

政府總部的信頭
Letterhead of GOVERNMENT SECRETARIAT
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30 December 1998

Mrs Constance LI,
Clerk to Bills Committee,
Legislative Council,
Legislative Council Building,
Jackson Road, Central,
Hong Kong.

Dear Mrs Li,

Bills Committee on
Immigration (Amendment) (No. 2) Bill 1998

Thank you for your letter of 9 December 1998. I would like to set out the Administration's position on the three issues raised as follows:

Clause 2

The Administration agrees that, for consistency in drafting, the phrase "enter Hong Kong" should be used instead of "come to Hong Kong". Draft Committee Stage amendments to this effect are attached.

Clause 3

The Bills Committee suggested that consideration should be given to amending this Clause so that a construction site controller will be liable only if an “illegal worker” took up employment in construction work on his construction site, but not if the “illegal worker” took up employment in other types of work on the site. The Administration has carefully considered this suggestion and has come to the view that we should not reduce the scope of application of the provision in the suggested manner.

The special provisions in section 38A were introduced to tackle the problem of illegal employment on construction sites, where we have practical difficulties in identifying the employer for prosecution under other provisions in the Immigration Ordinance because of the system of subcontracting prevalent in the industry. Where an “illegal worker” took up employment on a construction site, we would encounter similar difficulties in identifying the employer for prosecution irrespective of whether the work was “construction work”. Moreover, there is a wide variety of work on a construction site some of which may not fall within the definition of “construction work” in section 38A(1). (For example, cleaning the site, spraying water, directing traffic, removing debris, or keeping watch over stock materials, etc.) Our view is that the site controller is in a position to take steps to prevent illegal employment on his site irrespective of the type of work involved. Restricting application of the provision to “construction work” only would create a loophole and seriously undermine the effectiveness of the provision.

However, we would like to emphasize that section 38A will be invoked only if the offence of the employer cannot be proved under other provisions in the Immigration Ordinance. In other words, if there is sufficient evidence to prosecute the employer under section 17I, section 38A will not be used against the construction site controllers, unless, of course, there is ample evidence to prove that the controllers either condone, encourage or involve in the employment of illegal workers.

Definition of “Construction site controller”

The Bills Committee requested the Administration to confirm its interpretation of the definition as there seems to be a discrepancy between the Chinese and English texts.

Having gone through the record of proceedings of the Legislative Council in 1990 when the existing section 38A was introduced, it can be confirmed that the definition was so drafted that the liability was placed on the principal or main contractor irrespective of whether he was physically in control or in charge of a construction site. (This is consistent with the meaning of the Chinese text.) The purpose was to require extra vigilance on the part of principal contractors and ensure that he will exercise good management control over his subcontractors. To cater for cases where a main contractor has sublet the whole site to a subcontractor, a Committee Stage amendment was moved to include subcontractors under the definition, so that such subcontractors could be prosecuted. This definition has worked well. In practice, our experience is that the main contractor usually has control over or is in charge of the construction site. Furthermore, in prosecuting a construction site controller, we always satisfy ourselves that he was actually in a position to take the practicable steps required.

Please let me know if further information is required.

Yours sincerely,

K S SO
for Secretary for Security