

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

**Administration's Response to Issues Raised by Members
at the Bills Committee Meetings held on 16 July and 12 October 2009**

Purpose

This paper provides the Administration's response to the issues raised by Members of the Bills Committee on the Employment (Amendment) Bill 2009 (the Bill) at the Bills Committee meetings held on 16 July and 12 October 2009.

(A) Procedures of investigation and institution of criminal proceedings against employers defaulting on awards

2. By virtue of sections 4A¹ and 72² of the Employment Ordinance (EO) and the proposed section 43S(3)³ in the Bill, officers authorised by the Commissioner for Labour (CL) may conduct investigation into and prosecution of the new offence. Like existing offences under the EO, the Labour Department (LD) will take up the enforcement of the new offence against non-payment of awards made by the Labour Tribunal (LT) or the Minor Employment Claims Adjudication Board (MECAB) under the Bill.

3. If the employer fails to pay the employee the money awarded, the employee may file a petition against the defaulting employer and

¹ Section 4A of the EO stipulates that the CL may in writing authorise any public officer or class of public officer to exercise or perform any or all of the powers, functions or duties conferred or imposed on the CL under this Ordinance.

² Section 72 of the EO sets out the powers of the CL or any public officer authorised by the CL in writing for the purpose on, inter alia, the making of such examination and inquiry as may be necessary to ascertain whether the requirements of this Ordinance are complied with, and seize anything which may appear to be evidence of an offence against this Ordinance.

³ Proposed section 43S(3) in the Bill says that a prosecution for an offence under section 43P may be brought in the name of the CL and may be commenced and conducted by any officer of the LD authorised in that behalf in writing by the CL. Similar provision exists in section 64(3) of the EO for prosecution of offences under the Ordinance.

apply for ex-gratia payment from the Protection of Wages on Insolvency Fund. He should also report the case to LD to see if any breach of EO has been involved. Upon the commencement of the new offence under the Bill (if enacted), if any suspected offence of wilful non-payment of LT award is detected, LD will invite the employee to give witness statement and conduct investigation to collect evidence.

4. The proposed section 43S in the Bill provides that CL must hear the person against whom the allegation is made, or give the person an opportunity of being heard before giving consent in writing to commence prosecution. Such statutory requirement follows that of the wage offences currently under section 64 of the EO. The right to be heard and the requirement for CL's consent before instituting prosecution are intended to avoid netting in those innocent employers. After all, to forestall undue impact on investors' confidence and true to the intention of the legislative amendment, we should target only the employers who have wilfully defaulted on the award.

5. If there is sufficient evidence to support a charge under the new offence, the LD will initiate prosecution by laying summonses against the defaulting employer. Like other EO offences, it will be tried summarily in the Magistrates' Courts. A date for plea-taking before the Magistrates' Courts will be fixed. 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.

6. The time taken for the investigation and prosecution of the offence varies from case to case depending on various factors such as the complexity of the case, the number of defendants and witnesses involved, the availability of prosecution witnesses and concerned parties to give information or statement, whether there is conflicting evidence among defendants, witnesses and concerned parties, the plea of the defendant, the time required by court in fixing a hearing or trial and the duration required for conducting the trial. After taking witness statement and collecting necessary evidence from, as well as arranging hearing with the defendant on the matter, LD would immediately consider whether to proceed with prosecution action in light of available evidence. The LD, as other departmental prosecutors, is also obliged to assess prudently the

sufficiency of evidence in accordance with the Statement of Prosecution Policy and Practice (the Statement) issued by the Department of Justice (DoJ) in performing the prosecution function. In case of doubt, legal advice from the DoJ will be sought.

7. A flow chart depicting the procedures of investigation, prosecution and institution of criminal proceedings for defaults of LT/MECAB awards is at Annex A for reference.

8. At present, difficulties in prosecution may arise in some suspected cases of wilful default of wages or other statutory entitlements underpinned by criminal sanctions where the components of wages and their computation emanate from an oral contract between the employer and the employee agreed years ago, rendering it difficult to establish the contractual intention. With the introduction of the new offence, in cases involving an award which clearly indicates that wages or other statutory entitlements underpinned by criminal sanctions 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 resultant facilitation of investigation should greatly help expedite worthy prosecution as well as deter defaults of LT and MECAB awards.

9. In addition, the Administration is also conscientiously identifying means to simplify the procedures wherever appropriate and has built in such means in the Bill. In cases of LT defaults, some documents and information of the LT (e.g. a copy of a claim, award, or any other document relating to the proceedings, or whether the award is served on the employer), which should be uncontentious, have to be produced to the court. By the proposed section 43R in the Bill, specified documents certified or issued by LT can be admissible as evidence so as to save the time of the court that would otherwise be required for calling witnesses from LT to give oral evidence.

(B) Listing out all reasonable excuses in the proposed section 43P(1)(b)

10. The proposed section 43P(1)(b) in the Bill 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. At the Bills Committee meeting, the Administration was asked to explain the rationale for adopting the proposed provision of “without reasonable excuse” instead of listing all reasonable excuses under the proposed section 43P(1)(b). The latter was considered by some Members as having the benefit of clearing employers’ doubt on how to defend themselves in cases of prosecution.

11. During the consultation on criminalisation of LT defaults, stakeholders generally supported that defaulting acts by some irresponsible employers should be sanctioned while some employer representatives emphasised at the same time the need for the proposed offence to safeguard against unintended netting in of innocent businessmen. The Administration shares the view that the offence should focus on wilful non-payment of LT awards and thus be constructed in a way to distinguish the culpable offender from the innocent.

12. In fact, the available defence of reasonable excuse to an employer from being convicted is widely adopted in the current offence provisions under the EO against an employer who fails to pay wages and other statutory entitlements, including end-of-year payment, long service payment (LSP), severance payment (SP), statutory holiday pay, annual leave pay and sickness allowance. The 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 but unreasonable in another. By illustration, an employer claiming to have misdirected the cheque is likely to be more credible in a case of late payment of wages to an employee for one single wage period than that of repeated defaults of wages to a number of employees.

13. In assessing whether an employer has a reasonable excuse to delay payment of wages, cash flow problem arising from unforeseeable incidents (e.g. financial loss attributable to burglary) must be considered differently from insufficient funding due to the priority given to purchasing non-essential equipment for the company. In determining whether an excuse is reasonable in a specific case, we should not unduly

fetter the court's judgment based on a fair and impartial assessment of all facts and evidence of the case.

14. The new offence is based on the existing criminal liability attached to the default of LT awards in respect of wages or other statutory entitlements underpinned by criminal sanctions. We therefore find it practical and justifiable to adopt "without reasonable excuse" for the proposed section 43P(1)(b). This will bring the test on par with that applicable to the arrears and underpayment of wages and statutory entitlements which are the subject of LT awards. Using this well-established test will facilitate enforcement and compliance.

15. The reasonable excuse clause is in fact used not only under the EO but adopted widely in many offence provisions under other ordinances, including both employment-related (e.g. the Employees' Compensation Ordinance, the Occupational Safety and Health Ordinance, and the Mandatory Provident Fund Schemes Ordinance) and non-employment related (e.g. the Buildings Ordinance and the Prevention of Bribery Ordinance). Examples of provisions of the said ordinances, together with the EO provisions relevant to paragraph 12, are set out in Annex B.

16. It should be noted 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. It is after this first tier of offence element having been satisfied that the reasonable excuse comes into play to further safeguard an employer who has put forth a valid reason to avoid being convicted. Under the proposed section 43S, the investigation must give an opportunity to be heard to the employer 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 initiated against him. As such, we consider that the adoption of "without reasonable excuse", interplayed with other elements of the Bill, offers sufficient protection to innocent employers while maintaining the effectiveness of the offence.

(C) Coverage of specified entitlements under the proposed section 43N(1)

17. The basis of the proposed offence lies in the fact that, unlike other entitlements whose non-payment would only result in civil debts, non-payment of wages and other statutory entitlements covered by the proposed offence will result in criminal sanction. While criminalisation is generally supported by stakeholders in addressing the problem of LT defaults, there are policy and legal concerns about the read-across implication of the remedies for other parts of the civil adjudication system. Therefore, it is considered that the proposed offence must be confined to employee entitlements under the EO the non-payment of which entails criminal sanction.

Coverage of specified entitlements

18. Under the proposed section 43P(1)(a) in the Bill, 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 defined under the proposed section 43N(1) are payments that carry criminal liability under the EO, viz:

- (a) any wages or any other sum payable under section 23, 24 or 25⁴, 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 this Ordinance to grant to an employee but fails to grant, to the extent that the sum is not covered by paragraph (a), (b), (c), (d), (e), (f), (g) or (h); or

⁴ Other sum due upon termination of employment under s.25(2)(b), (ba) and (c) are payment in lieu of notice under s.7, payment for unlawful termination of employment of a pregnant employee under s.15(2) and for unlawful termination of the employment of an employee on paid sickness day under s.33(4BA), long service payment and any other sum due to the employee in respect of his contract of employment.

- (j) an award of terminal payments under section 32O to the extent that the award covers entitlements referred to in paragraph (a), (b), (c), (d), (e), (f), (g), (h) or (i).

19. The EO provides for the protection of wages and lays down the statutory employment benefits to employees. Such entitlements are specifically backed by criminal sanction, and thus are covered by specified entitlements under the proposed section 43N(1). There are payments which are not underpinned by criminal sanction under the EO due to their different nature and therefore do not come under the specified entitlements.

20. One category of payments not covered under proposed section 43N(1) is 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 of the EO. The obligation to pay wages fully and timely should always rest with the employer, who is the subcontractor in such case. Out of concern for the plight of the workers, legislative changes were made in 1977 to impose vicarious liability in 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. It would be unfair and unjustified to shift the criminal liability to parties other than the direct employer.

21. Another category of payments not covered under the proposed section 43N(1) is part of the remedies under Part VIA of the EO that an employee may claim for unreasonable and unlawful dismissal and unreasonable variation of employment contract by his employer. Such remedies may include terminal payments under section 32O of the EO that the employee might reasonably be expected to be entitled to had he 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 of the EO.

22. For terminal payments in paragraph 21 above, in the absence of fulfilment of the statutory requirement (e.g. an award to an employee with 4.5 years' service for terminal payment of proportionate amount of LSP), they are not entitlements underpinned by criminal sanction under

the EO. As regards compensation under section 32P, while the LT is empowered to award compensation (independently of whether a terminal payment has been made) as it considers just and appropriate in the circumstances in a claim for remedies under Part VIA, it is equally open for LT to award no remedy at all. Hence, the nature of remedies under Part VIA of the EO is not entirely the same as those statutory entitlements underpinned by criminal sanction in the EO.

23. In respect of terminal payments (i.e. moneys to which the employee is entitled upon termination of employment), since non-payment already entails, under the EO, criminal sanction, such payments are already covered as specified entitlement under the proposed section 43N(1)(j). It should also be noted that though the payments at paragraphs 20 and 21 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.

Drafting of specified entitlements

24. The Administration was asked to explain the approach adopted for drafting the proposed section 43N(1) by setting out the entitlements underpinned by criminal elements in the EO instead of making reference to Part XIII of the EO regarding offences of the EO (the latter referred to as “alternative approach” below).

25. We have consulted the DoJ on the merits of the present drafting. By adopting the alternative approach, an alternative definition would be required along the lines that “specified entitlement” means any sum of money where a failure to pay that sum is an element of an offence under section 15A(1)(b) or (c), 31O(3)(a), 63(1) or (4)(b)(i) or (ii), (4)(e)(i) or (ii) or (5) (in relation to contravention of section 41B), 63C or 63CA of the EO. To find out what this alternative definition of “specified entitlement” covers, the reader will have to look up each offence provision referred to in the alternative definition. Then the offence provision will guide the reader to the provision by which the obligation to pay is imposed. For example, the reader will have to look up section 63C of the EO, then sections 23, 24 and 25 to find out that wages and certain other entitlements are covered. A definition by reference to the offence sections will create an extra hurdle for the reader in understanding the

scope of entitlements covered. From reader's point of view, defining "specified entitlement" by listing the entitlements as presently done in the Bill is more direct and user-friendly.

26. Besides, the Administration was asked to consider specifying wages in lieu of notice (WILON) as one of the specified entitlements in the proposed section 43N(1). The Administration wishes to point out that WILON, by virtue of section 25(2)(b) of the EO⁵ and the proposed section 43N(1)(a), is already covered under the definition of specified entitlement. The representation of WILON under "any other sum" is adopted along the provision in section 25 of the EO. The Administration will ensure clarity on the coverage of WILON in publicity activities after the Bill is enacted.

Employer's contribution of mandatory provident fund (MPF)

27. The Administration was also asked to explain why contribution of MPF on the part of the employer was not included in the "specified entitlements" in the proposed section 43N(1). Regarding the issue of MPF contribution, we have to be wary that the objective of the present Bill is to amend the EO to criminalise non-payment of LT and MECAB awards. Wages and entitlements with criminal elements under the EO are major payments under an award made by LT or MECAB, which has exclusive jurisdiction on a claim arising from the breach of the EO. The 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 the EO and the jurisdiction of LT and MECAB.

⁵ Section 25(1) of the EO stipulates that subject to section 31O, where a contract of employment is terminated, any sum due to the employee shall be paid to him as soon as practicable and in any case not later than 7 days after the day of termination. Subsection (2) defines the sum as, among others, (b) the sum (if any) payable under s.7, 15(2) and 33(4BA). Under s.7(1A), subject to s.15 and 33, either party to a contract of employment may at any time terminate the contract without notice by agreeing to pay to the other party, depending on whether the length of notice required to terminate the contract is expressed in days/weeks or in months, a sum calculated by multiplying the number of days or months in the period for which wages would normally be payable to the employee by the daily or monthly average of the wages earned by the employee during the period of 12 months or a shorter period if so employed, immediately before the date of notification.

(D) Liability of directors and partners under the proposed section 43Q

28. Since business is predominantly operated by corporations⁶, some stakeholders strongly demand that the effectiveness of the proposed offence in defaulted cases committed by a body corporate be buttressed by imposing liability on its directors and responsible persons behind. The proposed section 43Q(1) thus provides for similar liability as section 64B(1) of the EO (applicable to wage offences) in that where an offence of non-payment of LT or MECAB award committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director or responsible person of the body corporate, that director or responsible person commits the like offence. Similar liability that applies to a partner of a firm under section 64B(2) of the EO for an offence committed by any other partner is also adopted under the proposed section 43Q(2).

(I) Responsible person of body corporate not being its director

29. Some Members expressed concern about whether a responsible person of a body corporate who is not registered as a director can be held liable for the proposed offence.

30. While we believe that 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, and many a time to other business counterparts, e.g. suppliers, as well. 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 de facto responsible person who is proved to have consented to, connived at or been neglectful to 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.

31. Similar provisions on defining the responsible person of the body corporate are not only adopted under section 64B(1) of the EO but also in other ordinances⁷. We believe that the coverage of the provision is able

⁶ According to the Annual Report of the Inland Revenue Department, there were over 580,000 corporations, accounting for 70.84% of the total business registrations in the year ending 31.3.2008.

⁷ Examples are section 137 of the Public Health and Municipal Services Ordinance (Cap. 132) and section 168N of Companies Ordinance (Cap.32).

to target the truly culpable person, irrespective of whether he is a registered director or not and, at the same time, as the case law⁸ 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 would not be convicted merely because he holds the post, should he have no part to play in the offence committed.

32. The viability of the proposed provision in convicting responsible persons (non-director) is evident from the cases of successful prosecution under section 64B(1) of the EO. During the period from January 2007 to September 2009, there were 46 convicted summonses against responsible persons (non-director) of body corporate for committing wage offences. All such cases involved de facto responsible persons revealed by facts and circumstances of the case. As illustration, a company director who had been convicted for wage offences tried to evade liability by carrying on the business under another limited company without his directorship. Although he held no specific position in that company, prosecution was successfully brought against him as the manager or other similar officer under section 64B for the wage defaults by the new company. In another case, a responsible person started a new company engaging ex-employees of another company where he was a director. He chose not to be registered as the director in the new company due to the commercial agreement with his former partners restraining him from running competitive business. Again, this de facto operator was convicted as manager or similar officer as a director for wage defaults under section 64B. In view of the enforcement experience, we consider that the same provision can catch the culpable person in cases of wilful LT defaults by body corporate.

(II) Whether a partner would be subject to two counts of offence under proposed sections 43P and 43Q

33. In respect of the same entitlement of the same employee, a partner would not be guilty of two counts of offence under proposed sections 43P and 43Q (if enacted). The proposed sections 43P and 43Q 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 (i.e. entering into contract as defined in section 2 of the EO) to pay an LT award whereas 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

⁸ Applying principles enunciated in *Bolton (Engineering) Co. v Graham* [1957] 1 QB 159 and *Tesco Supermarkets Ltd. v Nattras* [1971] 2 WLR 1166.

same firm to pay an LT award. The two sections are thus different in targets and offence elements that would be substantiated by diverse evidence.

34. For example, if both partners are actively involved and there is sufficient evidence against both as the employer who wilfully and without reasonable excuse fails to pay an award, both partners will be prosecuted under section 43P. If two partners perform different roles, the one as de facto employer (Partner A) will be prosecuted under section 43P. If there is sufficient evidence to prove consent, connivance or neglect of the other partner (Partner B), Partner B will also be prosecuted under section 43Q. However, if there is sufficient evidence to establish the proposed offences under both sections against a partner, alternative information may be laid against the partner (i.e. if the accused is guilty of one count of the offence, e.g. under section 43P, the other, e.g. under section 43Q, will be dropped). The partner would not be guilty of both sections 43P and 43Q in respect of the same entitlement of the same employee in view of the common law principle of double jeopardy⁹.

(III) Rebuttable presumption in the proposed section 43Q(3), (4) and (5) on liability of directors and partners

Purpose of the presumption

35. In deliberating the application of section 64B(1) in the context of LT defaults, it is recognised 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) thus introduces a rebuttable presumption regarding consent, connivance or neglect on the part of a director or responsible person of the body corporate if the prosecution can prove his involvement in the management of, or 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 that 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

⁹ At common law, there is a rule against a person being placed in double jeopardy i.e. placing an accused person in peril of being convicted of the same crime in respect of the same conduct on more than one occasion.

attributable to his neglect and the contrary is not proved by the prosecution beyond reasonable doubt.

36. Similar to section 64B(2) of the EO that provides for liability on other partner of a firm or person concerned in its management for wage offences committed by a partner of the firm, the proposed section 43Q(2), (4) and (5) are made for partners or persons concerned in the management of the firm.

The proposed section 43Q(3) and (4) being 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 ('HKBOR')

37. The use of presumption to assist prosecution for effective enforcement that would otherwise become very difficult, if not infeasible, is in fact not something new. It is used in various ordinances¹⁰ including the EO, such as section 11AA(1)¹¹ on end of year payment (regarding contractual intention), section 15(1B)¹² on termination of pregnant employee (regarding reasons other than summary dismissal) and section 31Q¹³ on SP (regarding reason of redundancy under certain conditions of termination). There are also statutory provisions of presumption in other ordinances¹⁴ that provide for an evidential burden on directors and responsible persons on potentially exculpatory matters.

38. We confirm in response to Member's question that the presumptions in the proposed section 43Q(3) and (4), 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 HKBOR as explained in paragraphs 39 to 42 below.

¹⁰ Examples are section 34 of Employees' Compensation Ordinance (Cap. 282), section 10 of Control of Chemicals Ordinance (Cap. 145), section 19 of Gambling Ordinance (Cap. 148), section 6 of Broadcasting Ordinance (Cap. 562) and section 21 of Film Censorship Ordinance (Cap. 392).

¹¹ S.11AA(1) of EO stipulates that it shall be presumed that an annual payment or annual bonus is not of a gratuitous nature and is not payable only at the discretion of the employer unless there is a written term or condition in the contract of employment to the contrary.

¹² S.15(1B) of EO stipulates that an employer who terminates the continuous contract of employment of a pregnant employee shall be taken for the purposes of section 15(1)(a) or (b) to terminate the contract otherwise than in accordance with section 9 under which the employer may terminate the contract without notice or payment in lieu.

¹³ S.31Q of EO stipulates that for the purposes of Part VA of the EO, an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.

¹⁴ Examples are section 60 of Unsolicited Electronic Messages Ordinance (Cap. 593) and section 118 of the Copyright Ordinance (Cap.528).

Legal principles

39. Basically, the legal principles in the interpretation of a statutory provision of presumption, as laid down in the judgment of Sir Anthony Mason NPJ in the Court of Final Appeal decision in *HKSAR v Lam Kwong Wai* [2006] 3 HKLRD 808, is to see whether such provision imposes a persuasive burden of proof on the accused. If that is its effect then there is an abrogation of the presumption of innocence, but not otherwise. Furthermore, shifting only an evidential burden (as opposed to a persuasive burden) to the defendant does not derogate from, and is wholly consistent with, the presumption of innocence, as explained by Mr Justice Ribeiro PJ in the Court of Final Appeal decision in *HKSAR v Ng Po On & Anor* [2008] 3 HKC 1. According to the judgement of *Ng Po On*, an evidential burden does not require the accused to establish anything as a matter of proof. An evidential burden arises where the defendant wishes to put in issue some matter that is potentially exculpatory while the prosecution continues to bear the persuasive burden throughout. Please refer to Annex C for a digest of the legal principles laid down in the two judgments.

Applying the legal principles to the proposed section 43Q(3) and (4)

40. The effect of the proposed section 43Q(3) and (4), read together with the proposed section 43Q(5), 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.

41. In the light of the Court of Final Appeal's judgment in *Ng Po On* quoted in Annex C, the Administration takes the view that the rebuttable presumption under the proposed section 43Q(3) and (4), read together with the proposed section 43Q(5) (if these provisions are enacted), is wholly consistent with the presumption of innocence guaranteed by Article 87(2) of the Basic Law and Article 11(1) of the HKBOR. In the light of the Court of Final Appeal's judgment in *Lam Kwong Wai* quoted in Annex C, given that the proposed section 43Q(3) and (4) does not derogate from the presumption of innocence and the right to a fair trial as protected by the Basic Law and the HKBOR, the issue of whether these provisions may be justified does not arise.

42. Similar to the proposed section 43Q(1) and (3) that applies to a director or responsible person of a body corporate as explained above, the proposed section 43Q(2) and (4) applies to a partner of a firm or a person

concerned in its management. The proposed section 43Q(2) imposes criminal liability on a partner of a firm or a person concerned in its management if an offence of wilful default of LT/ MECAB award covering specified entitlement was committed by a partner of the firm with the consent or connivance of or was attributable to neglect on the part of the first-mentioned partner or person. If enacted, the proposed section 43Q(4) operates with the proposed section 43Q(5) to shift an evidential burden as to consent, connivance or neglect to a partner of a firm or person concerned in its management. The analysis in paragraphs 40 and 41 above applies also to the shifting of an evidential burden to a partner of a firm or person concerned in its management just as it applies to the shifting of an evidential burden to a director or responsible person of a body corporate.

Safeguards to directors and partners in relation to proposed section 43Q(3) and (4)

43. It was raised at the meeting as to whether there is safeguard to protect the interests of the directors or responsible persons of a body corporate and a partner in a firm, given the element of “ought to have known” in the proposed section 43Q(3) and (4).

44. The presumption on the consent, connivance or neglect on the part of a director, responsible person or partner by his actual or constructive knowledge of the LT 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 LT defaults as explained in paragraph 35 above, while avoiding netting in those innocent with the various safeguards under the Bill. The proposed provision would encourage a director, responsible person or partner to be vigilant not to consent to, connive at or be neglectful of his body corporate or firm wilfully defaulting on an LT award.

45. A director’s or partner’s knowledge of an award may be evident in some cases with direct evidence (e.g. the director 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 family member at his residence and confirmed to have been given to him). Therefore, it is necessary to construct the presumption on both actual and constructive knowledge to ensure effective enforcement. Similar provisions of “know or ought to know” are also adopted in various

existing ordinances¹⁵.

46. There are already sufficient safeguards under the Bill to strike a balance between effective enforcement and protection for the innocent. To trigger the presumption, say under proposed section 43Q(3), the prosecution has to prove that (i) the body corporate wilfully and without reasonable excuse fails to pay the award; (ii) the accused is the director, manager, secretary or such similar officer of the body corporate and under the case law¹⁶, should primarily be those persons who are acting as the “brains” rather than the “hands” of the employing company; and (iii) the accused knew or ought to have known the award concerned with the offence that had been made against the body corporate. The presumption will be rebutted if there is evidence suggesting that he has not consented to, connived at or been neglectful of the non-payment, and the contrary cannot be proved by the prosecution beyond reasonable doubt. The requirement under the proposed section 43S (if enacted) to hear the allegation of the accused before commencement of prosecution also ensures the opportunity for one to give information during the investigation of an offence.

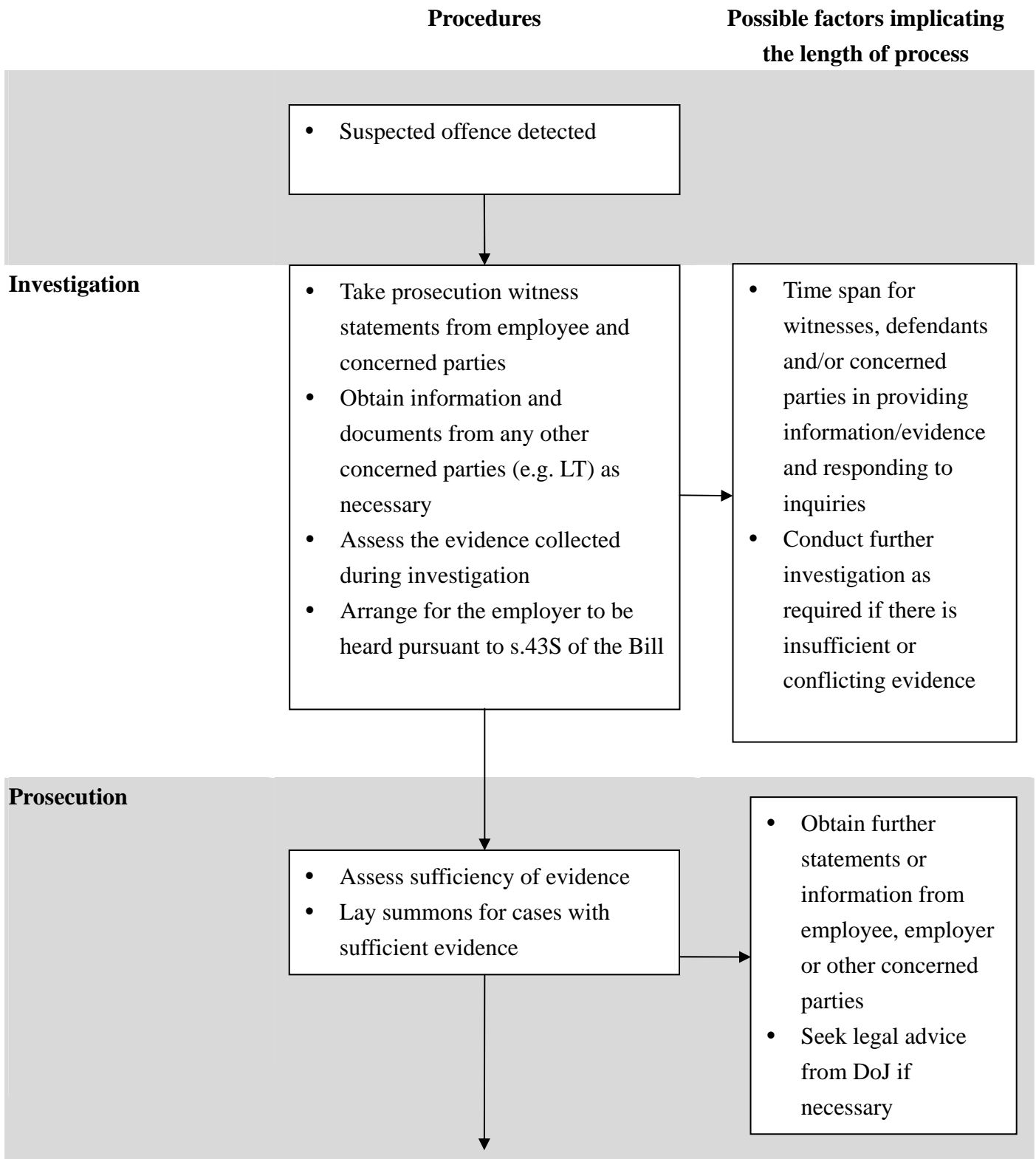
47. Moreover, according to the Statement by the DoJ, prosecution will not be initiated if the available evidence reveals no reasonable prospect of conviction. Therefore, even if the presumption may be triggered in a particular case against a director or responsible person, he will not be prosecuted if there is evidence showing that the offence is not committed with his consent, connivance or neglect and the prosecution does not have sufficient evidence to prove the contrary beyond reasonable doubt.

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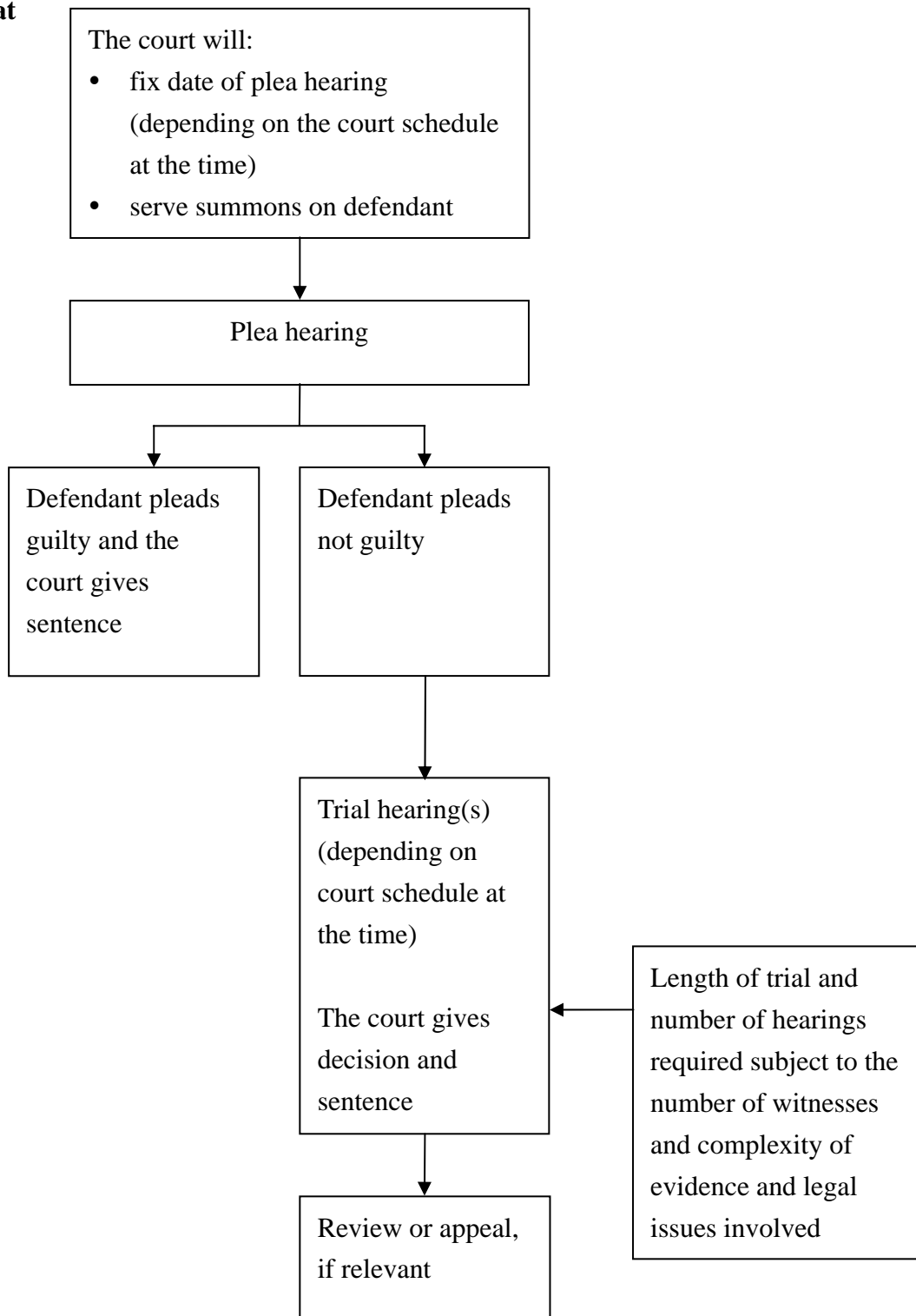
¹⁵ Section 60(5)(a) of the Employment Ordinance (Cap. 57), section 45B of Employees’ Compensation Ordinance (Cap. 282), section 26 of Public Order Ordinance (Cap. 245), section 73(1)(c) of Banking Ordinance (Cap. 155), section 19(1) of Merchant Shipping (Safety) (Dangerous Goods and Marine Pollutants) Regulation (Cap. 413H)

¹⁶ Applying principles enunciated in *Bolton (Engineering) Co. v Graham* [1957] 1 QB 159 and *Tesco Supermarkets Ltd. v Nattras* [1971] 2 WLR 1166.

Flow chart
Procedures for investigation and institution of criminal proceedings
on the proposed offence of non-payment of LT/MECAB awards



Criminal proceeding at Court



**Provisions in EO and examples of provisions in other ordinances
adopting “without reasonable excuse”**

Employment Ordinance, Cap. 57 (relating to non-payment of wages and entitlements)

Sections	Offences
s.63(1)	Failure to pay end of year payment
s.63C	Failure to pay wages within 7 days after expiry of wage period/on completion of contract of employment/on termination of employment contract
s.31O(3)	Failure to pay severance payment
s.63(4)(b)(i)	Failure to pay sickness allowance
s.63(4)(b)(ii)	Failure to pay statutory holiday pay
s.63(4)(e)	Failure to pay annual leave pay

Other ordinances including employment-related and non-employment related ordinances

Ordinances	Sections	Offences
Employment-related ordinances		
Employees' Compensation Ordinance, Cap 282	s.10(10)	Failure to pay periodical payment to an injured employee
	s.16(3C)	Failure to send to an employee free of charge a copy of the medical report in respect of a medical examination which the employee has undergone on the request of the employer
	s.16A(10) and s.16A(12)	Failure to pay compensation to an injured employee
Occupational Safety and Health Ordinance, Cap 509	s.24(2)(a)	Failure to provide information to an occupational safety officer
Boilers and Pressure Vessels Ordinance, Cap 56	s.50(1)	Failure to deliver documents to the Boilers and Pressure Vessels Authority,

		failure to apply for registration, failure to cause the registration number in a conspicuous place, failure to notify the Authority of sale or hiring of boilers, failure to keep certificate and report at the premises the boiler or pressure vessel is installed, failure to notify the Authority of an accident or defect
Mandatory Provident Fund Schemes Ordinance, Cap 485	s.43B(1)	Failure to arrange for employees to become scheme members
	s.43B(1B)	Failure to contribute to registered schemes
	s.7AD(4)	Approved trustee's failure to credit contribution paid by employer to relevant employee's account
	s.43D(1)(b)	Failure to comply with a lawful requirement made by the MPFA, an authorized person, an auditor appointed by an approved trustee for the purposes of s.30, an inspector appointed for the purposes of s.32 in the course of exercising or performing its functions
Pneumoconiosis and Mesothelioma (Compensation) Ordinance, Cap 360	s.23(4)	Failure to grant to an employee leave for the purpose of attending a medical examination and failure to pay him wages or salary in respect of such absence from work
Occupational Retirement Schemes Ordinance, Cap 426	s.60(a)	Failure to comply with a direction ordered by the Court to transfer assets to liquidator after a occupational retirement scheme is wound up
Non-employment related ordinances		
Buildings Ordinance, Cap. 123	s.40(1BA)	Failure to comply with a statutory removal order
Inland Revenue Ordinance, Cap. 112	s.80(2)(b)	Making an incorrect statement in connection with a claim for deduction or allowance in a tax return
Registration of Persons Ordinance, Cap. 177	s.7B	Failure to apply for new identity card as directed by the Secretary for Security

Education Ordinance, Cap. 279	s.78	Parent's failure to comply with an attendance order
Road Traffic Ordinance, Cap. 374	s.39C(15)	Refusal or failure to provide specimens of breath, blood or urine for analysis
Elections (Corrupt and Illegal Conduct) Ordinance, Cap. 554	s.11(1) and s.11(2)	Corrupt conduct to bribe electors and others at elections.

**Digest on the legal principles laid down
in HKSAR v Lam Kwong Wai [2006] 3 HKLRD 808 and
the HKSAR v Ng Po On & Anor [2008] 3 HKC 1
involving statutory provisions of presumption**

The approach to be adopted in a constitutional challenge mounted against a reverse onus provision on the basis that it derogates from the presumption of innocence has been authoritatively laid down in the judgment of Sir Anthony Mason NPJ in the Court of Final Appeal decision in *HKSAR v Lam Kwong Wai* [2006] 3 HKLRD 808 (at paragraph 29 of the judgment) (which was quoted by Ribeiro PJ in the Court of Final Appeal decision in *HKSAR v Ng Po On & Anor* [2008] 3 HKC 1 (at paragraph 29 of the judgment)) -

“Our first task is to ascertain the meaning of [the relevant statutory provision] according to accepted common law principles of interpretation as supplemented by any relevant statutory provisions. Our second task is to consider whether that interpretation derogates from the presumption of innocence and the right to a fair trial as protected by the Basic Law and the [HKBOR]. If that question is answered 'Yes', we have to consider whether the derogation can be justified and, if not, whether it could result in contravention of the Basic Law or the [HKBOR] and consequential invalidity. If invalidity could result, then it will be necessary to decide whether the validity of the section or part of it can be saved by the application of any rule of construction, severance of the offending part, reading down, reading in or any other remedial technique available to the Court.”

2. The *Ng Po On* case involves sections 14(4) and 24 of the Prevention of Bribery Ordinance (Cap. 201) (“POBO”). Under those provisions, a defendant charged with an offence for failing to comply with a notice requiring him to make a declaration regarding his assets, expenditures and liabilities held and incurred in the previous 3 years was imposed the persuasive burden of establishing the existence of a reasonable excuse. The Court of Final Appeal considered that sections 14(4) and 24 of POBO derogate from the presumption of innocence because they would expose the defendant to the risk of conviction if he fails to prove the facts constituting his excuse (which would be considered reasonable if established) on the balance of probabilities, even though he may do enough to raise a reasonable doubt as to whether his excuse is made out.

3. In *Ng Po On*, at paragraphs 25 to 28 of the judgment, the Court of Final Appeal clearly distinguished between statutory reverse onus provisions which impose persuasive burden on an accused on the one hand and those which merely impose evidential burden on an accused on the other hand. Where a reverse persuasive burden is employed, the accused is required to satisfy that burden on the balance of probabilities. Mr Justice Ribeiro PJ cited Sir Anthony Mason NPJ's speech in *Lam Kwong Wai* which explained that a reverse persuasive burden was objectionable and was "... inconsistent with the presumption of innocence because it allows the defendant to be convicted on failing to discharge the reverse onus, even though the prosecution fails to prove all the elements of the offence beyond reasonable doubt." Indeed, a reverse persuasive burden requires the defendant to be convicted even if his version of the facts is considered equally likely to be right as to be wrong.

4. Mr Justice Ribeiro PJ went on to explain why an evidential burden is wholly consistent with the presumption of innocence (at paragraph 27 of the judgment) as follows –

“An evidential burden stands in contrast to a reverse persuasive burden. It does not require the accused to establish anything as a matter of proof. An evidential burden arises where the defendant wishes to put in issue some matter that is potentially exculpatory while the prosecution continues to bear the persuasive burden throughout. In such cases, there must be evidence supporting such exculpatory matter which is sufficiently substantial that it raises a reasonable doubt as to the defendant's guilt. Unless such reasonable doubt is removed, the prosecution fails to prove its case. If, on the other hand, the accused fails to adduce or point to any evidence on the relevant issue or if the evidence adduced is rejected or is not sufficiently substantial to raise a reasonable doubt, the potentially exculpatory matter places no obstacle in the way of the prosecution proving its case beyond reasonable doubt. An evidential burden, functioning in this manner, is wholly consistent with the presumption of innocence.”