

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

**Administration's Responses to Views and Suggestions Raised by Deputations
at the Bills Committee Meeting held on 12 October 2009**

Views/suggestions	The Administration's responses
<i>(1) Scope of the proposed offence against non-payment of Labour Tribunal (LT) awards</i>	
(a) There were suggestions on specified entitlements under the proposed section 43N(1) which should include (i) coverage of wages in lieu of notice (WILON) and (ii) compensation under section 32P of the Employment Ordinance (EO) (Cap. 57).	<ul style="list-style-type: none"> • The award made by LT is a civil remedy and its enforcement modes are no different from those of other civil judgments. The basis of making defaults of LT awards a criminal offence lies in the fact that, unlike other entitlements whose non-payment would only attract civil liability, non-payment of wages and other statutory entitlements covered by the proposed offence also incur criminal sanction under the existing EO. To avoid possible read-across implications on enforcement of other civil judgments, there is a genuine need to confine the proposed offence to LT awards that comprise wages and employee entitlements under the EO currently underpinned by criminal sanction. • WILON is covered by the reference to “any .. sum payable under section .. 25” in paragraph (a) of the definition of “specified entitlement” in the proposed section 43N(1), by virtue of section 25(2)(b) of the EO¹. The representation of WILON

¹ Section 25(1) of the EO stipulates that subject to section 31O, where a contract of employment is terminated, any sum due to the employee shall be paid to him as soon as practicable and in any case not later than 7 days after the day of termination. Subsection (2) defines the sum as, among others, (b) the sum (if any) payable under sections 7, 15(2) and 33(4BA). Under section 7(1A), subject to sections 15 and 33, either party to a contract of employment may at any time terminate the contract without notice by agreeing to pay to the other party, depending on whether the length of notice required to terminate the contract is expressed in days/weeks or in months, a sum calculated by multiplying the number of days or months in the period for which wages would normally be payable to the employee by the daily or monthly average of the wages

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<p>(b) There was also view supporting the rationale of creating the new offence that the proposed offence should be restricted to LT awards comprising wages and entitlements for which non-payment already constituted criminal offences under the EO.</p>	<p>under “any other sum” is adopted along the provision in section 25 of the EO. The Administration will ensure clarity of the proposed offence covering WILON in publicity activities after the Bill is enacted.</p> <ul style="list-style-type: none"> • Section 32P of the EO provides an employee the right to claim compensation as part of the remedies under Part VIA for unlawful dismissal. The LT may award such compensation in an amount not exceeding \$150,000 as it considers just and appropriate in the circumstances of a claim, including such factors as any loss sustained by the employee which is attributable to the dismissal, possibility of the employee obtaining new employment, any contributory fault borne by the employee. However, as the remedy provided under section 32P is compensatory in nature, the LT may decide not to award any compensation. The nature of compensation under section 32P thus differs from wages and other statutory entitlements and its non-payment is not underpinned by criminal sanction in the EO. • It should be noted that another type of remedy under Part VIA, namely the award of terminal payment under section 32O, to the extent that it covers wages and statutory entitlements with criminal sanction, is already covered in paragraph (j) of the definition of “specified entitlement” in the proposed section 43N(1). Besides, though the compensation under section 32P by itself does not fall within the scope of specified entitlements, if an award includes not just section 32P compensation but also a specified entitlement, the employer can still be held liable under the proposed offence for wilfully and without reasonable excuse defaulting on payment of the award.

earned by the employee during the period of 12 months or a shorter period if so employed, immediately before the date of notification.

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<i>(2) The proposed offence under section 43P and requirement under section 43S</i>	
<p>(a) The deputations mostly indicated support in the introduction of the new offence against employers wilfully failing to pay the LT awards.</p> <p>(b) There were some deputations indicating reservation of criminalisation of LT awards in view of the possible adverse impact on the business environment and labour relations.</p> <p>(c) There was deputation indicating concern over the difficulty in proving wilfulness of the employer, thus affecting the effectiveness of the proposed offence.</p>	<ul style="list-style-type: none"> • There has been growing community concern that some employers fail to make payment to employees even after LT has so awarded. Making non-payment of LT awards a criminal offence is a concrete measure long favoured by the stakeholders for achieving deterrence. After careful study and deliberation, the Administration considered the option acceptable on the basis of the criminal sanction currently attached to wages and statutory entitlements under the EO. • During consultation, while stakeholders generally supported that the acts of default on the part of some irresponsible employers should be sanctioned, some employer representatives emphasised at the same time the need for the proposed offence to guard against any unintended harm to innocent employers. We are wary of the adverse impact that the proposed offence may have on these employers. The legislative intent is thus built on the consensus of stakeholders to target only wilful defaults of LT awards. • To achieve the legislative intent, the proposed Bill only makes wilful non-payment of LT awards without reasonable excuse an offence. The elements of the proposed offence are on par with the existing wage offence under the EO. The probable effectiveness of the proposed offence may thus be gauged by reference to the effects of the criminal sanction of wage offence under the current EO. The increase in the number of convicted summonses on wage offences, coupled with the decrease of the wage disputes and claims handled by the Labour Department (LD), suggests that the proposed offence should be effective. As a market economy with strong commitment to safeguarding simultaneously business confidence and employees'

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<p>(d) There was query by deputation whether the existing EO offences and the proposed offence to be created would cause double penalty as far as employers were concerned.</p>	<p>legitimate interests, the present proposal strikes a balance between protecting workers' rights and deterring wilful default of LT awards while avoiding netting in the innocent in Hong Kong.</p> <ul style="list-style-type: none"> • Experience suggests that irresponsible employers constitute a very small portion of our business sector. Targetting only at the irresponsible employers, the proposed offence should not affect the business environment. In fact, deterring wilful defaults of employees' entitlements will help promote harmonious labour relations. • Whether an employer would be liable for prosecution under existing EO offences and the proposed offence at the same time is subject to the sufficiency of evidence in the case. The court would consider the sentence imposed on the existing EO offences when imposing sentence on the offence of wilful default of LT award by the same accused. It is the obligation of the employer to pay wages and statutory entitlements to his employee as well as paying any sum as LT has so awarded. Non-payment of wages and non-payment of LT awards are two different acts of defaults. Any employer who meets his statutory obligations will not be subject to the criminal sanction.
<p>(e) There was suggestion to extend the statutory payment period of wages to 14 days for general construction workers due to practical consideration of</p>	<ul style="list-style-type: none"> • The proposed section 43P(1)(b) makes it an offence if 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 the date on which the sum is, by the terms of the award, payable (as the case may be). While employers are obliged to pay the sum as it becomes due, a grace period of 14 days is already provided under the proposed provision.

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<p>(f) There was deputation which did not agree with the requirement of the consent by Commissioner for Labour (CL) under the proposed section 43S before instituting prosecution.</p> <p>(g) There was also deputation of the view that the proposed offence should focus only those wilfully or without reasonable excuse defaulting on the awarded payment and the requirement of hearing under the proposed section 43S should be retained.</p>	<ul style="list-style-type: none"> • The proposed section 43S in the Bill provides that CL's written consent is required for instituting prosecution against an offence under the proposed section 43P, and that CL must hear the person against whom the allegation is made, or give the person an opportunity of being heard, before giving consent in writing to commence prosecution. Such statutory requirement is in line with present arrangements in respect of wage offences under section 64 of the EO. • The right to be heard and the requirement for CL's consent before instituting prosecution are intended to avoid inadvertently netting in those innocent employers.
<p>(h) There were suggestions to provide rules or guidelines to illustrate what constituted reasonable</p>	<ul style="list-style-type: none"> • The proposed offence has not fundamentally shifted the onus of proof to the employers. It remains the prosecution's responsibility to provide proof of wilfulness on the part of the employers. Only when this prerequisite has been met would the need for an employer to defend himself by reference to "reasonable excuses" arise.

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<p>excuses and to distinguish employers with genuine financial difficulty from those with wilful defaults.</p>	<p>In other words, the need for an employer to raise any “reasonable excuse” defence would be limited to cases where the prosecution has been able to provide evidence to support the wilful default on the part of the employer.</p> <ul style="list-style-type: none"> • The reasonable excuse clause without elaboration has long been adopted for offences for non-payment of wages and other statutory entitlements under the EO. This, together with the use of similar provisions in numerous ordinances, suggests that the merit of not fettering the court’s judgment of the availability of reasonable excuse based on a fair and impartial assessment of the circumstances of the particular case is generally recognised. The enforcement experience of employment-related cases reveals that there is no hard and fast rule to determine whether, on given facts, a reasonable excuse is established and the same excuse may be considered reasonable in one case but not in another because of different circumstances of each case. • Likewise, the question of whether or not financial difficulty per se constitutes a reasonable excuse does not have a universal answer but must be assessed against the facts and circumstances of each case. For example, non-payment in a case of cash flow problem arising from unforeseeable incidents (e.g. financial loss attributable to burglary) must be considered differently from insufficient funding due to the priority given to purchasing non-essential equipment for the company. • Members may refer to paragraphs 10 to 16 of the LC Paper No. CB(2)80/09-10(01) on the subject of listing reasonable excuses. • In view of the above considerations, the Administration is of the view that the present

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	<p>reasonable excuse clause under section 43P(1)(b), coupled with other elements of the offence provided in the Bill, is a practical and sufficient means to distinguish a culpable employer from the innocent one. Upon the passage of the Bill, we will spare no efforts in publicising the Bill through various channels and will cover in the publicity materials, among others, the explanation on the reasonable excuse clause of the new offence with illustration of cases² as appropriate to enhance the public's understanding.</p>
<p><i>(3) Liability of company directors and responsible persons</i></p>	
<p>(a) There were deputations expressing concern about the difficulty in proving consent, connivance or neglect of directors or the role of responsible persons and also asking about the procedures as compared with those under section 64B(1) of the EO.</p>	<ul style="list-style-type: none"> Some stakeholders felt strongly that criminal liability of company directors and responsible persons was an important tool in ensuring the effectiveness of the proposed offence. Since most businesses operate in the form of limited companies, the Administration shares the concern and thus provides for criminal liability of directors and responsible persons of a company involved in the company's wilful default of an LT award. This is similar to the criminal liability of directors and responsible persons of a company under section 64B(1) of the EO (applicable to wage offences) where an offence of non-payment of LT award committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director or responsible person of the body corporate, that director or responsible person commits the like offence.

² For example, financial difficulties alleged by one employer in a wage offence case was not admitted as reasonable excuse by court in the absence of concrete substantiating evidence while in another, the employer was acquitted due to genuine financial difficulty and the best efforts shown to clear wages as accepted by court after its consideration of the employer's evidence.

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<p>(b) There were also concerns that some might evade liability by not registering as director, transfer of company assets, staying outside Hong Kong (in case non-Hong Kong resident) or having assets held by separate company or subsidiary.</p> <p>(c) There was also view that the Administration should be mindful of limiting the directors' liability to serious offences.</p>	<p>Provisions similar to section 64B(1) and the proposed section 43Q(1) are adopted in other ordinances³.</p> <ul style="list-style-type: none"> • In recent years, LD has revamped its enforcement strategy and strengthened the investigation in combating wage offences. If the employer is a limited company, apart from prosecuting the employer, LD will, subject to sufficiency of evidence, also prosecute the culpable director or responsible person. As a result, the convicted summonses against directors and responsible persons for wage offences in 2008 increased significantly by 58% and 188% respectively as compared with the figures in 2007 and 2006. This illustrates the effectiveness of the provisions of section 64B(1) of the EO in catching culpable directors and responsible persons. Similar provisions and procedures of section 64B(1) will thus be applied to the proposed offence. • The enforcement experience of section 64B also shows that the provision can hold liable the de facto responsible person who may not be the registered director or hold any particular post in the company if he is proved to have consented to or connived at the commission of the offence by the limited company or the offence is proved to have been attributable to his neglect. There were successful convictions where the culpable persons were convicted as manager, secretary or similar officer or the company. Please refer to details at paragraphs 29 to 32 of the LC Paper No. CB(2)80/09-10(01). A director, no matter how often he stays for business in Hong Kong, if proved to have responsibility in the offence committed by the limited company by his consent, connivance or neglect, can also be held liable. On the other

³ Examples are section 137 of the Public Health and Municipal Services Ordinance (Cap. 132) and section 168N of the Companies Ordinance (Cap. 32).

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	<p>hand, with these elements in the proposed offence, a person will not be criminally liable merely because he holds directorship or other post if the default is not committed with his consent, connivance or neglect.</p> <ul style="list-style-type: none"> • LD has in place established channels of communication with the Police, Legal Aid Department and Official Receiver's Office (ORO). If suspected offences of fraud and transfer of assets are detected, LD will refer the cases to the Police and ORO. From Q1 2008 to Q3 2009, among such referral cases, court orders were made against 31 persons for suspension from being director of limited companies. Besides, the court will take into account relevant financial resources held by subsidiary companies or the transfer of assets in determining the wilfulness of the employer in committing the offence.
<p>(d) There was deputation raising query on the effectiveness of the proposed offence in view of the rebuttable nature of the presumption on director's liability under the proposed section 43Q(3) and (5).</p>	<ul style="list-style-type: none"> • The use of presumption to assist prosecution for effective enforcement that would otherwise become very difficult, if not infeasible, is not something new. Similar presumptions are adopted in the EO⁴. There are also statutory provisions of presumption in other ordinances that provide for an evidential burden on directors and responsible persons on potentially exculpatory matters⁵. • The proposed presumption under section 43Q(3), when read together with subsection (5), only shifts an evidential burden on the accused. To trigger the presumption, the prosecution has to prove in the first place that the accused is concerned in the

⁴ Including sections 11AA, 15(1B), 31Q of the EO.

⁵ Examples are section 60 of Unsolicited Electronic Messages Ordinance (Cap. 593) and section 118 of the Copyright Ordinance (Cap. 528).

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<p>(e) There were at the same time deputations indicating reservation in that (i) the presumption was unfair to the accused and the burden of proof should be borne by the prosecution; and (ii) the rebuttable presumption already assisted prosecution and should not be removed by turning the proposed offence into strict liability.</p>	<p>management of the company which committed the wilful defaults or has knowledge or ought to have knowledge about the award made against the company. The presumption may be rebutted by the accused if there is sufficient evidence to raise an issue that the offence was committed without the accused's consent or connivance and was not attributable to his neglect and the contrary is not proved by the prosecution <i>beyond reasonable doubt</i>. According to legal principles laid down in case law, an evidential burden does not require the accused to establish anything as a matter of proof. An evidential burden arises where the defendant wishes to put in issue some matter that is potentially exculpatory while the prosecution continues to bear the persuasive burden throughout. The prosecution is required to prove its case beyond reasonable doubt. Thus, the proposed presumption is consistent with the presumption of innocence guaranteed by Article 87(2) of the Basic Law and Article 11(1) of the Hong Kong Bill of Rights.</p> <ul style="list-style-type: none"> • Please refer to details at paragraphs 35 to 47 of the LC Paper No. CB(2)80/09-10(01).
<p><i>(4) Other issues on the proposed offence or the enforcement of LT awards</i></p>	
<p>(a) There were suggestions on enhancing the enforcement of the proposed offence including (i) enforcement undertaken by the Commercial Crime Bureau (CCB) of the Police; (ii) strengthening and proactive</p>	<ul style="list-style-type: none"> • Like existing EO offences, LD will be responsible for the investigation and prosecution of the proposed offence. Measures introduced by LD in recent years to enhance enforcement against wage offences have been effective in bringing a substantial increase in successful prosecution against culpable employers. Such measures include, for example, the engagement of retired police officers to strengthen evidence collection. If there is suspected offence of fraud detected, LD has already in place a referral mechanism for CCB to investigate.

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<p>enforcement by LD; and (iii) establishing mechanism between LD and LT.</p> <p>(b) At the same time, there was view that the proposed offence must be enforced carefully so as not to net in innocent businessmen.</p>	<ul style="list-style-type: none"> • LD has regular liaison with LT with a view to ensuring smooth operation and improving the services continuously. To provide better service to employees with defaulted award, LD has introduced the Award Enforcement Support Service (AESS) since July 2008. Upon enactment of the proposed offence, LD will spare no effort in enforcing it and at the same time, will prudently assess the sufficiency of evidence in every prosecution case in accordance with the Statement of Prosecution Policy and Guidelines issued by the Department of Justice (DoJ).
<p>(c) There was view that more publicity on the proposed Bill should be made upon enactment.</p>	<ul style="list-style-type: none"> • The Administration will widely publicise the Bill upon its passage by various means and providing consultation to enhance understanding of the public. The publicity materials will also be delivered through employer associations, trade unions, human resources managers' clubs and industry-based tripartite committees to raise community awareness about the new offence. • We consider that by increasing employers' awareness of the potential costs of wilful default of LT awards, publicity would help enhance significantly the deterrence impact of the proposed offence.
<p>(d) Some deputations raised suggestions on other measures to enhance the enforcement of LT awards, including (i) combining civil and criminal actions;</p>	<ul style="list-style-type: none"> • There has been prolonged and increasing concern over the problem of default on LT awards. In addressing the issue, the Administration had consulted, both formally and informally, Members of the Labour Advisory Board (LAB) and Panel on Manpower of the Legislative Council (LegCo) on the various options floated by stakeholders in April 2008. In July 2008, the Administration reported three measures identified as viable and worth pursuing to the LAB and LegCo Manpower Panel, viz making the

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<p>(ii) amending the Companies Ordinance to allow group action to wind up the employer company, imposing director's responsibility in ensuring employees' benefits and at least one natural person as director; (iii) facilitating employees to take legal action against the employer by relaxing the means test of Legal Aid Department (LAD) or assistance by LD; (iv) imposing civil liability on directors; (v) blacklisting employers from directorship; (vi) waiving the charge for bailiff service on employees; (vii) imposing additional sum on defaulting employers; (viii) empowering LT to order disclosure of financial information by defaulting</p>	<p>non-payment of LT award a criminal offence, empowering LT to order the defaulting employers to pay an additional sum and to disclose financial information.</p> <ul style="list-style-type: none"> • In deliberating the viable measures, the Administration has taken into account the views of stakeholders and considers that the measures should target at employers who are able but unwilling to pay. For cases of insolvent employers, the Protection of Wages on Insolvency Fund already provides a safety net for the employees in need. Besides, the obligation to pay wages and statutory entitlements should lie with employers themselves. As such, the measures should rightfully target the wilful defaulting employers by imposing criminal sanction on them and facilitating the employees to enforce the award. • With the three measures reported to and generally welcomed by the LAB and the LegCo Manpower Panel in July 2008, the Administration introduced the Employment (Amendment) Bill 2009 into the LegCo in the 2008-09 session to create a new offence against non-payment of LT award. The Administration will continue to work on the other two measures which involve complicated policy, legal and operational issues with relevant parties. • Relaxing or waiving the means test of legal aid and waiving the charge for bailiff service for employees were options floated by the stakeholders and which had been studied collectively by the Administration. The former has implication on the cardinal principles relating to the means and merit tests of legal aid eligibility. The latter cannot solve the problem of efficacy of the execution of LT awards if the

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<p>employers; and (ix) suspension of convicted employers from bidding government contracts.</p>	<p>judgment debtor does not have any property under his name or does not seek to sell his property, or the assets of the judgment debtor are of little value. The proposed measure of empowering LT to order the defaulting employers to disclose financial information is thus proposed to enable the employee to make an informed decision on whether to execute the award and the appropriate mode of execution. As a proactive enhancement measure, LD has introduced the AESS to provide one-stop assistance to employees who failed to obtain payment of the awarded sum. Should the proposed offence be enacted, then with enhanced deterrence, the Administration considers that the problem could be much alleviated.</p> <ul style="list-style-type: none"> • It is a cardinal principle under common law that civil and criminal actions are distinct. Changes to this may have read-across implications. The ramifications of breaching this principle go far beyond the EO and must therefore be duly considered. • The Companies Ordinance is under review and LD has submitted its comments to the relevant Government bureau for consideration. • It is at present the Government's policy that convictions under the EO and other ordinances will be taken into account in considering tenders of government service contracts as applicable under the Financial Circular No. 4/2006 issued by Financial Services and the Treasury Bureau. The proposed offence under EO, if created, will also be considered alike.

Labour and Welfare Bureau
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