

立法會 *Legislative Council*

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Report of the Bills Committee on Employment (Amendment) (No. 2) Bill 2017

Purpose

This paper reports the deliberations of the Bills Committee on Employment (Amendment) (No. 2) Bill 2017 ("the Bills Committee").

Background

2. Employment agencies ("EAs") in Hong Kong, including EAs providing placement services of foreign domestic helpers ("FDHs"), are regulated by Part XII of the Employment Ordinance (Cap. 57) ("EO") and the Employment Agency Regulations (Cap. 57A) ("EAR"). Pursuant to section 51(1) of EO, any person who wishes to operate an EA¹ in Hong Kong is required to obtain a licence or a Certificate of Exemption ("CoE") from the Commissioner for Labour ("C for L"). According to section 57(a) of Part XII of EO, as well as Regulation 10 and Part II of the Second Schedule to EAR, the maximum commission which an EA may receive from a job-seeker shall not exceed 10% of his/her first month's wages upon successful placement ("the prescribed commission"). A person contravening the provision is liable to a maximum penalty of a fine of \$50,000 under section 60(7) of EO. Operating an EA without a licence or a CoE is an offence and is liable to a maximum fine of HK\$50,000 upon conviction under section 60(6) of EO, i.e. the same level of penalty as that for the offence of overcharging job-seekers.

3. Up to end-May 2017, there were 3 023 licensed EAs in Hong Kong, amongst which 1 416 were EAs providing placement services of FDHs ("FDH EAs").

4. In January 2017, the Labour Department ("LD") promulgated the Code

¹ According to section 50(1) of EO, EA means a person who operates a business the purpose of which is:

- (a) to obtain employment for another person; or
- (b) to supply the labour of another person to an employer, whether or not the person who operates the business will derive any pecuniary or other material advantage from either the employer or such other person.

of Practice for EAs ("the Code") as an administrative measure to promote the professionalism and service quality of EAs by setting out the minimum operation and management standards which C for L expects of EA licensees. A copy of the Code is provided in Annex B to the Legislative Council ("LegCo") Brief (File Ref.: LD CR/5/15/706).

The Employment (Amendment) (No.2) Bill 2017 ("the Bill")

5. The Bill seeks to amend EO and EAR to:
- (a) raise the maximum penalties for the existing offences of unlicensed operation of EAs and overcharging job-seekers on commissions;
 - (b) extend the scope of the existing offence of overcharging job-seekers to associates in addition to the licensee;
 - (c) provide for new grounds for refusal to issue or to renew or for revoking a licence to operate an EA; and
 - (d) empower C for L to issue codes of practices for EAs.

Details of the above legislative proposals are set out in paragraphs 2 to 11 of the LegCo Brief (File Ref.: LD CR/5/15/706).

The Bills Committee

6. At the House Committee meeting on 30 June 2017, a bills committee was formed to scrutinize the Bill. The membership list of the Bills Committee is in **Appendix I**.

7. Under the chairmanship of Hon KWOK Wai-keung, the Bills Committee held three meetings with the Administration and received views from the public at one of the meetings. A list of the organizations and individuals which/who have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

8. Members in general are in support of the legislative proposals put forward in the Bill as they agree that these proposals would increase the deterrent effect against overcharging of commissions and unlicensed operation of EAs by imposing heavier penalties on EAs that overcharge job-seekers or

operate without a licence. Members in general consider that the proposals contained in the Bill are conducive to the strengthening of regulation of EAs.

Proposal to impose heavier penalties on employment agencies

Overcharging commission from job-seekers

9. Members in general welcome the proposal to impose heavier penalties on EAs overcharging commission from job-seekers by increasing the maximum penalty from a fine of HK\$50,000 at present to a fine of HK\$350,000 and imprisonment for three years, so as to achieve a greater deterrent effect and afford better protection to job-seekers (including FDHs). Some members including Hon Andrew WAN and Hon Jeremy TAM have, however, expressed concern that after the passage of the Bill, an EA may continue to overcharge job-seekers by resorting to other means in order to evade the requirement under EO that an EA cannot receive from a job-seeker any amount of payment that exceeds the prescribed commission. They have asked the Administration to consider a hypothetical situation under which a Hong Kong EA may arrange an FDH to take out loans from financial institutions and repay loans to another EA in the FDH's home country, and then make arrangements with the latter EA on splitting the repayment. In this way, the Hong Kong EA, without committing the offence of overcharging, could still obtain an amount of payment that exceeds the prescribed commission by splitting the repayment with the overseas EA.

10. The Administration has advised that apart from the prescribed commission, EA must not directly or indirectly receive from a job-seeker any reward or payment of any kind on account of having obtained, or in connection with obtaining employment for that person. As proposed under the Bill, the maximum penalty for contravening the abovementioned provisions would be raised from the current level of a fine of \$50,000 to a fine of \$350,000 and imprisonment for three years. The Administration has stressed that although Part XII of EO only applies to EAs carried on in Hong Kong, if there is sufficient evidence indicating that a Hong Kong EA has, through an overseas EA, received from job-seekers (including FDHs) a payment on account of having obtained employment for such job-seekers, and that the amount of payment concerned exceeds the prescribed commission, LD will conduct prosecution in accordance with established procedures.

11. The Administration has further advised that paragraph 4.12 of the Code expressly states that EAs should not be directly or indirectly involved in the financial affairs of job-seekers, and should not advise, arrange, encourage or force job-seekers to take out loans from any financial institutions or individuals. If it is found that EA contravenes the requirements or standards in

the Code, LD would issue written warnings or even revoke the licence of EA concerned.

12. The Administration has further advised that apart from rigorous enforcement, it is equally important to raise the awareness of FDHs through publicity and education. LD has reminded FDHs through various channels not to sign any documents or agreements that they do not understand with any person or organization, and not to take out loans from financial institutions for making payments to EAs.

Unlicensed operation of EAs

13. Members in general are supportive of the proposal to raise the penalty for the offence of unlicensed operation of an EA from a maximum fine of HK\$50,000 at present to a maximum fine of HK\$ 350,000 and imprisonment for three years. The revised penalty level is on par with that of the overcharging offence.

Withholding passports

14. Members note that some EAs may illegally withhold an FDH's passport as collateral for loan. At present, an EA or any other person withholding the personal property of FDHs, such as their passports, without their explicit consent may constitute an offence under the Theft Ordinance (Cap. 210) ("TO"). Some members including Dr Hon Fernando CHEUNG and Hon Andrew WAN have expressed concern about the effectiveness of tackling EAs withholding passports of FDHs by EAs under TO, having regard to the possibility that an FDH might have given consent to an EA for keeping her passport for processing necessary documents, but the latter subsequently does not return the passport to the FDH. In such circumstances, withholding of the passport by the EA may not be regarded as "theft", which is usually defined as obtaining personal belongings without the owner's consent. These members have called on the Administration to draw reference to the relevant legislation of Singapore which has provided for a specific offence and penalty to address the malpractice of withholding FDHs' passports by EAs.

15. The Administration has explained that paragraph 3.11 of the Code clearly states that an EA or any other person withholding the personal property of FDHs, such as their passports, without their explicit consent may constitute an offence under TO. As provided by the Bill, non-compliance with the Code by the licensee and/or associates would be a ground upon which C for L could refuse to issue or renew, or revoke a licence under the proposed new section 53(1)(c)(iva), (d)(iii) and (e)(ii) of EO. In fact, since the promulgation of the Code in January 2017, an EA's licence had been revoked for keeping passports

of FDHs without consent. In addition, the Administration has stepped up publicity and educational efforts in relation to the employment of FDHs to enhance their awareness of employees' rights as well as the Code. As regards the suggestion of creating a specific offence under EO for withholding FDHs' passports by EAs, the Administration has advised that this might not be the only or the most effective means to address the issue, as the suggestion could entail other issues such as the difficulty in securing sufficient evidence for prosecution.

Extending the scope of the offence of overcharging job-seekers to associates in addition to the licensee

16. The Administration has explained that at present, only a holder of a licence issued under section 52 of EO ("the licensee") could be held liable to the overcharging offence under section 57(a) of EO, but not other persons involved in the operation of the EA who charge job-seekers excessive fees. For example, if the licensee is a limited company, even if there is sufficient evidence showing that its director(s) or staff member(s) has overcharged job-seekers, LD can only prosecute the limited company. If a job-seeker is overcharged by an EA staff member or a partner in a firm who is not the licensee, the licensee may argue that he/she was not in the know or has no gain during the process, LD may not be able to prosecute owing to the limitations of the provision. Members consider this far from satisfactory, and support the Administration's proposal to amend section 57 to expand the scope of the offence of overcharging to cover certain persons associated with the licensee ("associates"). Members note that the associates include the management of EAs, that is to say, in the case of an EA being a company, any director, manager, secretary, or other similar officers of the company²; or in the case of an EA being a partner in a partnership, any partner in the partnership and any other person concerned in the management of the partnership. The persons employed by EAs and a person purporting to act as a licensee or associate would also be covered.

17. While indicating support for the aforementioned proposals, Hon KWOK Wai-keung and Hon POON Siu-ping have expressed concern on whether an EA employee could become the scapegoat for the licensee since EA employees could be held liable to the overcharging offence in future. Mr KWOK considers that an EA employee assigned to charge excessive commission from

² By "other similar officers of the company", the Administration refers to officers of the company who exercise similar power as that of a director, manager or secretary of an EA, though these officers may not carry the same official title(s). The intention is to close the loophole by netting in those who are in effect in charge of an EA but, in order to evade legal responsibilities, hide behind the scene by not bearing the official title(s) of a director, manager or secretary.

job-seekers may not dare opposing the employer's instructions for fear of losing his/her job. The legal adviser to the Bills Committee has suggested that consideration may be given to providing a defence similar to that in section 15A(5) of the Human Reproductive Technology Ordinance (Cap. 561)³ in section 57 of EO to enhance protection for EA employees.

18. The Administration has advised that whether an EA employee in the above scenario would be held liable would depend on the outcome of investigation. The Administration has stressed that in considering whether to prosecute a person involved in overcharging, LD would carefully consider all relevant facts of each case, such as ascertaining whether such a person is the end receiver of the overcharged commission. The person may also rely upon the common law defence by showing that he/she has an honest and reasonable belief in a state of facts which, if they exist, would make him/her innocent. LD would also strictly follow established prosecution procedures, including consulting the Department of Justice as appropriate, when considering whether to proceed with prosecution of a case. Given such, the Administration considers that the proposed formulation of section 57(1) of EO would afford sufficient protection to an innocent employee. The Administration has explained that it would undermine the effectiveness of the legislative proposals in enhancing the deterrence against overcharging if the proposed defence was specifically provided in the Bill. The Administration considers that EA employees concerned should have sufficient knowledge about labour laws (particularly those concerning placement services), and LD would launch publicity to enhance EA employees' awareness of the overcharging offence as well as the revised penalty level upon the passage of the Bill. Employees should report overcharging cases to LD and serve as prosecution witnesses if their employers have overcharged job-seekers.

Providing a legal basis for the Code of Practice for Employment Agencies

19. The Administration has advised that C for L would take into account EAs' compliance with the Code when considering the issue, renewal or revocation of licences, and the applicant's track record in meeting the

³ The defence in section 15A(5) of the Human Reproductive Technology Ordinance (Cap. 561) reads as follows:

- "It is a defence for a person charged with an offence for contravening subsection (1) to show that -
- (a) the conduct was engaged in by the person –
 - (i) in the course of the person's employment; and
 - (ii) in accordance with instructions given by the person's employer in the course of that employment; and
 - (b) at the time the conduct was engaged in, the person was not in a position to make or influence a decision regarding the conduct."

requirements set out in the Code. Notwithstanding that, the Administration has noted the concerns about the effectiveness of the Code in deterring the malpractices of EAs in the absence of legal backing. Against this background, the Administration has proposed under the Bill a new provision that C for L may issue from time to time codes of practice for EAs.⁴ Moreover, the proposed provisions under section 53(1)(c)(iva), (d)(iii) and (e)(ii) make it clear that non-compliance with a code of practice by a licensee and/or associate(s) will be a ground upon which C for L may refuse to issue or renew, or revoke an EA licence.⁵ The Administration has advised that since the promulgation of the Code, 12 written warnings had been issued by LD to EAs for contravention of the requirements set out in the Code, and one EA's licence had been revoked for keeping passports of FDHs without consent.

20. Members have requested the Administration to promote FDHs' awareness of the Code. Dr Hon Fernando CHEUNG has suggested that the Code should be made available in the mother languages of all FDHs in Hong Kong. The Administration has advised that it would take note of the suggestion. According to the Administration, the Code is available bilingually for reference mainly by EAs and employers, while more easy-to-understand publicity materials would be prepared for FDHs. Further, the one-stop Employment Agencies Portal launched by LD in January 2017 contains useful reference materials and publications, including the Code and press releases on cases of successful prosecution, revocation and refusal of renewal of EAs licences, etc. The Administration has undertaken to closely monitor the implementation of the Code and consider conducting a review in about 18 months or two years after its implementation.

Suggestion of changing the summary offences of overcharging and unlicensed operation into indictable offences

21. According to section 26 of the Magistrates Ordinance (Cap. 227) ("MO"), "[i]n any case of an offence, other than an indictable offence, where no time is limited by any enactment for making any complaint or laying any information in respect of such offence, such complaint shall be made or such information laid within 6 months from the time when the matter of such complaint or information respectively arose." At present, there is no statutory

⁴ Under the Bill, the proposed section 62A(1) will provide a clear legal basis for C for L to issue codes of practice for the operation, management or control of EAs.

⁵ According to the Administration, apart from complying with the statutory requirements (particularly those set out in Chapter 3 of the Code) at all times, whether an EA licensee or an applicant can meet the standards set out in Chapter 4 of the Code is also an important factor which C for L will take into account when considering if a person is a fit and proper person to operate an EA in the course of deciding whether to issue or renew, or to revoke the EA's licence.

time limit specified for the offences under section 60 (Offences) of EO and hence section 26 of MO applies to those offences, including those under the existing section 60(6) and (7) concerning unlicensed operation and overcharging job-seekers respectively.

22. Members have suggested that the Administration should consider extending the statutory time limit for prosecution of the aforesaid two offences so as to allow complainants sufficient time to file complaints, which may reduce the chance of unscrupulous EAs escaping from criminal liability upon the expiry of the statutory time limit.

23. The Administration has explained that the Bill seeks to, among others, increase the maximum penalties for the offences of unlicensed operation of EAs (i.e. the proposed section 60(6)) and overcharging of commission by EAs from job-seekers (i.e. the proposed section 60(7)), so as to generate a greater deterrent effect against offenders. The Administration considers that the deterrent effect against the aforesaid two offences could be further enhanced by extending the statutory time limit for prosecution. The Administration therefore agrees to propose a Committee stage amendment ("CSA") to add a new subsection in section 60 of EO to give effect to the proposed extension of time limit for prosecution of the two offences.

24. The Administration has proposed that the time limit be extended from six to 12 months to tie in with the requirement under section 56(3) of EO that EAs have to retain records of job applicants for a period of not less than 12 months after the expiry of each accounting year of the EA concerned. The Administration has explained that beyond that period, it would be difficult for investigators to secure sufficient evidence for prosecution of the offence(s).

25. At the last meeting of the Bills Committee on 21 November 2017, members noted the Administration's aforementioned position and rationale of proposing to extend the statutory limit to 12 months and agreed that the Administration's proposed CSA be circulated for consideration.

26. With regard to the Administration's proposed CSA provided to the Bills Committee after the last meeting, Dr Hon Fernando CHEUNG has proposed to further extend the time limit for prosecution to two years (i.e. the duration of an FDH contract) so that FDHs could come forward to report the case of overcharging of commission without fear of losing their jobs. He has further proposed to amend section 56(3) of EO to the effect that EAs would be required to keep records of job applicants for a period of not less than 24 months after the expiry of each accounting year. Dr CHEUNG's proposals have been provided to the Administration for consideration and response.

27. The Administration has advised that it would be undesirable to unduly prolong the investigation process by further extending the statutory time limit as evidence and memory will fade along the lapse of time. The Administration has stressed that it is important to start the investigation and evidence collection early as cases involving overcharging of job-seekers (including FDHs) rely heavily on evidence from victims and witnesses, such as documentary proof (e.g. payment receipt issued by EAs and placement record kept by EAs which section 56 of EO requires EAs to keep for a period of not less than 12 months after the expiry of each accounting year) and the statement provided by the aggrieved job-seekers. Beyond the 12-month record keeping period, it would be difficult for investigators to secure sufficient and reliable evidence for prosecution of the offence(s). If an FDH only reports a case to the authority after two years of the date of the commission of the offence(s), such substantial delay will result in difficulties in investigation and evidence collection, and would not be conducive to effective follow-up actions by the authority.

28. As for Dr Hon Fernando CHEUNG's suggestion on amending section 56(3) of EO to the effect that EAs would be required to keep records of job applicants for a period of not less than 24 months after the expiry of each accounting year, the Administration considers that it would impose an additional requirement on EAs which has not been deliberated by the Bills Committee before. Furthermore, contravention of the requirement in section 56(3) constitutes another offence under section 60(3), i.e. one that is separate from the offences under the proposed section 60(6) to (8) of the Bill. The Administration considers it inappropriate to take up the proposal before having fully considered the possible implications, and consulted the stakeholders on the additional liability arising from the proposed extension of the record keeping period.

29. The Administration considers that its proposed CSA has struck a balance between allowing sufficient time for aggrieved job-seekers (including FDHs) to file complaints and at the same time encouraging job-seekers to file complaints as soon as possible after commission of the offence. The arrangement will address members' concerns that unscrupulous EAs might escape from criminal liability due to the expiry of the existing six-month time limit under section 26 of MO, and will further enhance the deterrence against the overcharging and unlicensed operation acts by EAs, which is the primary aim of the Bill.

Committee stage amendment

30. Members in general have not raised objection to the Administration's proposed CSA as elaborated in paragraphs 23, 24 and 29. The Bills Committee has not proposed any amendment.

Resumption of Second Reading debate

31. Subject to the moving of the proposed CSA by the Administration, the Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting of 31 January 2018.

Consultation with the House Committee

32. The Bills Committee reported its deliberations to the House Committee on 19 January 2018.

Council Business Division 2
Legislative Council Secretariat
24 January 2018

Bills Committee on Employment (Amendment) (No. 2) Bill 2017

Membership list

Chairman	Hon KWOK Wai-keung, JP
Members	Hon WONG Ting-kwong, GBS, JP Hon Paul TSE Wai-chun, JP Hon Dennis KWOK Wing-hang (since 13 October 2017) Dr Hon Fernando CHEUNG Chiu-hung Dr Hon Elizabeth QUAT, BBS, JP Hon POON Siu-ping, BBS, MH Dr Hon CHIANG Lai-wan, JP Hon Andrew WAN Siu-kin Dr Hon Junius HO Kwan-yiu, JP Hon HO Kai-ming Hon Jeremy TAM Man-ho (since 13 October 2017) Total : 12 members
Clerk	Ms Joanne MAK
Legal Adviser	Mr Alvin CHUI
Date	13 October 2017

《2017 年僱傭(修訂)(第 2 號)條例草案》委員會
Bills Committee on Employment (Amendment) (No. 2) Bill 2017

曾向法案委員會表達意見的團體/個別人士名單
List of organizations/individuals which/who have
submitted views to the Bills Committee

<u>名稱</u>	<u>Name</u>
1. David BISHOP 先生	Mr David BISHOP
* 2. Domestic Workers Roundtable	Domestic Workers Roundtable
3. Fair Employment Agency	Fair Employment Agency
4. Justice Centre Hong Kong	Justice Centre Hong Kong
* 5. PathFinders Limited	PathFinders Limited
6. Students Against Fees And Exploitation	Students Against Fees And Exploitation
7. 工黨	Labour Party
8. 公民黨	The Civic Party
9. 外勞事工中心	Mission For Migrant Workers
10. 左翼廿一	LEFT21
11. 民主建港協進聯盟	Democratic Alliance for the Betterment and Progress of Hong Kong
12. 社區及院舍照顧員總工會	社區及院舍照顧員總工會
* 13. 社會主義總退修促進委員會	Advocacy of total retreat on Socialism
14. 社會福利機構員工會	社會福利機構員工會
* 15. 香港共產黨	香港共產黨
16. 香港亞洲家務工工會聯會	Hong Kong Federation of Asian Domestic Workers Unions
17. 家傭匡扶中心	HELP for Domestic Workers
18. 泰國移工工會	Thai Migrant Workers' Union
* 19. 劉慧卿女士	Ms Emily LAU Wai-hing
* 只提交意見書 provided submissions only	