Bills Committee on Minimum Wage Bill

Administration's Response to Issues Raised at the Bills Committee Meeting Held on 7 January 2010

Introduction

This paper provides information requested by Members of the Bills Committee at its meeting held on 7 January 2010 in examining the Minimum Wage Bill (the Bill).

Live-in domestic workers

2. The Administration was asked to consider whether clause 6(3) of the Bill should include a reference to the distinctive working pattern, and the complete range of in-kind benefits, of live-in domestic workers. Clause 6(3) exempts live-in domestic workers from the coverage of the proposed statutory minimum wage (SMW) regime. Details of our considerations regarding the exemption are set out in the Legislative Council (LegCo) Brief, as extracted at Annex A.

3. Clause 6(3) provides that:

> "This Ordinance does not apply to a person who is employed as a domestic worker in, or in connection with, a household and who dwells in that household free of charge."

4. It is important to note that the exemption under the Bill is legally tenable since live-in domestic workers are not in an analogous position with other employees because of their distinctive working pattern and their enjoyment of in-kind benefits not available to non-live-in workers. Such different working pattern (especially working and resting in the employer's household) and enjoyment of in-kind benefits (viz. free accommodation, savings in transport between home and workplace, etc.), which form important considerations, stem from the very fact that live-in domestic workers live in the employer's residence.

5. From the drafting point of view, clause 6(3) seeks to provide a clear and objective definition to describe the exempted category of live-in

domestic workers under the Bill. It is neither necessary nor appropriate for the Bill to detail the various policy considerations in the LegCo Brief (including those relating to the distinctive working pattern and in-kind benefits of live-in domestic workers) that have led to, and justify, the exemption. The Bill needs only to define the exempted category of live-in domestic workers for legal purposes, as it is now provided in clause 6(3).

6. For the above reasons, we do not consider that there is a need to revise the current formulation under clause 6(3).

Information on SMW legislation in the United Kingdom and Canada

7. A Member enquired about the provisions relating to live-in domestic workers in the SMW legislation in the United Kingdom (UK) and Canada.

8. In the National Minimum Wage Regulations 1999 of the UK, Regulation 2(2) provides for the exemption of live-in domestic workers from the national minimum wage. Workers who live in the family home of the employer but are not members of the family do not need to be paid the national minimum wage for work done relating to the employer's family household. The requirements specified in Regulation 2(2) for the exemption are at Annex B.

9. As regards Canada, it is noted that the national Canada Labour Code has no particular provisions to deal with live-in domestic workers concerning employees' entitlement to SMW. Down from the federal level, all the provinces and territories in Canada have enacted their own minimum wage laws to suit their local circumstances. For domestic workers, live-in or otherwise, we understand that they are covered by SMW in most provinces and territories, but in New Brunswick[1] and the Northwest Territories[2] domestic workers are exempted.

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1 In New Brunswick, the definition of "employer" in the SMW legislation does not include a person having control or direction of or being responsible, directly or indirectly, for the employment of persons in or about his private home.

2 In the Northwest Territories, SMW legislation does not apply to an employee employed in domestic work in a private residence in which his employer ordinarily resides.

10. For Hong Kong, we consider that our local circumstances, including the unique situation of live-in domestic workers, should be the prime considerations in exempting such workers from the Bill.

Monthly SMW for live-in domestic workers not an option

11. Another Member asked the Administration to explain the justifications for not adopting a monthly SMW for live-in domestic workers in the Bill.

12. It must be pointed out that the main object of the Bill is to provide for SMW at an hourly rate so as to forestall the payment of excessively low wages. SMW is expressed as an hourly rate to help ensure that employees' pay is commensurate with the time that they have worked at a rate not lower than the SMW level. It is not the policy intent of the Bill to provide for a monthly SMW, be it for the working population at large or any particular category of employees, nor is the object of the Bill to regulate the working hours of employees.

13. The LegCo Brief, as extracted at Annex A, has explained the justifications for not adopting a monthly SMW for live-in domestic workers under the Bill. Specifically, the free accommodation and usually free food enjoyed by different live-in domestic workers, even for foreign domestic helpers (FDHs), vary. It means that different live-in domestic workers could have very different wages in real terms, thus rendering it infeasible to set or assume the initial monthly SMW rate. In addition, the genuine risk of a fundamental erosion of the FDH policy could not be underestimated.

Labour and Welfare Bureau/
Department of Justice
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Annex A

Extract from Legislative Council Brief on the Minimum Wage Bill

Domestic workers

13. Domestic workers in Hong Kong are broadly divided into domestic helpers and other workers such as gardeners, chauffeurs, boat boys, etc. To date, domestic helpers make up the bulk of the domestic working population in Hong Kong. Generally speaking, whether a household would employ a certain kind of domestic worker, live-in or otherwise, local or foreign, would depend on its own needs and circumstances.

14. We do not have comprehensive data on the number of live-in domestic workers in Hong Kong. As an indication, however, the number of households employing foreign domestic helpers (FDHs) stood at some 207 500 in the fourth quarter of 2008, whereas the number of households employing local live-in domestic workers stood at about 1 100 in 2006.[2] With the large number of households at stake, it is expected that there would be community-wide concern over the inclusion or otherwise of domestic workers, especially those who live in the households of their employers, in the SMW regime. Indeed, stakeholders (including employer groups, employee groups and labour unions) have expressed different views on the exclusion or otherwise of live-in domestic workers under the SMW.

15. Having carefully considered all relevant factors and circumstances as well as the views of stakeholders, we propose to exclude all live-in domestic workers, local or foreign, from the coverage of the SMW. Our major considerations are, namely, (a) the distinctive working pattern of live-in domestic workers; (b) their enjoyment of in-kind benefits not usually available to non-live-in workers; (c) the possible significant and far-reaching socio-economic ramifications; and (d) the fundamental erosion of the long-established FDH policy.

(a) Distinctive working pattern

The distinctive working pattern, i.e. round-the-clock presence and provision of service-on-demand expected of live-in domestic workers, will give rise to insurmountable practical difficulties in bringing

[2] The household figure is obtained from the General Household Survey conducted by the Census and Statistics Department (C&SD). According to the record of the Immigration Department, the total number of FDHs stood at around 257 000 as at end-2008. As for the number of 1 100 households employing local live-in domestic workers (including domestic helpers, chauffeurs, gardeners, etc. totalling around 1 400), it was obtained from the 2006 Population By-Census conducted by C&SD.

them under the SMW. It is common knowledge that domestic duties are multifarious and can vary day in day out, depending on the prevailing needs of the employer and his/her family members. Since the proposed SMW would be calculated on an hourly basis, it would be impossible to ascertain the actual hours worked so as to determine the wages to be paid.

As live-in domestic workers work and rest in the same place, it is also not possible for a household to keep a clear record of such working hours as required of other employers under the SMW regime. This is especially so for families whose live-in domestic workers are the only persons staying at the households for a substantial period of time while family members are at work or school.

(b) Enjoyment of in-kind benefits

Like non-live-in employees, the employment terms of live-in domestic workers vary, depending largely on the agreement between the parties concerned. Notwithstanding this, the remuneration package for live-in domestic workers is usually distinctive for it includes in-kind benefits not available to non-live-in workers. For example, live-in domestic workers are given free accommodation. Since they live in their employers' residence, such workers are also spared the cost of commuting between home and workplace. It is also common for employers to provide free food given the round-the-clock attendance expected of live-in domestic workers. In short, the distinctive employment terms of live-in domestic workers involve, on top of wages, in-kind benefits not available to non-live-in workers. Live-in domestic workers therefore enjoy a higher disposable income.

For FDHs, the Government has long prescribed a standard employment contract by setting out the basic employment terms, including free accommodation with reasonable privacy, free food (or food allowance in lieu), free medical treatment, free passage from and to the FDH's place of origin, etc. Furthermore, to provide additional safeguard, the Government has since the early 1970s prescribed for FDHs a minimum allowable wage (MAW), currently at $3,580[3].

[3] The MAW is subject to regular reviews. Since its inception in early 1970s, the MAW has since been adjusted for 23 times, all but two were upward adjustments, among which five times represented 20% or more increase each. In setting and reviewing the MAW, the Administration, according to the established mechanism, takes account of Hong Kong's general economic and employment situation, as reflected through a basket of economic indicators including the relevant income movements, price change and labour market situation.

(c) Possible significant and far-reaching socio-economic ramifications

We fully realise that there are many families which have a genuine need for the service of live-in domestic workers, e.g. working couples with children and/or elderly at home who require the round-the-clock presence of live-in domestic workers at home.

Bringing live-in domestic workers, including FDHs, under the SMW could cause financial hardship to many such families. For families that need to stop employing live-in domestic workers owing to increased cost, either a working spouse (more likely the wife) would be forced to leave the workforce and stay home, or the working couples would need to identify a comparable alternative which may not be available.

It is noteworthy that according to figures provided by C&SD, the female labour participation rate (aged 25 to 45) increased from 66.5% to 76.6% between 1998 and 2008, whereas their median monthly earnings stood at around $10,000 in 2008. Against the backdrop of an ageing population in Hong Kong, we should be mindful of any measure that may reduce the labour participation rate of those within the economically active age brackets.

Furthermore, there is a real possibility that, should live-in domestic workers be covered in the SMW, some employers may require their workers to leave the household when there is not much work for the workers to do during day time, in order to minimise the "working time" and thus wages to be paid. We are wary of the possible social problems that this may cause.

(d) Fundamental erosion of the FDH policy

Apart from inclusion under the SMW, it has been suggested by some stakeholders that the Government should prescribe "standard working hours" and remove the "live-in" requirement to enable computation of working hours. However, both of these would amount to a significant departure from the existing FDH policy which has been put in place for good policy reasons and necessary immigration control. Also, to alter the existing FDH employment terms in such a drastic manner would certainly cause much distress to many families.

Indeed, prescribing "standard working hours" and removing the "live-in" requirement would dismantle the cornerstone of the policy of importing FDHs. It has been the Government's established policy that the importation of low-skilled workers should only be allowed where there is confirmed manpower shortage in the local market. The importation of FDHs is designed to meet the shortfall of live-in domestic helpers providing round-the-clock services locally, thus

releasing our home-makers to join the labour force. As some stakeholders have logically argued, should live-in requirement be no longer mandatory, the importation of FDHs should be subject to the Supplementary Labour Scheme restrictions[4], on par with the arrangements for the importation of other low-skilled workers.

Removing the "live-in" requirement for FDHs would also compound the immigration control problem of ensuring that FDHs do not breach their conditions of stay in Hong Kong, e.g. working only for designated employers at designated locations only.

16. In view of the above considerations, we propose to exclude all live-in domestic workers, local or foreign, who dwell in the employer's household free of charge, from the SMW regime. According to legal advice, exclusion of live-in domestic workers from the SMW legislation is legally tenable as there is a justifiable difference, mainly involving different working patterns and provision of in-kind benefits arising from dwelling in the households of their employers free of charge, between live-in domestic workers and other workers who would qualify for the SMW.

Monthly SMW for live-in domestic workers not an option

17. In arriving at the proposed exclusion of live-in domestic workers from the SMW, we have explored, and decided against, the other option of monthly SMW rate for live-in domestic workers proposed by some stakeholders.

18. A monthly SMW would give rise to practical difficulties and significant policy implications in the longer run. First, it is quite infeasible to set/assume the initial monthly SMW rate as the free accommodation and free food at present enjoyed by live-in domestic workers, even for FDHs, vary, meaning that they could have very different wages in real terms.

19. Second, the hourly SMW and monthly SMW[5] would call for different review cycles, mechanisms and indicators (e.g. the household incomes of the

[4] The Supplementary Labour Scheme (SLS) regulates the importation of low-skilled workers from outside Hong Kong. Each application is considered on a case-by-case basis by the Labour Advisory Board, and normally at a ratio of every 2 local workers to 1 imported worker in the same establishment. Imported workers under the SLS are required to be paid at least the median monthly wages of local workers in comparable positions. In 2008, the total number of workers applied for importation under the SLS was 2 440, with 1 082 approved.

[5] One of the proposals from the FDH groups is to derive the monthly SMW rate by applying standard working hours to the same hourly SMW rate minus the assumed costs of in-kind benefits.

FDH employers now being one of the cardinal factors for MAW reviews might be relevant for the monthly SMW, but would certainly not be so for the hourly SMW), as well as adjustment rates, owing to their very different policy objectives and target beneficiaries. Arising from their different review mechanisms, the gap between the hourly SMW and monthly SMW will fluctuate over time. The fluctuations would lead to emotive discussions as invidious comparisons would be inevitable. This would not be conducive to social harmony.

20. The difficulties in setting the monthly SMW rate aside, the risk of a fundamental erosion of the FDH policy as mentioned in paragraph 15(d) remains. One should also note that the MAW has been in place since early 1970s, long before the proposed introduction of SMW, to safeguard the interests of the FDHs. While the current MAW is not statutory, it is mandatory through the stipulation in the standard employment contract for FDHs, alongside other in-kind benefits not available to local workers.

Annex B

Regulation 2(2) of National Minimum Wage Regulations 1999 of the United Kingdom

(2) In these Regulations "work" does not include work (of whatever description) relating to the employer's family household done by a worker where the conditions in sub-paragraphs (a) or (b) are satisfied.

(a) The conditions to be satisfied under this sub-paragraph are -

(i) that the worker resides in the family home of the employer for whom he works,

(ii) that the worker is not a member of that family, but is treated as such, in particular as regards to the provision of accommodation and meals and the sharing of tasks and leisure activities;

(iii) that the worker is neither liable to any deduction, nor to make any payment to the employer, or any other person, in respect of the provision of the living accommodation or meals; and

(iv) that, had the work been done by a member of the employer's family, it would not be treated as being performed under a worker's contract or as being work because the conditions in sub-paragraph (b) would be satisfied.

(b) The conditions to be satisfied under this sub-paragraph are -

(i) that the worker is a member of the employer's family,

(ii) that the worker resides in the family home of the employer,

(iii) that the worker shares in the tasks and activities of the family,

and that the work is done in that context.