)(a), (b) or (c). Section 63B(2) of EO covers giving false information or withholding information when information is required under section 72(1)(b) or (c).

² A total of 79 provisions under 51 ordinances other than EO are identified.

10. We appreciate Members' concerns that prosecution of the proposed offence against culpable employers should be conducted expeditiously. Nevertheless, we should also guard against possible accusations of prejudice, which may undermine the prosecution's case and may undermine the chances of successful conviction against culpable employers.

11. LD is committed to laying summonses immediately once sufficient evidence is revealed upon completion of investigation and, if the case requires, once legal advice is available. As always, we will ensure that the investigation and prosecution of suspected offences will be conducted expeditiously and properly.

12. The criminalisation of default on LT awards, being civil judgments in nature, is an important achievement that reflects the mutual understanding among different stakeholders including employee and employer representatives, in particular those sitting on the Labour Advisory Board (LAB). Employer members of the LAB have given their support for the proposed offence on the understanding that sufficient procedural safeguards would be provided to ensure that the proposed offence targets only the wilful offenders. As improvements in labour legislation need the support of both employees and employers, we consider it important to provide procedural safeguards to target wilful offenders.

CL's decision of no prosecution

13. At the meeting on 22 December 2009, the Administration was asked whether consultation would be carried out with, or report be made to, the DoJ regarding the no prosecution (NP) decisions by CL and the related mechanism.

14. In deciding whether to initiate prosecution upon completion of investigation, LD would need to consider the sufficiency of evidence, prospect of conviction and other relevant factors as promulgated in the Statement of Prosecution Policy and Practice and previous legal advice issued by DoJ, and would need to consult DoJ further when necessary. LD is empowered to decide on the course of prosecution in accordance

with the approved prosecution principles and advice. As LD has considerable experience over the years in making prosecution decisions (in consultation with DoJ when necessary), it is not required to report every prosecution or NP decision to DoJ in daily operation. In practice, if there is sufficient evidence, LD would bring prosecution before court for its decision on whether the defendant is guilty or not. LD would only decide not to prosecute in more clear-cut cases as agreed with DoJ, such as cases with no prosecution witness or winding-up order on defendant company issued by court. All such NP decisions have to be vetted and approved by the senior supervising officers. For more complicated cases, LD would seek legal advice before a decision not to prosecute is made.

Civil and criminal proceedings

15. At the meeting of 22 December 2009, the Administration was asked to provide information on the initiation of criminal investigation or prosecution without waiting for civil proceedings.

16. Under the common law system, civil and criminal proceedings are separate and distinct. A creditor pursues his monetary claims through civil proceedings while an enforcement agency prosecutes an offender for contravention of law in criminal proceedings. Criminal proceedings will result in punishment, e.g. fine and imprisonment, and require more stringent standard of proof than civil proceedings.

17. At present, if a suspected breach of the EO is detected, LD will take out prosecution upon sufficiency of evidence, irrespective of the progress of the employee's civil claim in LT if any. As there are sufficiently different elements between the proposed offence under the Bill and the existing EO offences, LD can prosecute the employer for non-payment of an LT award even if the employer has been prosecuted for failure to pay wages or other statutory entitlements before the making of the LT award. Depending on the progress of the investigation and prosecution of the earlier EO offences concerned, prosecutions for the earlier EO offences and the proposed offence may be taken together, thus saving efforts and time for the enforcement agency, witnesses and court.

18. LD will continue its strategy to initiate prosecution against culpable employers once there is sufficient evidence after the passage of

the Bill.

Application of the proposed section 43P to LT awards comprising specified entitlements partially

19. At the meeting of 9 December 2009, the Administration was asked to clarify whether the proposed section 43P covered LT awards where the sum payable comprised specified entitlements and other payments, such as compensation under section 32P and terminal payments under section 32O currently not covered by the proposed section 43N(1).

20. An offence under the proposed section 43P(1) is committed if both its paragraphs (a) and (b) are met.

21. An award clearly falls within the proposed section 43P(1)(a) if it provides partly for payment of specified entitlements and partly for other payments (referred to in this paper as a “mixed entitlement award”, an example of which is an award covering wages and section 32P compensation).

22. The next step is to see whether the proposed section 43P(1)(b) is also met (whether the employer, wilfully and without reasonable excuse, fails to pay any sum payable under the award within 14 days after the date of the award (or 14 days after a later date specified in the award for payment of that sum)).

23. The reference in section 43P(1)(b) to failure to pay “any sum payable under the award” refers to the award mentioned in section 43P(1)(a), that is, a mixed entitlement award. To illustrate, we use an example of a mixed entitlement award for a total sum of \$10,000 (of which \$6,000 is wages and \$4,000 is section 32P compensation). The \$6,000 is a sum payable under the award. The \$4,000 is also a sum payable under the award. This is not affected by the fact that the former is specified entitlement while the latter is not. Further, suppose the award provides for payment by instalments, each instalment and any part of an instalment, as stipulated under section 43P(2), is also a sum payable under the award.

24. The reference in section 43P(1)(a) to “an award of a tribunal that provides, in whole or in part, for the payment ... of any specified entitlement” clearly contemplates an award providing for payment of other payments in addition to specified entitlements, i.e. a mixed

entitlement award. And the reference in section 43P(1)(b) to failure to pay any sum payable under the award naturally covers not just specified entitlements. Section 43P(1)(b) refers to failure to pay “any sum payable under the award”, not failure to pay the “specified entitlement”. A failure to pay any sum payable under the award is caught by section 43P(1)(b), be the sum specified entitlement or not.

25. In summary, the condition in the proposed section 43P(1)(a) for an award to provide, in whole or in part, for payment of specified entitlement is to make sure that the proposed s.43P will be triggered only when an award covers at least some specified entitlement. However, once this condition is met, the employer must pay the whole of the award, not just the specified entitlement.

Enforcement actions and measures against overseas directors and middle management who had consented to, connived at, or been neglectful of the proposed section 43P offence

26. At the meeting of 9 December 2009, the Administration was asked to provide information on the enforcement actions and measures against overseas directors and middle management who had consented to, connived at, or been neglectful of the wilful non-payment of an award by the corporate employer.

27. The proposed section 43Q imposes liability on a director, manager, secretary or other similar officer if the wilful non-payment of an LT award by the corporate employer is committed with his consent or connivance or is attributable to his neglect. The provision is so phrased that the responsible person cannot evade his liability by the post title. This is important as our experience with wage offences showed that some unscrupulous employers did try to escape their liability by not registering as directors. We have also noted the employer sector's concern about netting in innocent directors with no involvement in the default. Thus, the accused would only be held liable by consent, connivance or neglect on his part rather than by mere reference to the post he holds.

28. As a market economy, Hong Kong welcomes external investments and non-local residents can register as directors of a company. Some of them may be mere investors and have delegated the management to the local partners while some participate in the management of the company in various degrees. Whether an overseas director will be

prosecuted will depend on his management role, decision-making power and above all whether the offence is committed with his consent or connivance or is attributable to his neglect. The EO offences are tried summarily in the magistrate courts and, like all other summary offences, the service of summons and the proceedings are governed by the Magistrates Ordinance (Cap. 227).

29. On whether the middle management of the company will be prosecuted, it will likewise depend on whether there is sufficient evidence to show his consent, connivance or neglect in causing the wilful non-payment of an LT award by the company. The case law³ suggests that those acting as the brain rather than the hands would be held liable. This is also supported by our actual experience in enforcing wage offences of the EO where the convicted managers, secretaries or similar officers were the actual responsible persons of the company. More details of the cases have been given in paragraphs 29 to 32 of LC paper no. CB(2)80/09-10(01). If one is merely acting under the company's instruction and has made efforts to handle the payment of an LT award required of the company or has no responsibility for the matter, there should not be evidence that the non-payment is made with his consent, connivance or neglect.

Labour and Welfare Bureau
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³ Applying principles enunciated in *Bolton (Engineering) Co. v Graham* [1957] 1 QB 159 and *Tesco Supermarkets Ltd. v Nattras* [1971] WLR 1166.