

Legislative Council Bills Committee on Employment (Amendment)
(No.2) Bill 2017

RE: LACK OF A TIME LIMIT OR STATUTE OF LIMITATIONS IN THE PROPOSED EMPLOYMENT ORDINANCE
AMENDMENT

To Whom It May Concern:

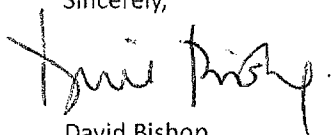
My name is David Bishop and I am a Principal Lecturer at The University of Hong Kong. I am an expert in matters relating to employment law, employment agencies, and foreign domestic workers in Hong Kong. I applaud the Labour Department and Employment Agencies Administration for their work in enhancing the policing of domestic worker employment agencies, and believe that the increased scrutiny will significantly benefit Hong Kong and its residents.

But I am concerned about a few aspects of the proposed amendment to the EO. *My biggest concern is that the proposed amendment does not include a time limit for claims against employment agencies, and as a result the Amended EO and Code of Practice (COP) would be largely unenforceable.* I spoke with the Labour Department about this issue in July, and they agree that the lack of a time limit is one of their biggest impediments to prosecuting illegal employment agency practices. Accordingly, I implore the Committee to add a time limit to the proposed amendment. Without such a time limit, I fear EA illegal behavior will continue unabated, and the Amended EO and Code of Practice will effectively be unenforceable.

In my opinion, this is the biggest problem with the proposed amendment. And if it is not remedied, I fear all the hard work that went into crafting this new law will be in vain.

I sincerely ask that you please consider adding a time limit to the Amended EO. My legal reasoning is included in Exhibit A below. I am happy to provide more information on this matter should it be useful.

Sincerely,



David Bishop
Principal Lecturer
The University of Hong Kong

EXHIBIT A: LEGAL REASONING FOR ADDING A TIME LIMIT

Lack of a time limit provision severely inhibits enforcement of the EO and COP

One of the things inhibiting the prosecution of unethical and illegal EA practices is the lack of a relevant and specific time limit provision. And by not including a specific time limit provision in the Amended EO, the LD and EAA have essentially proposed an Amendment and COP *that cannot be effectively enforced*.

Most of the complaints against EAs fall under the EO Part XII and the Employment Agencies Regulations (cap 57A) (EAR). Additionally, some ancillary claims against illegal EA behavior are regulated by the Money Lenders Ordinance (cap 163) (MLO).¹

However, these laws – including the proposed Amendment to the EO – do not contain time limit provisions that specifically relate to offenses outlined in the Amended EO and the COP, e.g., overcharging workers by the EAs. That means that most claims against EAs will be barred by s26 of the Magistrates Ordinance.

Section 26 of the Magistrates Ordinance

Because the EO Part XII, EAR and MLO do not currently contain specific time limit provisions, most claims against EAs are restricted by the time constraints of the Magistrates Ordinance (cap 227) (MO) section 26 governing *summary offenses*. That section states:

MO s26 Limit of time for complaint or information

In any case of an offence, other than an indictable offence, where no time is limited by any enactment for making any complaint or laying any information in respect of such offence, such complaint shall be made or such information laid *within 6 months from the time when the matter of such complaint or information respectively arose*. [emphasis added]

This time limit for summary offenses presents a major obstacle for the LD/EAA in going after unethical agencies. It means that claims against said agencies ***must be made within 6 months of the event/injury***. But often workers do not learn that they have been mistreated until after that time. And as stated above, even convincing the LD/EAA to prosecute a claim can take several months. ***Under the current circumstances, many legitimate claims against illegal EA behavior go uninvestigated and unprosecuted simply because there is not enough time to do so.*** The lack of a specific time limit in the Amended EO will make it very hard for the LD/EAA to effectively police and regulate unethical EA conduct, causing EAs to confidently break the law without fear of reprisal.

The current 6 month time limitation: outdated legal standard

The current 6 month time limitation is unique and outdated based on similar HK laws, especially given the importance of this issue, and the Hong Kong government's great efforts and money spent on eradicating

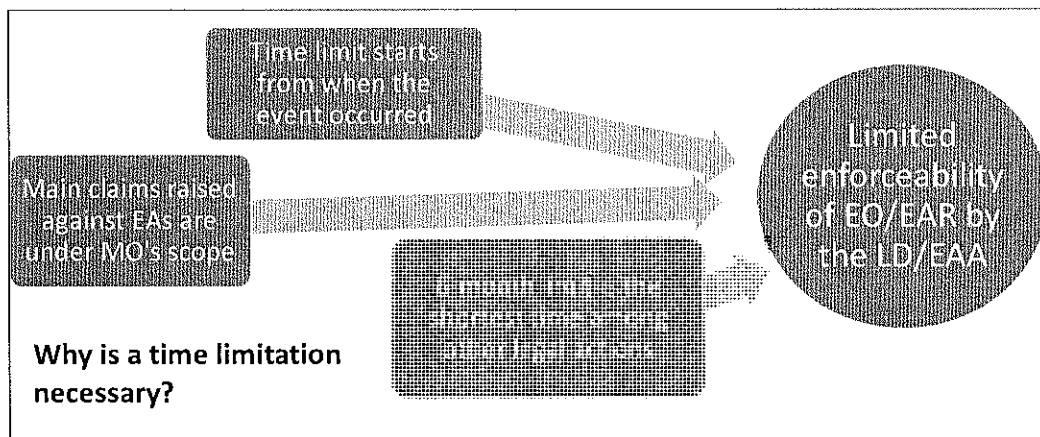
¹ For example, according to Mission for Migrant Workers, 72% of FDW claims are against employment agencies or money lenders: Mission for Migrant Workers. FDWs in HK Face More Widespread And Intensified Problems With Recruitment And Moneylending Agencies. (2013). Mission for Migrant Workers. Retrieved from: <http://www.migrants.net/fdws-in-hk-face-more-widespread-and-intensified-problems-with-recruitment-and-moneylending-agencies/>

illegal EA behavior. It is unique for two primary reasons:

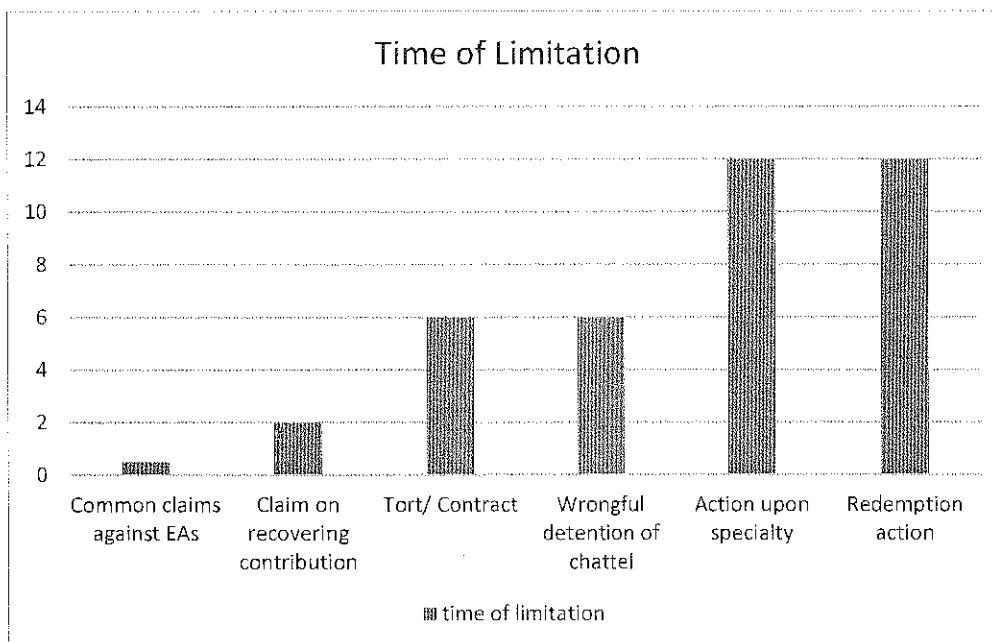
First, the 6 month time limit *is significantly shorter* than other similar actions like tort and breach of contract claims.

Second, the 6 month time limit starts *from the date of the event/injury*, not from the date that the injured party learns about the event/injury. Time limitation provisions in HK laws typically start *from the date the injured party learns of the event/injury*.

The LD and EAA will not be able to effectively investigate, pursue, and prosecute EAs unless the Amended EO contains a more modern and up-to-date time limitation provision.



The chart below provides a comparison of time limitations under HK law. As is obvious, common claims against EAs have a significantly shorter time limit, particularly considering the time limit starts *from the date of event/injury* and not *from the date the injured party learned about the event/injury*.



Should the Amended EO consider overcharging by EAs an indictable offense?

The current EO Part XII, EAR, and MLO do not contain time limit provisions because the offenses in the EO Part XII, EAR, and MLO were largely considered “summary offenses,” which are generally considered less serious offenses.² For example under the current EO, EAs that overcharged a worker were only liable for up to a maximum of HK\$50,000 and no jail time, hence the designation as a summary offence.

But the proposed Amendment to the EO increases penalties against EAs significantly, which one could argue raises such actions from “summary offenses” to “indictable offenses.” For example, under the proposed amendment EAs would now be liable for up to HK\$350,000 and 3 years in jail. Not considering these violations as “indictable offenses” OR including a specific time limitation was a major oversight by the LD and EAA. They have essentially proposed an amendment and Code of Practice that are almost completely unenforceable. They have ignored one of the most important and immediate obstacles to prosecution without any resolution. Such an oversight must be corrected before the Amended EO takes effect.

Therefore, my suggestions are:

- 1 **First Suggestion:** Include a specific provision in the Amended EO providing a time limit for bringing claims against EAs for violation of the EO and the Code of Practice. Without such a provision, *the Amended EO and COP cannot be very effective, because the LD/EAA will not have the requisite time needed to enforce such laws.*
- 2 **Second Suggestion:** Ensure the time limit provision starts to run when the offense is discovered rather than when it occurs, as is customary in HK law for similar torts and violations.

Suggested Time Limits

I specifically recommend the following time limit provisions be added to the Amended EO:

- 1 **A 6 year time limit for claims against EAs for overcharging and other infractions against domestic workers:** Claims against EAs are primarily centered on overcharging placement fees and suing for the recovery of said placement fees. Accordingly, these claims are most similar to “...actions to recover any sum recoverable by virtue of any Ordinance...,” which are governed under s4(1)(d) in the HK Limitations Ordinance (LO), and carry a 6 year time limit for claims.

If one was to consider overcharging by EAs as a breach of contract (considering workers are clients of the EAs and have a contractual relationship with them), breach of contract claims also have a 6 year time limit in Hong Kong. *Accordingly, based on the two most similar types of legal claim, I recommend including a 6 year time limit for claims against EAs by domestic workers.*

- 2 **A 2 year time limit for claims against EAs and Money Lenders who finance illegal placement fees in contravention of the COP:** As made clear in the Code of Practice, EAs and money lenders are not

² CLIC. I have heard of “summary offences” and “indictable offences”. What are the differences between the two and which court can try these offences?. CLIC. Retrieved from:

http://www.clic.org.hk/en/topics/policeAndCrime/court_procedure/q2.shtml

allowed to finance illegal placement fees. Claims by domestic workers against such practices are most similar to "claiming for recovering penalty or forfeiture" as in s 4(5) of the LO, which has a 2 year time limit. Moreover, the offences under s 29(3) of the MLO on updating information of money lending companies also has a 2 year time limit of action according to s 32A of the MLO. Thus, a 2 year time limit for claims against EAs and money lenders who finance illegal placement fees in contravention of the COP.

Please note that I do not recommend that the MO's time limit be changed, as that would affect many different laws, and would be unnecessarily complicated.