

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

**Administration's Response to Issues Raised by Members
at the Bills Committee Meeting held on 23 November 2009**

Purpose

This paper provides the Administration's response to several issues raised by Members of the Bills Committee on the Employment (Amendment) Bill 2009 (the Bill) at the Bills Committee meeting held on 23 November 2009.

Manpower of the Labour Department (LD) in conducting investigation and prosecution

2. A Member requested for information on LD's existing manpower in conducting investigation and prosecution. The Administration provides the information below.

3. The Labour Inspection Division (LID) and the Employment Claims Investigation Division (ECID) are responsible for conducting investigation of offences under the Employment Ordinance (EO) to uphold employees' rights and benefits. The Prosecutions Division (PD) of the department takes charge of prosecution of the offences referred by the two enforcement divisions. Apart from the EO, the LID is also tasked to enforce the Employment of Children Regulations and the Employment of Young Persons (Industry) Regulations, and the compulsory insurance provisions of the Employees' Compensation Ordinance (ECO). The LID also safeguards the rights and benefits of imported workers and helps combat illegal employment. Apart from EO and ECO offences, the PD is also responsible for the prosecution of offences under other ordinances.¹

¹ The PD also takes out prosecution in respect of the Protection of Wages on Insolvency Ordinance, the Trade Unions Ordinance and the Immigration Ordinance.

4. As the officers conduct investigation and prosecution of various offences as an integral part of their duties, there is no breakdown of the manpower for the enforcement of specific ordinances or offences. The existing manpower of the above three divisions is at Annex. We will review the manpower requirement upon the enactment of the Bill.

Information on time taken for the Commissioner for Labour (CL) to give consent under section 64 of the EO

5. Under the proposed section 43S(1), CL's consent in writing is required before prosecution is conducted under the proposed section 43P of the Bill. This statutory requirement is similar to section 64 of the EO. However, some Members were concerned that such a requirement might unduly delay the time taken to initiate prosecution against law-defying employers and asked the Administration to provide information, if any, on the time taken for CL to give consent under section 64.

6. LD has not kept such information. Once the investigation of a case is completed and legal advice, as the case may require, is obtained, and if there is sufficient evidence, the authorised officer will without delay give consent in writing on behalf of CL to commence prosecution. As a matter of fact, once a suspected offence is detected, there is an internal mechanism in place to closely monitor the progress of the case in the enforcement and prosecutions divisions of LD until the summons is laid.

Impact of the proposed section 43Q on section 64B of the EO

7. The Administration was asked to advise on the impact of the proposed section 43Q, if enacted, on the existing section 64B of the EO, in particular, whether prosecution would no longer be made under section 64B after the enactment of the proposed section 43Q. The requested information is provided below.

8. Similar to the existing section 64B of the EO, the proposed section 43Q in the Bill adopts the elements of consent, connivance or neglect in defining the offence by a director and responsible person of a corporate employer for the non-payment of Labour Tribunal (LT) awards committed by the corporate employer. Under the proposed section 43Q, a director or responsible person will also be held liable for a corporate employer's non-payment of an LT award that comprises wages or other statutory entitlements underpinned by criminal sanctions. With both provisions, the EO would be more effective in targeting wilful defaults in different scenarios, thus achieving stronger deterrence and better protection of employees' rights and benefits.

9. An offence of wage defaults under section 63C of the EO is committed if the employee is entitled to wages and the employer wilfully and without reasonable excuse fails to pay within 7 days after it has become due. In contrast, the crux of the proposed offence of non-payment of LT awards under the proposed section 43P of the Bill lies in creating an offence in respect of an employer's wilful failure, without any reasonable excuse, to pay within 14 days any sum payable under an LT award (comprising any specified entitlement under the proposed section 43N(1)) after it has become due. In fact, the original wage offence and the subsequent default of LT award are two separate acts which happen in very different time sequence. There are sufficiently different elements in the wage offence and in the proposed offence of LT defaults that prosecution may be taken out for both offences without amounting to double jeopardy. If either or both of the offences are committed by a corporate employer with its director's or responsible person's consent, connivance or neglect, prosecution can be brought against the director or responsible person under section 64B of the EO or/and the proposed section 43Q of the Bill, as the case may be.

10. To step up enforcement against wage offences, in case of a corporate employer, LD will take out prosecution against the corporate employer and, if there is sufficient evidence under section 64B, against its director or responsible person who consents to or connives at the corporate employer's offence or to whose neglect the corporate employer's offence is attributable. The increasing number of successful prosecutions underlines the effectiveness of such a strategy in deterring wage offences.

11. At present, if there is sufficient evidence to substantiate wilful default of wages, LD will initiate prosecution for wage offences against the employer without waiting for the civil proceedings at LT, if any, to complete. While this approach has been proven to be effective, LD will continue the strategy of initiating prosecution against the employer for wage offences, and under section 64B against company director and responsible person once there is sufficient evidence.

Labour and Welfare Bureau
December 2009

**Establishment of investigation and prosecution divisions
of the Labour Department
(as at 1.11.2009)**

| | Labour Inspection Division | Employment Claims Investigation Division | Prosecutions Division |
|---------------------------------|---|---|----------------------------------|
| Labour Officer grade officers | 5 | 12 | 21 |
| Labour Inspector grade officers | 194 | - | 7 |
| Total | 199 | 12 | 28 |