

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

**Explanatory Paper on Committee Stage Amendments
Proposed by the Administration**

Introduction

This paper sets out the Committee Stage amendments (CSAs) to the Employment (Amendment) Bill 2009 (the Bill) proposed by the Administration. The draft CSAs are at Annex.

Background information

2. Over the past eight meetings, the Bills Committee has scrutinised the objectives, merits and principles of the Bill and completed the clause-by-clause examination¹ of the Bill. At the meetings, Members have expressed their views on a wide range of issues such as the coverage of the “specified entitlement” under the proposed section 43N(1)², the necessity of the elements, the construction of the offence under the proposed section 43P and its application in different scenarios³, the effect and the elements of the proposed section 43Q applicable to directors and partners, etc.⁴ and the procedural requirements under the proposed section 43S⁵.

¹ Covering the long and short titles, the application including its commencement, the consequential amendments to section 31O of the EO and the newly created Part IXB (proposed sections 43N, 43O, 43P, 43Q, 43R and 43S).

² Including the entitlements under the EO covered and not covered by the proposed section 43N(1), the wages in lieu of notice being covered as specified entitlement, drafting of the proposed section and explanation on non-coverage of the mandatory provident fund etc.

³ Including the need to adopt “wilfully and without reasonable excuse” and the application of the offence under the proposed section 43P in cases of partial defaults and defaulted instalments of awards etc.

⁴ Including the consistency of the proposed section 43Q with the Basic Law and Hong Kong Bill of Rights as well as the common law principle regarding rebuttable presumption, etc.

⁵ Including the reasons for the necessity of the requirements under the proposed section 43S, i.e. giving the suspect an opportunity of being heard and written consent by the Commissioner for Labour for prosecution, etc.

3. Following the Administration's responses and Members' full deliberation of all the issues, the Bills Committee came to the consensus at the meeting on 11 February 2010 to confine the proposed amendments of the Bill to the compensation under section 32P and the terminal payments under section 32O of the Employment Ordinance (EO) arising from unreasonable and unlawful dismissal (UUD) in the definition of "specified entitlement" under the proposed section 43N(1). To help distinguish wilful defaults of awards made by the Labour Tribunal (LT) or the Minor Employment Claims Adjudication Board for criminal sanction from other civil defaults, it was also agreed that the overall construction of the present safeguards in the EO (including "wilfully" and "without reasonable excuse" in the proposed section 43P as well as the procedural requirements under the proposed section 43S to give the suspect an opportunity to be heard and to require as a prerequisite to prosecution the written consent of the Commissioner for Labour) should remain intact.

4. The Administration had already indicated no in-principle objection to the said extension of "specified entitlement" based on the above understanding vide paragraphs 3 to 6 of the LC Paper No. CB(2)855/09-10(01). Details of the proposed CSAs are given in the ensuing paragraphs.

Proposed CSAs on extension of "specified entitlement" under the proposed section 43N(1)

5. As explained in previous LC papers⁶, while the enforcement of an LT award is no different from other civil judgments, the criminal sanction already attached to the default of wages and statutory entitlements under the EO forms a solid basis to distinguish payments under LT awards from other civil debts and thus the creation of the proposed offence against their non-payment. Noting the concerns expressed by some stakeholders about the read-across implications for other civil judgments, the Administration proposes to limit the offence to LT awards comprising wages and statutory entitlements underpinned by criminal sanction under the EO, and which are stipulated as "specified entitlement" under the proposed section 43N(1).

⁶ LC Paper No. CB(2)2617/08-09(01), CB(2)80/09-10(01) and CB(2)855/09-10(01)

6. Some Members have requested that although the compensation under section 32P does not carry criminal sanction upon its default under the EO, it should be covered as “specified entitlement” as it arises out of UUD which per se is a criminal offence. They argued that, likewise, terminal payments under section 32O arising out of UUD should also be covered as “specified entitlement”. The Administration has considered the possible read-across implication and consulted the stakeholders. Given that the criminal sanction attached to UUD can indeed be a plausible basis to distinguish the payments under section 32P and section 32O⁷ from purely civil debts, the Administration has accepted Members’ proposal and amended the definition of “specified entitlement” in the proposed section 43N(1) to give effect to the proposal.

7. In the draft CSAs, the definition of “specified entitlement” in the proposed section 43N(1) is revised by substituting a new paragraph (j) for the original one. The revised paragraph (j)(i) covers those terminal payments under section 32O that include wages and statutory entitlements under the EO as set out in paragraphs (a) to (i) of that definition (being entitlements underpinned by criminal sanction under the EO) to which the employee is entitled upon termination of the contract of employment but has not been paid. Those terminal payments which are awarded to the employee for EO entitlements for which he has not yet attained the minimum qualifying period (e.g. proportionate amount of long service payment for 4.5 years’ service, being less than the minimum five-year minimum qualifying requirement) are not covered as “specified entitlement” as those entitlements are not backed by criminal sanction. Further, with the new paragraphs (j)(ii) and (k) proposed in the draft CSAs, all terminal payments awarded in relation to UUD and compensation under section 32P for UUD would come under the ambit of “specified entitlement”.

⁷ Compensation under section 32P is solely awarded for UUD. Yet, apart from UUD, terminal payments under section 32O can also be awarded for unreasonable dismissal and unreasonable variation of contract. As unreasonable dismissal and unreasonable variation of contract are not criminal offences, terminal payments arising from such causes will remain not covered except for terminal payments arising from those entitlements the default of which constitutes criminal sanction (i.e. to the extent that the award of terminal payment covers entitlements referred to in paragraphs (a) to (i) of the definition of “specified entitlement” in the proposed section 43N(1)).

Proposed CSAs on technical refinements to the Bill

8. The Administration also proposes CSAs to make technical refinements to the Chinese version of section 43R(1)(b) & (c) concerning the proof of certain matters in proceedings for an offence under the proposed section 43P, for better drafting alignment with the English version.

9. Members are invited to note and consider the proposed CSAs to be moved by the Administration.

Labour and Welfare Bureau
March 2010

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”.