

Summary of issues over which the Bills Committee will consider the way forward

Issue	Concerns and suggestions raised by members	The Administration's response
<p>(I) Personal liability of controllers of a corporate employer to pay outstanding MPF contributions</p>	<p>Some members are gravely concerned that some corporate employers have persisted in failing to make contributions required under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (MPFSO). Recovery actions by the Mandatory Provident Fund Schemes Authority (MPFA) are unsuccessful because the defaulting companies have no assets. As a last resort, there is a suggestion that the Administration may consider holding the directors (including a shadow director) and shareholders of such a company personally liable for the unpaid contributions. If this approach is adopted, the legal adviser has proposed that members may wish to consider adding a provision to the Bill along the following lines :</p> <p>"Where—</p> <ul style="list-style-type: none"> (a) any employer, which is a company, has been convicted more than once under section 43B; (b) recovery action by MPFA against the employer is unsuccessful because it has insufficient assets; and (c) the employer continues to carry on business and persists in failing to pay any contributions due, <p>the Court may, on an application by MPFA, make an order that the directors and shareholders of the employer or any of them (including a shadow director) shall personally pay to MPFA the outstanding contributions within the time specified in such order if the Court is satisfied that it is just and equitable so to order."</p>	<p>The Administration has not agreed to propose any amendment to the Bill to impose civil liability on individual directors/shareholders for the payment of outstanding MPF contributions.</p>

Issue	Concerns and suggestions raised by members	The Administration's response
	<p>Some members consider that it may not be fair to hold company directors personally liable as very often, directors may not be involved in the day-to-day operation of the company. The members are concerned about the impact of the proposal on employers of small and medium enterprises.</p>	
(II) Criminal liability of directors of companies	<p>Pursuant to existing section 44(1) of the MPFSO, a company director may be prosecuted if an offence under the MPFSO committed by the company is proved to have been committed with his consent or connivance, or to be attributable to his neglect. Some members consider that the standard of proof required is too high and suggest that consideration may be given to reversing the onus of proof or imposing an evidential burden on the defendant director as to his not having knowledge of or consented to the offence. Some members however have reservation on such an approach.</p>	<p>The Administration has not indicated that it would propose any amendment to existing section 44(1) of MPFSO.</p>
(III) Liability for payment of retrospective outstanding contributions by employers in respect of non-enrolled employees	<p>Members note that under the Bill, the employer would be required to pay the retrospective outstanding contributions (since as early as 1 December 2000) comprising both the employer's and the employee's portions even if he has not made any deduction from the employee's relevant income.</p> <p>Members have expressed different views on whether the Bill should be amended to stipulate that the employer does not have the right to recover the employee's portion of MPF contributions from the employee if the non-enrolment and non-payment of contributions has been due to the fault of the employer concerned. No common view has been reached on whether or how the employer should be allowed to recover the paid amount from the employee.</p>	<p>The Administration does not intend to amend the Bill to stipulate the circumstances under which an employer would be barred from recovering the employee's portion of MPF contributions from the employee. In the light of operational experience, the Administration/MPFA consider it more appropriate and fair for the employer and employee concerned to settle the matter through mutual agreement or civil routes.</p>