

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

**Administration's Response to Issues Raised by Members
at the Bills Committee Meeting held on 13 January 2010**

Purpose

This paper provides the Administration's response to issues raised by Members of the Bills Committee on the Employment (Amendment) Bill 2009 (the Bill) at the Bills Committee meeting held on 13 January 2010.

2. At the meeting on 13 January 2010, the Bills Committee recognised the need to distinguish criminal from civil actions and the role which the safeguards¹ and overall construction under the Bill play in helping to distinguish wilful defaults of Labour Tribunal (LT) awards for criminal sanction. Against this backdrop, the Administration was asked to consider the outstanding issues as set out below.

Compensation under section 32P of the Employment Ordinance (EO) and terminal payments under section 32O of the EO arising from unreasonable and unlawful dismissal (UUD) to be covered as specified entitlements under the Bill

3. Some Members insisted that the Administration should consider covering the compensation under section 32P and terminal payments under section 32O of the EO arising from UUD in the definition of "specified entitlement" under the proposed section 43N(1).

4. In common law, the responsibility for enforcing civil remedies lies with the awardees. The proposed criminalisation of non-payment of LT awards is a breakthrough premised on the clear understanding that, unlike other entitlements which are purely civil debts, non-payment of wages and other statutory entitlements covered by the proposed offence can already result in criminal sanction. To forestall read-across implications of the proposals for other parts of the civil adjudication

¹ Including "wilfully" and "without reasonable excuse" in the proposed section 43P and procedural requirements under the proposed section 43S

system, there is a genuine need to confine the proposed offence to awards comprising employee entitlements under the EO the non-payment of which would entail criminal sanction. Since compensation under section 32P and some terminal payments under section 32O² do not carry criminal sanction in their non-payment, they are not covered by the definition of “specified entitlement” in the proposed section 43N(1). More details are given in paragraphs 17 to 23 of LC Paper No. CB(2)80/09-10(01).

5. While appreciating the need to confine the proposed offence to awards with EO entitlements underpinned by criminal sanction, some Members considered that compensation under section 32P and terminal payments under section 32O that arise from UUD should also be covered owing to the criminal sanction attached to UUD.

6. In response to Members’ request, the Administration has explored the possible read-across implications and consulted stakeholders. Given the criminal sanction upon UUD and notwithstanding the consideration in paragraph 4 above, we have no in-principle objection to considering compensation under section 32P and terminal payments under section 32O that arise from UUD as entitlements underpinned by criminal sanction and having such included in the definition of “specified entitlement”. However, this inclusion is based on the clear understanding that the provision of the present safeguards in the Bill to ensure that the proposed offence targets only wilful defaults stays intact. Subject to Members’ views, the Administration will proceed with the preparation of committee stage amendments to the Bill accordingly on the above understanding.

Other issues

7. At the meeting of 13 January 2010, Members agreed to retain the procedural requirements under the proposed section 43S. Yet, some Members asked the Administration to consider providing an internal guideline or a performance pledge on the time limit for completing the

² Terminal payments in respect of entitlements to which the employee is entitled upon termination of employment has already been covered under paragraph (j) of the definition of “specified entitlement” in the proposed section 43N(1). That definition currently does not cover terminal payments in respect of entitlements that the employee might reasonably be expected to be entitled to had he been allowed to continue with his original employment or terms of employment contract to attain the minimum qualifying length of service required.

procedures under the proposed section 43S, while other Members considered the proposal unnecessary and considered that flexibility should be allowed to complete the procedures in different circumstances. A Member suggested the Administration to review the effectiveness of the proposed offence under the Bill one year after its commencement and report to the LegCo Panel on Manpower.

8. Evidence from the employee who was owed wages or other statutory entitlements is crucial to the prosecution of an EO offence. It is thus not practicable to set a definitive timeframe for completing the procedures in view of the fact that the time for the employee and other relevant parties to provide statements and relevant information varies from case to case and is outside the Labour Department's control. For more details, Members may refer to paragraphs 7 to 12 of LC Paper No. CB(2)706/09-10(01). Regarding a Member's suggestion of setting time limit for conducting hearing or giving opportunity to be heard under the proposed section 43S(2), it should be noted that there is a genuine need to assess whether another hearing or postponement should be granted to a suspected offender against the circumstances of each case (e.g. being out of town, suffering from injury in an accident, more time for procuring necessary information), thus rendering a time limit not feasible.

9. The Administration is committed to conducting investigation and prosecution for the proposed offence, if enacted, expeditiously. Nevertheless, at the same time, we need to allow for flexibility to cater for different circumstances of individual cases to ensure that every prosecution case could be handled properly and fairly. This conscientious approach also accounts for the successful convictions in prosecutions for wage offences instigated by Labour Department (the number of which increased by 161% from 2004 to 2009). If the Bill is supported by Members, we would monitor closely and report to the Manpower Panel the progress in the implementation of the proposed offence.

Labour and Welfare Bureau
January 2010