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**Paper for the House Committee meeting on 16 April 2010**

**Report of the Bills Committee on Employment (Amendment) Bill 2009**

**Purpose**

This paper reports on the deliberations of the Bills Committee on Employment (Amendment) Bill 2009.

**Background**

2. The Labour Tribunal ("LT") was set up in 1973 under the Labour Tribunal Ordinance (Cap. 25) ("LTO") with an exclusive jurisdiction to adjudicate employment-related civil claims. While LT provides a speedy, inexpensive and informal forum for the adjudication of employment claims, the modes of execution of LT awards are no different from the enforcement of any other civil judgments in respect of which the successful party bears the responsibility of enforcing the judgment if it is not complied with. There has been increasing concern in the community over some employers' failure in effecting payment to their employees even after LT had so awarded. A measure strongly favoured by stakeholders is to make non-payment of LT awards a criminal offence so as to achieve additional deterrence against defaulting employers.

3. The Minor Employment Claims Adjudication Board ("MECAB") is a board established under the Minor Employment Claims Adjudication Board Ordinance (Cap. 453) ("MECABO") to adjudicate minor employment claims involving not more than 10 claimants for a sum not exceeding \$8,000 per claimant.

**The Bill**

4. The Bill seeks to amend the Employment Ordinance (Cap.57) ("EO") to create a new offence against employers failing to make payment under an award of LT or MECAB and to provide for matters including prosecution of the proposed offence, liability of directors, partners and responsible persons of the employers, and proof of certain matters in the relevant proceedings. The offence would apply to any

LT/MECAB award comprising wages and entitlements underpinned by criminal elements under EO. An employer who wilfully and without reasonable excuse fails to pay any sum payable under such a LT/MECAB award within 14 days from the date on which the sum is due commits an offence. If an employer who is a body corporate is proved to have committed the offence (i.e. wilful default of an award without reasonable excuse) with the consent or connivance of its director or other responsible person, or if the commission of the offence is attributable to the neglect of its director or other responsible person, the director or other responsible person is liable for the same offence. A rebuttable presumption is proposed on the consent, connivance or neglect of a director or responsible person, if he is proved to be concerned in the management of the body corporate or knew or ought to have known about the award. Similar provisions are made in relation to a partner of a firm who is similarly involved in an offence of wilful default of an award without reasonable excuse.

### **The Bills Committee**

5. At the House Committee meeting on 10 July 2009, Members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

6. Under the chairmanship of Hon Alan LEONG up to 28 January 2010 and Hon WONG Ting-kwong thereafter, the Bills Committee has held nine meetings with the Administration, and received the views of deputations at one of the meetings. A list of deputations which have submitted views to the Bills Committee is in **Appendix II**.

### **Deliberations of the Bills Committee**

#### Justifications for criminalizing non-payment of LT and MECAB awards

7. Some members have queried the need to criminalize non-payment of LT and MECAB awards comprising wages and entitlements underpinned by criminal elements of EO, given that defaults of wages and other statutory entitlements are already offences under EO.

8. The Administration has advised that although the obligation of paying wages and employment benefits emanates from private contracts, failure to pay wages or certain other statutory entitlements is an offence under EO. However, non-payment of LT or MECAB awards per se, even though the award covers statutory entitlements underpinned by criminal sanctions in EO, is currently not a criminal offence. Attaching criminal liability directly to the default of LT or MECAB awards would target employers who have no genuine financial difficulty but are unwilling to pay, and serve as an important and additional deterrent.

9. The Administration has pointed out that under existing wage-related and other provisions in EO, difficulties in prosecution arise in some cases where the components of wages and their computation emanate from an oral contract between the employer and the employee concluded years ago or where no formal record of daily wage and length of service for calculating employment benefits is available, thus rendering it difficult to establish the contractual intention or amount in arrears beyond all reasonable doubt. If the proposed offence is created and an award made by LT or MECAB clearly indicates that wages or other statutory entitlements are payable by an employer, the prosecution will no longer need to go behind the award to ascertain the contractual intention and amount in dispute. The new offence coupled with the existing EO offences will form an all-embracing net to catch culpable employers under different scenarios.

10. Some members have expressed concern about the read-across implications of criminalizing non-payment of LT and MECAB awards on other civil judgments. The Administration has advised that it is aware that extending the criminal liability to other payments not underpinned by criminal sanction may entail much wider implications beyond EO. The Administration thus considers it of cardinal importance to ensure that the new offence is limited solely to LT and MECAB awards comprising wage and statutory entitlements that are underpinned by criminal sanction under EO.

#### Process of investigation and institution of criminal proceedings against defaulting employers

11. Some members have enquired about the process of investigation and institution of criminal proceedings against employers defaulting on LT and MECAB awards.

12. The Administration has advised that like existing offences under EO, the Labour Department ("LD") will take up the enforcement of the new offence against non-payment of awards made by LT or MECAB under the Bill as follows -

- (a) if an employer fails to pay the employee the money awarded by LT or MECAB, the employee may file a petition against the defaulting employer and apply for ex-gratia payment from the Protection of Wages on Insolvency Fund. The employee should also report the case to LD to see if any breach of EO is involved. Upon the commencement of the Amendment Ordinance, if any suspected offence of wilful non-payment of LT or MECAB award is detected, LD will take a witness statement from the employee and conduct investigation to collect evidence;
- (b) under the proposed section 43S, the Commissioner for Labour ("CL") must give the suspect an opportunity of being heard before giving consent in writing to commence prosecution. Such statutory requirement follows that for wage offences under section 64 of EO. The right to be heard and the requirement for CL's consent before instituting prosecution are

intended to avoid netting in inadvertently innocent employers who are willing but unable to pay;

- (c) after taking witness statement and collecting necessary evidence through investigation, as well as arranging to hear the suspect on the matter, LD would immediately consider whether to proceed with prosecution in light of available evidence. LD is also obliged to assess prudently the sufficiency of evidence in accordance with the Statement of Prosecution Policy and Practice issued by the Department of Justice ("DoJ"). In case of doubt, legal advice from DoJ will be sought; and
- (d) if there is sufficient evidence to support a charge under the new offence, LD will institute prosecution by laying summonses against the defaulting employer. Like other EO offences, it will be tried summarily in the magistrate courts. The criminal proceedings will be concluded upon a guilty plea by the defendant or continue with a full trial upon a not guilty plea. Both the defendant and the prosecution have the right to seek a review of, or appeal against, the decision and the sentence handed down by the court.

13. Some members have enquired whether criminal investigation and prosecution will be instituted without the need to wait for the conclusion of civil proceedings. Some members consider that the Administration should combine civil and criminal proceedings in respect of default of employment-related entitlements. Some other members however consider that civil and criminal proceedings, the latter of which require more stringent standard of proof, should not be combined in the light of the read-across implications.

14. The Administration has advised that under the common law system, civil and criminal proceedings are separate and distinct. Changes to this may have read-across implications. The ramifications of breaching this principle go far beyond the ambit of EO and must therefore be very carefully considered.

15. The Administration has stressed that if a suspected breach of EO is detected, LD will take out prosecution when there is sufficient evidence, irrespective of the progress of the employee's civil claim in LT or MECAB, 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 or MECAB award even if the employer has been prosecuted for failure to pay wages or other statutory entitlements before LT or MECAB grants the award. Depending on the progress of 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. The Administration has also stressed that after the passage of the Bill, LD will continue instituting prosecution against culpable employers once there is sufficient evidence.

## Consent of CL for prosecution under the proposed section 43S

### *Need for the consent of CL under the proposed section 43S*

16. Under the proposed section 43S, CL's consent in writing is required for instituting prosecution for the new offence. Before giving such consent, CL must hear the person against whom the allegation is made or give the person an opportunity of being heard. Some members have queried the need for the written consent by CL and hearing of the suspect under the proposed section 43S(1) and (2). A member considers that the need for written consent by CL for wage-related provisions in EO should be reviewed in the longer term. Some other members consider it necessary to protect scrupulous employers and provide more safeguards when non-payment of LT or MECAB award of civil nature is made a criminal offence.

17. The Administration has explained that the requirements for CL's consent and hearing under the proposed section 43S(1) and (2) are made with due consideration of the legal policy and intent. The requirements give the suspect an early opportunity to inform the authority of his explanation and any special circumstances that would likely mitigate his culpability or even make it unnecessary to bring prosecution against him. Early knowledge of possible exculpatory matters is to the benefit of both the employees and the employers involved, as it could help expedite the authority's investigation and decision-making on whether to prosecute.

18. The Administration has pointed out that other offences under EO that can lead to imprisonment, such as offences under section 63B, 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 can also be found in other ordinances. These 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).

### *Time taken and time limit for CL to give consent under the proposed section 43S(1)*

19. Some members are concerned that the requirement for CL to give consent under the proposed section 43S may unduly prolong the time taken for initiating prosecution against law-defying employers. They have asked the Administration to consider providing an internal guideline, administrative order or a performance pledge on the time limit for CL to give consent under the proposed section 43S. Some other members, however, consider that flexibility should be allowed for LD to complete the necessary procedures under different circumstances.

20. The Administration has explained that LD would commence investigation expeditiously and closely monitor the progress of the cases. Prosecution has to be instituted within six months of the offence day. Under section 64 of EO, LD would arrange for hearing of the person who is alleged to have committed a wage offence or certain other offences. If sufficient evidence is revealed, the authorized officer would without delay give consent in writing on behalf of CL to commence prosecution.

21. The Administration has pointed out that unlike an offence that can be detected on the spot by public officers, LD in prosecuting an offence under EO has to rely on evidence from the employee who is 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. It is therefore not practicable to provide a definite time limit for CL's consent for prosecution. 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, such as when he is out of town, or suffering from injury in an accident, thus rendering a time limit not feasible.

22. The Administration has advised that it appreciates members' concerns that prosecution of the proposed offence against culpable employers should be conducted expeditiously. Nevertheless, it has to guard against possible accusations of prejudice, which may undermine the prosecution's case as well as the chance of successful conviction against culpable employers.

23. The Administration has also pointed out that the criminalization of default on LT and MECAB awards, which are civil judgments in nature, is an important achievement that reflects the mutual understanding among different stakeholders including employee and employer representatives, and in particular those sitting on the Labour Advisory Board ("LAB"). Employer members of 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, the Administration considers it important to provide procedural safeguards to target wilful offenders.

24. The Administration has assured the Bills Committee that LD is committed to laying summonses, without delay, once sufficient evidence is revealed upon completion of investigation and, if the case requires, once legal advice is available. It will ensure that the investigation and prosecution of suspected offences will be conducted expeditiously and properly. Nevertheless, there is a need at the same time to allow for flexibility to cater for different circumstances of individual cases to ensure that every prosecution case could be handled properly and fairly. The Bills Committee has requested the Administration to keep records as far as practicable on the time required to complete the relevant procedures under the proposed section 43S, review the implementation of the Amendment Ordinance one year after its commencement,

including CL's consent for prosecution and other procedural requirements, and report to the Panel on Manpower.

*Consultation with DoJ regarding CL's decision of not instituting prosecution*

25. Some members have enquired whether consultation will be carried out with, or a report will be made to, DoJ regarding a decision by CL of not instituting prosecution.

26. The Administration has explained that in deciding whether to institute 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 "no prosecution" decision to DoJ in its daily operation. In practice, if there is sufficient evidence, LD would bring prosecution before the court for its decision on whether the defendant is guilty or not. LD would only decide not to prosecute in clear-cut cases as agreed with DoJ, such as cases with no prosecution witness or winding-up order on the employer company issued by court. All such "no prosecution" decisions have to be vetted and approved by the senior supervising officers. For more complicated cases, LD would seek legal advice before a decision of not instituting prosecution is made.

Application of the proposed offence in cases where the employer settles part of an LT or MECAB award

27. Some members have expressed concern about cases where the employer only settles part of an LT or MECAB award. They have enquired whether the proposed offence is applicable to various scenarios of LT or MECAB award defaults involving partial settlement.

28. The Administration has explained that under the proposed section 43P(1), the offence is applicable if the LT or MECAB award concerned contains in whole or in part any specified entitlements under the proposed section 43N(1). If the employer, wilfully and without reasonable excuse, fails to pay any sum payable under such an award within 14 days after the sum is due, he is liable to prosecution. To safeguard against irresponsible employers who may wish to escape liability by paying only part of the award, the proposed section 43P(2) makes it clear that an employer will be criminally liable for failure to pay any part of a sum payable under the award and in the case of a sum payable by instalments, any instalment or part of an instalment.

29. The Administration has pointed out that there are cases where an LT or MECAB award, made by consent or agreement, provides for the payment of a sum to settle the

claims without further breakdown. If an award is treated as providing for the payment of a specified entitlement by virtue of the proposed section 43P(3), it falls within the scope of the proposed section 43P(1). An employer who wilfully and without reasonable excuse fails to pay any sum of the award will commit an offence.

30. The Administration has also explained that under section 15 of LTO and section 14 of MECABO, if a settlement of a claim is reached, the terms of the settlement shall be in writing, signed by the parties to the settlement and filed with LT or MECAB. By virtue of section 15(9) of LTO and section 14(4) of MECABO, such a settlement filed shall be treated for all purposes as if it were an LT or MECAB award. The proposed section 43N(2) provides that such settlements also fall within the definition of an award. Accordingly, failure to pay any sum under such a settlement that covers specified entitlements may also constitute an offence under the proposed section 43P(1).

### Specified entitlements under the proposed section 43N(1)

#### *Coverage of specified entitlements*

31. Under the proposed section 43P(1)(a), the proposed offence applies to an award that provides, in whole or in part, for the payment by an employer of any specified entitlement. Specified entitlements are payments that carry criminal sanction under EO and, as defined in the proposed section 43N(1), means -

- (a) any wages or any other sum payable under sections 23, 24 or 25, or interest payable under section 25A on the wages or sum;
- (b) any end of year payment payable under Part IIA;
- (c) any maternity leave pay or sum payable under Part III;
- (d) any severance payment payable under Part VA;
- (e) any long service payment payable under Part VB;
- (f) any sickness allowance or sum payable under Part VII;
- (g) any holiday pay payable under Part VIII;
- (h) any annual leave pay payable under Part VIIIA;
- (i) any sum payable in respect of rest days, maternity leave, holiday or annual leave which the employer is required under EO to grant to an employee but fails to grant, to the extent that the sum is not covered by (a) to (h) above; or



- (j) an award of terminal payments under section 32O to the extent that the award covers entitlements referred to in (a) to (i) above.

32. Some members are concerned whether wages in lieu of notice is a specified entitlement under the proposed section 43N(1). The Administration has advised that wages in lieu of notice, by virtue of section 25(2)(b) and the proposed section 43N(1)(a), is already covered under the definition of specified entitlement. The representation of wages in lieu of notice under "any other sum" is adopted along the provision in section 25. The Administration will ensure clarity on the coverage of wages in lieu of notice in publicity activities after the Bill is enacted.

33. Some members have enquired whether there are entitlements of employees covered by EO but not by the proposed section 43N(1). The Administration has advised that there are payments which are not underpinned by criminal sanction under EO due to their different nature and therefore do not come under the specified entitlements. These include -

- (a) outstanding wages of the first two months owed to an employee by a subcontractor for which the principal contractor or superior subcontractor becomes vicariously liable under Part IXA. The Administration considers that the obligation to pay wages fully and timely should always rest with the employer, which is the subcontractor in such a case. Out of concern for the plight of the workers, legislative changes were made in 1977 to impose vicarious liability of a civil nature on the principal contractor and superior subcontractor. The wages so paid will become a debt owed by the subcontractor to the principal contractor and superior subcontractor. Criminal liability for non-payment of wages rests with the direct employer. The Administration considers it unfair and unjustified to shift the criminal liability to parties other than the direct employer; and
- (b) part of the remedies under Part VIA that an employee may claim for unlawful dismissal, unreasonable dismissal and unreasonable variation of employment contract by his employer. Such remedies may include terminal payments under section 32O that the employee might reasonably be expected to be entitled if he has been allowed to continue with his original employment or terms of employment contract to attain the minimum qualifying length of service required, and compensation in an amount not exceeding \$150,000 under section 32P.

34. The Administration has stressed that although these payments do not fall within the scope of specified entitlements under the proposed section 43N(1), if the same award comprises any specified entitlement, the employer can still be held liable under the proposed new offence for defaulting payment of the award.

*Inclusion of the compensation under section 32P and terminal payments under section 32O arising from unreasonable and unlawful dismissal in the specified entitlements in the proposed section 43N(1)*

35. Some members take the view that compensation under section 32P and terminal payments under section 32O arising from unreasonable and unlawful dismissal should be included in the definition of specified entitlement under the proposed section 43N(1).

36. The Administration has explained that under the common law, the responsibility of enforcing civil remedies lies with the awardees. The proposed criminalization of non-payment of LT and MECAB 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 result in criminal sanction. To forestall read-across implications of the proposals for other parts of the civil adjudication system, there is a genuine need to confine the proposed offence to awards comprising employee entitlements under EO the non-payment of which would entail criminal sanction. Since compensation under section 32P and some terminal payments under section 32O 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).

37. Some members remain of the view that compensation under section 32P and terminal payments under section 32O that arise from unreasonable and unlawful dismissal should also be included in the specified entitlements under the proposed section 43N(1). They consider that although the compensation under section 32P does not carry criminal sanction upon its default under EO, it should be covered as "specified entitlement" as it arises out of unreasonable and unlawful dismissal which per se is a criminal offence. Likewise, terminal payments under section 32O arising out of unreasonable and unlawful dismissal should also be included in the definition of "specified entitlement".

38. After consideration, the Administration has advised that it has explored the possible read-across implications and consulted stakeholders. Given the criminal sanction upon unreasonable and unlawful dismissal, the Administration has no objection to propose an amendment confined to including compensation under section 32P and terminal payments under section 32O that arise from unreasonable and unlawful dismissal in the definition of specified entitlement on the understanding that the overall construction of the safeguards in the Bill (viz. specific reference to "wilfully" and "without reasonable excuse" in the proposed section 43P, procedural requirements under the proposed section 43S giving the suspect an opportunity to be heard and requiring CL's written consent as a prerequisite to prosecution) stays intact to ensure that the proposed offence targets wilful defaults only. After discussing its proposed amendment with the Bills Committee, the Administration has advised that it will, on the basis of the above understanding, move Committee Stage amendments

("CSAs") to the Bill to include compensation under section 32P and terminal payments under section 32O that arise from unreasonable and unlawful dismissal in the definition of specified entitlement under the proposed section 43N(1).

*Employer's contribution of mandatory provident fund*

39. Some members have queried why contribution of mandatory provident fund ("MPF") on the part of the employer is not included in the definition of specified entitlements in the proposed section 43N(1).

40. The Administration has explained that MPF contribution on the part of the employer is not covered by the proposed section 43N(1) because it does not come under the ambit of EO and the jurisdiction of LT and MECAB. While payment and deduction of wages are governed by EO, contribution for MPF is regulated by the Mandatory Provident Fund Schemes Ordinance (Cap. 485) ("MPFSO").

Elements of "wilfully" and "without reasonable excuse" in the proposed section 43P(1)(b)

*Need for the elements of "wilfully" and "without reasonable excuse" in the proposed section 43P(1)(b)*

41. The proposed section 43P(1)(b) makes it an offence if an employer wilfully and without reasonable excuse fails to pay any sum awarded by LT or MECAB within 14 days after the date of the award or the date on which the sum is payable by the terms of the award. Some members have queried the need for the elements of "wilfully" and "without reasonable excuse" in the proposed section 43P(1)(b). Some members however consider it necessary to retain the element of "wilfully" in the proposed section to single out the wilful non-compliance cases for targeted sanction.

42. The Administration has advised that the elements of "wilfully" and "without reasonable excuse" in the proposed section 43P are to reflect and achieve the intent of criminalizing only wilful defaults but not those unable to pay. It should also be noted that, if enacted, the proposed offence would remove one of the hurdles facing enforcement against wage offences, i.e. the need to prove contractual intention or amount. To strike a balance between the interests of employers and employees, the proposed offence should be confined to proven wilful default of LT or MECAB awards.

43. The Administration has stressed that sufficient safeguards have been incorporated in the proposed section to ensure that, by design, the proposed offence will target only wilfully defaulting employers. Similar to wage offences under section 63C of EO, the proposed offence is intended to carry the same maximum penalty level of \$350,000 and three years' imprisonment under 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 suspect under the proposed section 43S are thus adopted on par with the wage offences.

44. The Administration has explained that the Bill seeks to address the long-standing difficulty faced by employees in enforcing, under the civil justice system, LT and MECAB awards on which some employers have defaulted. Making non-payment of LT and MECAB awards a criminal offence has been a measure strongly favoured by the labour sector over the years. However, LT and MECAB awards are civil in nature and come under the same execution mechanism as other civil awards. Stakeholders including some members of the legal profession have expressed concern that such a policy of criminalizing non-payment of LT and MECAB 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 penalizing employers who are genuinely unable to pay. Despite such concerns, there is a general consensus among stakeholders for criminal sanction to be imposed on those employers who are able to pay but are so irresponsible as to evade payments even after awards have been made by LT or MECAB.

*Drafting in relation to "without reasonable excuses" in the proposed section 43P(1)(b)*

45. Some members have queried the rationale behind adopting the phrase "without reasonable excuse" instead of listing out all reasonable excuses in the proposed section 43P(1)(b). They consider that listing out all reasonable excuses would provide the benefit of clearing employers' doubt on how to defend themselves in cases of prosecution. Some other members however consider the sole element of wilfulness a sufficient safeguard for innocent defaulting employers and suggest deleting "without reasonable excuse" in the proposed section 43P(1)(b).

46. The Administration has advised that the available defence of reasonable excuse to an employer is widely adopted in the current offence provisions under EO against an employer who fails to pay wages and other statutory entitlements, including end-of-year payment, long service payment, severance payment, statutory holiday pay, annual leave pay and sickness allowance. EO does not elaborate on what constitutes "reasonable excuse". The circumstances of non-payment or late payment of wages and other entitlements vary significantly from case to case. All relevant circumstances must be taken into account. The reasonableness of an excuse must be assessed against the specific facts of the case in question. An excuse may be reasonable in one case but unreasonable in another.

47. The Administration has explained that apart from EO, there were hundreds of other precedents on "without reasonable excuse" that do not contain any elaboration, including both employment-related legislation, such as the Employees' Compensation Ordinance (Cap. 282) ("ECO") and the Occupational Safety and Health Ordinance (Cap. 509) and MPFSO, and non-employment related legislation such as the Buildings Ordinance (Cap. 123) and the Prevention of Bribery Ordinance (Cap. 201).

48. The Administration has pointed out that the wide adoption of a similar reasonable excuse clause as referred to in paragraphs 46 and 47 above 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 all relevant circumstances of a particular case is generally recognized. The Administration's enforcement experience in respect of employment-related cases reveals that there is no hard and fast rule on what constitutes reasonable excuse and the same excuse may be considered reasonable in one case but not in another.

49. The Administration has also pointed out that the proposed section 43P(1)(b) requires the prosecution to prove wilfulness in the first place for the purpose of catching only defaulting employers with intent to default. Only after satisfying this first tier of offence element would the reasonable excuse come into play to further safeguard an employer who has put forth a valid reason to avoid being convicted. Under the proposed section 43S, an opportunity for the employer to be heard must be provided before commencement of prosecution, thus ensuring that if there is no reasonable prospect of conviction due to reasonable excuse of the employer, no prosecution action will be instituted against him. As such, the Administration considers that the element of "without reasonable excuse", together with other elements of the Bill, offers sufficient protection to innocent employers while maintaining the effectiveness of the offence.

50. The Administration has stressed that the reasonable excuse clause under the proposed section 43P(1)(b), coupled with other elements of the Bill, is a practical and sufficient means to achieve deterrence while safeguarding innocent employers against unjustified prosecution. Upon the enactment of the Bill, the Administration will publicize the Bill through various channels, including, among others, production of leaflets on the reasonable excuse clause of the new offence with illustration of cases as appropriate to enhance the public's understanding.

*Application of the proposed section 43P to LT and MECAB awards comprising specified entitlements and other payments*

51. Some members have asked whether the proposed section 43P covers an LT or MECAB award where the sum payable comprises both specified entitlements and other payments.

52. The Administration has advised that the proposed section 43P(1)(a) clearly covers an award that provides partly for payment of specified entitlements and partly for other payments ("mixed entitlement award"). The reference in the proposed section 43P(1)(b) to failure to pay "any sum payable under the award" refers to the award referred to in the proposed section 43P(1)(a), that is, it does cover a reference to failure to pay any sum under mixed entitlement award. 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 section 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.

### Liability of directors and partners under the proposed section 43Q

53. Under the proposed section 43Q, where a body corporate or a firm is proved to have committed the proposed offence with the consent or connivance of, or the offence is attributable to any neglect of any director/partner or other responsible officer of the body corporate/firm, such director/partner or officer commits the like offence. A rebuttable presumption of such consent, connivance or neglect will arise if the prosecution can prove the involvement of the accused in the management of the body corporate/firm or his actual or constructive knowledge about the award concerned. Some members have expressed concern whether the rebuttable presumption provision in the proposed section 43Q(5) would render prosecution against directors and responsible persons of a body corporate difficult. They have enquired about the purpose of the rebuttable presumption provisions in the proposed section 43Q(3), (4) and (5).

54. The Administration has explained that in deliberating the application of section 64B(1) of EO in the context of defaults of LT or MECAB awards, it has recognized that in some cases, the employee may have limited knowledge of the role of the director or responsible person at the time of default either because the employee has already left the company or because the award was made ex-parte. There is thus merit in ensuring the effectiveness of the proposed offence while avoiding netting in those who have totally no part to play in the body corporate's default. The proposed section 43Q(3) introduces a rebuttable presumption regarding consent, connivance or neglect on the part of a director or responsible person of the body corporate based on the prosecution proving his involvement in the management of the body corporate, or his actual or constructive knowledge of the award made against, the body corporate. The rebuttable nature and effect of the presumption is explicitly spelt out in the proposed section 43Q(5). Under the proposed section, 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 beyond reasonable doubt. Similar provisions regarding a partner or other responsible person of a firm are contained in the proposed section 43Q(4) and (5).

55. The Administration has advised that the presumption of the consent, connivance or neglect on the part of a director/partner or other, responsible person based on his actual or constructive knowledge of the LT or MECAB award under the offence is proposed as a practical and reasonable tool to enhance the effectiveness in holding a culpable person liable under the particular circumstances of defaults of LT or MECAB award, while avoiding netting in those innocent with the various safeguards under the Bill. The proposed provision would encourage a director/partner or other responsible

person to be vigilant not to consent to, connive at or be neglectful of his body corporate or firm wilfully defaulting on an LT or MECAB award.

*Consistency of the rebuttable presumptions under the proposed section 43Q with the Basic Law and the Hong Kong Bill of Rights*

56. A member has expressed concern about the consistency of the rebuttable presumptions in the proposed section 43Q with the presumption of innocence guaranteed under the Basic Law and the Hong Kong Bill of Rights. The Administration has explained that the presumptions to assist prosecution for effective enforcement that would otherwise become very difficult, if not infeasible, are in fact not new in legislation. They are found in various ordinances including EO, such as sections 11AA(1), 15(1B) and 31Q. There are also statutory provisions on presumption in other ordinances that provide for an evidential burden on directors/partners and responsible persons on potentially exculpatory matters. Examples of such ordinances include Unsolicited Electronic Messages Ordinance (Cap.593) and Copyright Ordinance (Cap. 528).

57. The Administration has stressed that in the light of the Court of Final Appeal's judgment in *HKSAR v Lam Kwong Wai* and *HKSAR v Ng Po On & Anor*, the presumptions in the proposed section 43Q(3) and (4), when read together with the proposed section 43Q(5), are wholly 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. The effect of the proposed sections is to create a rebuttable presumption as to consent, connivance or neglect on the part of the accused. The presumption may be rebutted 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 the accused's neglect and the contrary is not proved by the prosecution beyond reasonable doubt.

*Whether a responsible person of a body corporate who is not registered as a director, an overseas director and the middle management can be held liable for the proposed offence*

58. Some members have enquired whether a responsible person of a body corporate who is not registered as a director can be held liable for the proposed offence. The Administration has advised that although most businessmen in Hong Kong take timely payment of wages and benefits to their employees seriously, there exist some irresponsible business operators who try to evade liabilities to their employees. The Administration is wary of the need to distinguish such operators for enhanced protection of employees. The proposed section 43Q(1) applies to any director, manager, secretary or other similar officer of the body corporate so that the actual responsible person who is proved to have consented to, connived at or been neglectful of the wilful non-payment of an award by his body corporate, can be held liable as the manager, secretary or, even if in none of such capacity, as other similar officer.

59. The Administration has pointed out that the scope of responsible person of the body corporate covered in the proposed section 43Q(1) is similar to that covered in section 64B(1) of EO and similar provisions in other ordinances. The Administration believes that the drafting of the proposed section 43Q(1) is adequate for targetting the truly culpable person, irrespective of whether he is a registered director or not and, at the same time, as the case law indicates, the court will look primarily to those persons who are acting as the "brains" rather than the "hands" of the employing company. Conversely, a director, manager and secretary will not be convicted merely because he holds the post, if he has no part to play in the commission of the offence. The viability of the proposed provision in convicting responsible persons who are not directors is evident from cases of successful prosecution under section 64B(1).

60. Some members have expressed concern about the Administration's enforcement actions and measures against overseas directors and middle management who have consented to, connived at, or been neglectful of the wilful non-payment of an award by the corporate employer.

61. The Administration has explained that 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. EO offences are tried summarily in the magistrate courts and, like all other summary offences, the service of summonses and the proceedings are governed by the Magistrates Ordinance (Cap. 227). Likewise, whether the middle management of a company will be prosecuted will depend on whether there is sufficient evidence pointing to his consent to or connivance at the wilful non-payment of an LT or MECAB award by the company or that the non-payment is attributable to his neglect.

*Whether a partner will be subject to two counts of offence under the proposed sections 43P and 43Q*

62. The proposed section 43P provides that an employer commits an offence if he wilfully and without reasonable excuse fails to pay any sum under an award of LT or MECAB within 14 days from its due date. The proposed section 43Q provides that where a body corporate or a firm is proved to have committed the proposed offence with the consent or connivance of, or attributable to any neglect of any director/partner or other responsible officer, such director/partner or officer commits the like offence. Some members are concerned whether a partner would be subject to two counts of offence under the proposed section 43P and the proposed section 43Q respectively.

63. The Administration has advised that in respect of the same entitlement of the same employee, a partner will not be guilty of two counts of offence under the proposed sections 43P and 43Q. The proposed sections target at two different scenarios in the context of partnership. The proposed section 43P tackles the scenario of wilful failure of a partner in the capacity of an employer to pay an LT or MECAB award. The proposed section 43Q deals with the scenario of a partner of a firm consenting to or



conniving at or being neglectful of the failure of another partner of the same firm to pay an LT or MECAB award. The two proposed sections are thus different in targets and offence elements and would thus need to be substantiated by diverse evidence.

64. The Administration has explained that if two partners are actively involved and there is sufficient evidence against both as the employer who wilfully and without reasonable excuse fail to pay an award, both partners will be prosecuted under the proposed section 43P. A partner will not be guilty of both the proposed sections 43P and 43Q in respect of the same entitlement of the same employee in view of the common law principle against double jeopardy.

*Safeguards to directors and partners under the proposed section 43Q(3) and (4)*

65. Some members have asked whether there is safeguard to protect the interests of the directors/partners or responsible persons of a body corporate/firm, given the element of "ought to have known" in the proposed section 43Q(3) and (4).

66. The Administration has explained that a director's or partner's knowledge of an award may be evident in some cases with direct evidence (e.g. he personally attended the hearing when the award was made or acknowledged receipt of the award) but very often in other cases, can only be inferred by circumstantial evidence (e.g. an award was served on a director's/partner's family member at his residence and confirmed to have been given to him). It is therefore necessary to construct the presumption so that it arises on the basis of either actual or constructive knowledge of the award to ensure effective enforcement. Similar provisions of "know or ought to know" are also adopted in various existing ordinances.

67. The Administration has advised that there are already sufficient safeguards under the Bill to strike a balance between effective enforcement and protection for the innocent. To trigger the presumption under the proposed section 43Q(3), the prosecution has to prove that -

- (a) the body corporate wilfully and without reasonable excuse failed to pay the award;
- (b) the accused was the director, manager, secretary or such similar officer of the body corporate and under the case law, should primarily be those persons who were acting as the "brains" rather than the "hands" of the employing company; and
- (c) the accused knew or ought to have known the award concerned with the offence that has been made against the body corporate.

The Administration has also advised that similar safeguards are available to a partner or other responsible person of a firm.

68. The Administration has stressed that the presumption will be rebutted if there is evidence suggesting that the offence was not committed with his consent or connivance and was not attributable to his neglect, and the contrary cannot be proved by the prosecution beyond reasonable doubt. The requirement under the proposed section 43S to hear the suspect before commencement of prosecution also ensures the opportunity for the suspect to put forth his explanation at the investigation stage.

*Relationship between the proposed section 43Q and the existing section 64B*

69. A member has enquired about the impact of the proposed section 43Q on the existing section 64B and expressed concern whether prosecution could still be made under section 64B after the enactment of the proposed section 43Q.

70. The Administration has explained that in line with section 64B, the proposed section 43Q adopts the elements of consent, connivance or neglect in defining the offence by a director/partner and responsible person of an employer who is a body corporate/firm for the non-payment of LT or MECAB awards committed by the employer. Under the proposed section 43Q, the director/partner or responsible person will also be held liable for the employer's non-payment of an LT or MECAB award that comprises wages or other statutory entitlements underpinned by criminal sanctions. With both provisions, EO would be more effective in targeting wilful defaults in different scenarios, thus achieving stronger deterrence and better protection of employees' rights and benefits.

71. The Administration has advised that an offence of wage default under section 63C is committed if the employee is entitled to wages and the employer wilfully and without reasonable excuse fails to pay within seven days after it has become due. In contrast, the crux of the proposed offence of non-payment of LT or MECAB awards under the proposed section 43P lies in an employer's wilful failure, without any reasonable excuse, to pay any sum payable under an LT or MECAB award (comprising any specified entitlement under the proposed section 43N(1)) within 14 days after it has become due. In fact, the original wage offence and the subsequent default of LT or MECAB award are two separate acts which happen in very different time sequence. There are sufficiently different elements in the wage offence and in the proposed offence of default of award that prosecution may be taken out for both offences without amounting to double jeopardy. If either or both of the offences are committed by an employer who is a body corporate/firm with its director's/partner's or other responsible person's consent or connivance or are attributable to his neglect, prosecution can be brought against the director/partner or responsible person under section 64B and/or the proposed section 43Q, as the case may be.

72. The Administration has assured the Bills Committee that it will continue with its enforcement against wage offences. In case of a corporate employer, LD will take out prosecution against the corporate employer and, if there is sufficient evidence under

section 64B, against its director or responsible person who consents to or connives at the corporate employer's offence or to whose neglect the corporate employer's offence is attributable. This applies similarly to wage offences involving a firm.

#### Publicity on the commencement of the Amendment Ordinance

73. Under clause 2, the Amendment Ordinance shall come into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette, which is subject to the negative vetting procedure. Some members have expressed concern about whether sufficient time would be allowed for publicity so that employers, especially an employer against whom an LT or MECAB award is made immediately after commencement of the Amendment Ordinance, would be made fully aware of the commencement date.

74. The Administration has advised that it would launch publicity upon passage of the Bill through newspapers and distributing posters and publicity leaflets to employers' associations, trade unions, the 18 Human Resources Managers Clubs and nine industry-based tripartite committees. Publicity on the new offence would also be made at premises of branch offices of the Labour Relations Division of LD, LT and MECAB.

#### Manpower involved in conducting investigation and prosecution in LD

75. A member has expressed concern about the adequacy of manpower in LD for conducting investigation and prosecution after the enactment of the Bill. Another member however considers that the enactment of the Bill does not necessarily give rise to prosecution in all cases and thus the Administration should critically review its manpower requirement after the passage of the Bill.

76. The Administration has advised that the Labour Inspection Division and the Employment Claims Investigation Division of LD are responsible for conducting investigation of offences under EO to uphold employees' rights and benefits. The Prosecutions Division of LD takes charge of prosecution of the offences referred by the two enforcement divisions. Apart from EO, the Labour Inspection Division is also tasked to enforce the Employment of Children Regulations (Cap. 57 sub. leg. B) and the Employment of Young Persons (Industry) Regulations (Cap. 57 sub. leg. C), and the compulsory insurance provisions of ECO. The Labour Inspection Division also safeguards the rights and benefits of imported workers and helps combat illegal employment. Apart from EO and ECO offences, the Prosecutions Division is also responsible for the prosecution of offences under other ordinances.

77. The Administration has also advised that as officers conduct investigation and prosecution of various offences as an integral part of their duties, there is no breakdown of the manpower for the enforcement of specific ordinances or offences. The Administration will review the manpower requirement of LD upon the enactment of the Bill.

### **Committee Stage amendments**

78. Apart from the CSAs referred to in paragraph 38 above, the Administration will move a technical amendment to the Bill. A copy of the draft CSAs to be moved by the Administration is in **Appendix III**.

### **Resumption of Second Reading debate on the Bill**

79. The Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting on 28 April 2010, subject to the CSAs to be moved by the Administration.

### **Follow-up actions by the Administration**

80. The Bills Committee has requested the Administration to keep records as far as practicable on the time required to complete the relevant procedures under the proposed section 43S, review the implementation of the Amendment Ordinance one year after its commencement, including CL's consent for prosecution and other procedural requirements, and report to the Panel on Manpower (paragraph 24 above refers).

### **Advice Sought**

81. Members are invited to note the deliberations of the Bills Committee and the date for resumption of the Second Reading debate on the Bill.

Council Business Division 2  
Legislative Council Secretariat  
15 April 2010

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

**Membership list**

**Chairman** Hon Alan LEONG Kah-kit, SC (up to 28 January 2010)  
Hon WONG Ting-kwong, BBS, JP (since 11 February 2010)

**Members** Hon LEE Cheuk-yan  
Hon LEUNG Yiu-chung  
Hon LI Fung-ying, BBS, JP  
Hon Tommy CHEUNG Yu-yan, SBS, JP  
Hon WONG Kwok-hing, MH  
Hon Jeffrey LAM Kin-fung, SBS, JP  
Hon Andrew LEUNG Kwan-yuen, SBS, JP  
Hon LEUNG Kwok-hung (up to 28 January 2010)  
Hon Ronny TONG Ka-wah, SC  
Hon Cyd HO Sau-lan  
Dr Hon LAM Tai-fai, BBS, JP  
Hon WONG Sing-chi  
Hon IP Wai-ming, MH  
Hon IP Kwok-him, GBS, JP  
Hon Paul TSE Wai-chun

(Total: 15 Members)

**Clerk** Mr Raymond LAM

**Legal Adviser** Ms Clara TAM

**Date** 11 February 2010

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

A. Organizations which have given oral representation to the Bills Committee

1. The Hong Kong Federation of Trade Unions - Rights & Benefits Committee
2. Catering and Hotels Industries Employees General Union
3. Catholic Diocese of HK Diocesan Pastoral Centre for Workers (Kowloon)
4. Construction Site Workers General Union
5. Eating Establishment Employees General Union
6. Hong Kong & Kowloon Trades Union Council
7. Hong Kong Catholic Commission for Labour Affairs
8. Hong Kong Chamber of Small and Medium Business Ltd.
9. Hong Kong Confederation of Trade Unions
10. Hong Kong Construction Industry Employees General Union
11. Hong Kong Federation of Restaurants & Related Trades
12. Hong Kong Small and Medium Enterprises Association
13. Neighbourhood and Worker's Service Centre
14. Salary Back Worker Concern Group
15. The Federation of Hong Kong and Kowloon Labour Unions

B. Organizations which have provided written submissions only

1. Employers' Federation of Hong Kong
2. Federation of Hong Kong Industries
3. Hong Kong Catering Industry Association
4. Hong Kong General Chamber of Commerce

EMPLOYMENT (AMENDMENT) BILL 2009

**COMMITTEE STAGE**

Amendments to be moved by the Secretary for Labour and Welfare

<u>Clause</u>	<u>Amendment Proposed</u>
4	<p>In the proposed section 43N(1), in the definition of “specified entitlement” –</p> <p>(a) in paragraph (i), by deleting “or” at the end;</p> <p>(b) by deleting paragraph (j) and substituting –</p> <p>“(j) any terminal payments payable under section 32O to the extent that –</p> <p>(i) the terminal payments are entitlements referred to in paragraph (a), (b), (c), (d), (e), (f), (g), (h) or (i) to which an employee is entitled upon the termination of the employee’s contract of employment or, by virtue of section 32O(5), as a consequence of the unreasonable variation of the terms of that contract; or</p> <p>(ii) the award of those terminal payments is made by virtue of section 32M(2); or”;</p> <p>(c) by adding –</p> <p>“(k) any compensation payable under section 32P;”.</p>

In the proposed section 43R(1), in the Chinese text –

- (a) in paragraph (b), by deleting “指明文件的副本，並且看來是由審裁處或法院的人員擬備” and substituting “、並且是由審裁處或法院的人員擬備的指明文件的副本”;
- (b) in paragraph (c), by deleting “指明文件的副本，並且看來是由審裁處或法院的人員擬備” and substituting “、並且是由審裁處或法院的人員擬備的指明文件的副本”.