

Bills Committee on Minimum Wage Bill

Administration's Response to Issues Raised at the Bills Committee Meeting Held on 5 November 2009

Introduction

This paper provides information requested by Members of the Bills Committee at its meeting held on 5 November 2009 to examine the Minimum Wage Bill (the Bill).

Information on minimum wage systems in other jurisdictions

2. A flowchart depicting the procedures for setting the National Minimum Wage rates in the United Kingdom is at Annex A. The industry coverage of minimum wage in Taiwan is set out at Annex B. The Research and Library Services Division of the Legislative Council Secretariat has previously prepared a research report on the minimum wage system in selected places. An extract of the table from the report summarising such information is at Annex C.

Volunteer, student intern and pupillage

3. The Bill does not apply to cases where there is no employer-employee relationship. Currently, the Employment Ordinance (Cap. 57) is the main piece of legislation governing conditions of employment in Hong Kong, and it covers a comprehensive range of employment protection for every person engaged under a contract of employment.

4. Whether a person is an employee engaged under a contract of employment is a mixed question of fact and law. According to *Chitty on Contracts* (30th edition, 2008, Vol. II, Chapter 39 "Employment", para 39-010) -

"The case law suggests that the factors relevant to the process of identifying a contract of employment may usefully be listed as follows:

- (a) the degree of control exercised by the employer;
- (b) whether the worker's interest in the relationship involved any prospect of profit or risk of loss;

- (c) whether the worker was properly regarded as part of the employer's organisation;
- (d) whether the worker was carrying on business on his own account or carrying on the business of the employer;
- (e) the provision of equipment;
- (f) the incidence of tax and national insurance;
- (g) the parties' own view of their relationship;
- (h) the structure of the trade or profession concerned and the arrangements within it."

The above is not an exhaustive list of relevant factors to be considered. There is no strict rule as to the relative weight that each factor should carry in a particular case.

5. An employment contract entails an exchange of undertaking for the employee to perform work or services for the employer in return for wages or other remuneration. Where a person undertakes to perform work gratuitously (i.e. without consideration), or otherwise with no intention to create legal relations, the essential element of a contract is missing and there is no contract (of employment). A volunteer is therefore not engaged under a contract of employment. According to the Universal Declaration on Volunteering (www.iave.org/content/universal-declaration-volunteering), all people in the world should have the right to freely offer their time, talent, and energy to others and to their communities through individual and collective action, without expectation of financial reward. The "Reference Guide for Volunteer Service" of the Social Welfare Department (2008) also stipulates that volunteer work refers to any service provided by a person voluntarily not for any material reward. As the volunteers and the agency in which they serve do not involve any financial or material reward, a contract of employment does not exist between them.

6. There are a few cases on the subject decided by the English Employment Appeal Tribunal, e.g. *Melhuish v Refbridge Citizens Advice Bureau* [2005] IRLR 419, *South East Sheffield Citizens Advice Bureau v Grayson* [2004] ICR 1138, *Uttley v St John Ambulance and Another* (EAT 635/98), *Migrant Advisory Service v Chaudri* (EAT 1400/97). From the decisions of these cases, it appears that a person/volunteer who agrees to carry out work with an organisation (with no sanction for a failure to honour that commitment) without pay, or who is reimbursed for work-related expenses only, will likely not be working under a contract of employment as there is no consideration and/or intention to create legal relations.

7. As for student interns, internship programmes are commonly adopted by post-secondary and other education institutions for training and education purposes. While the Bill only applies upon the establishment of an employer-employee relationship and full-time students under a training internship would unlikely be caught under normal circumstances, some internship programmes do involve employer-employee relationship between the students and the hosting organisations during the work attachment period. Universities and other education institutions have expressed concerns over the possible reduction in training opportunities should employers be required to pay students on internship at a rate not lower than the statutory minimum wage (SMW). They have appealed for special treatment in respect of students obliged to acquire workplace training and practical knowledge as an integral element of their curricula. We have proposed that student internships which form a compulsory or elective part of their programmes and are required for the award of the academic qualifications in full-time locally-accredited programmes as arranged or endorsed by specified education institutions should be excluded from the application of the Bill.

8. The question as to whether or not a student intern is an employee has to be determined by taking into account all the relevant facts and circumstances of the particular case in question. As stated in the judgment in *POON Chau-nam (Appellant) v YIM Siu-cheung trading as Yat Cheung Airconditioning & Electric Co (Respondent)* (FACV No. 14 of 2006 (Civil)), the modern approach to the question of whether one person is another's employee is to examine all the features of their relationship against the background of the indicia developed in case-law with a view to deciding whether, as a matter of overall impression, the relationship is one of employment, bearing in mind the purpose for which the question is asked. Therefore, there is no hard and fast rule as to what are the relevant factors for distinguishing between a student intern and an employee, not least because there could be variations in arrangements which are referred to as "student internship".

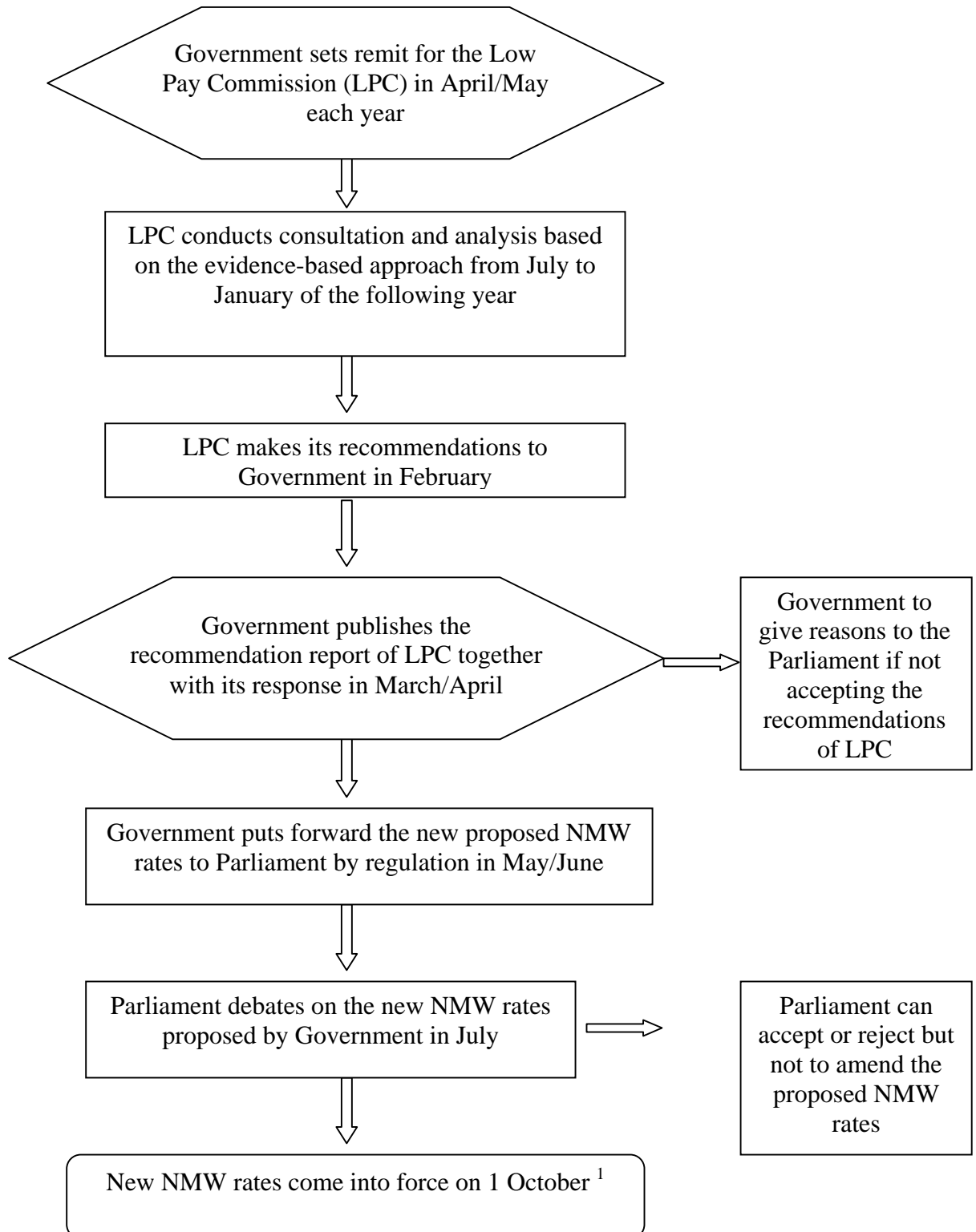
9. On the relationship between pupil master and pupil barrister, it is generally accepted that there is no employer-employee relationship between the parties. In *Edmonds v Lawson and Others* [2000] ICR 567, the English Court of Appeal decided that a pupil barrister was not engaged under a contract of employment and accordingly not a "worker" within the meaning of the Minimum Wage Act 1998 and did not qualify for the SMW.

10. Each case has to be determined on its own facts and circumstances. Whilst there is generally no contract of employment between a pupil master and a pupil barrister, it does not necessarily follow that a contract of employment can never exist in the pupillage arrangements. There is also English case law where an articulated clerk (trainee solicitor) has been held to be engaged under a dual system whereby he was articulated to the individual partner of the law firm under a deed of articles (the training contract) and, at the same time, employed by the law firm in accordance with a contract of employment (*Oliver v J P Malnick & Co* [1983] ICR 708, UK Employment Appeal Tribunal case).

Labour and Welfare Bureau
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Annex A

Flowchart of the Procedures for Setting the National Minimum Wage (NMW) rates in the United Kingdom (UK)



¹ Since the introduction of NMW in 1999, the UK government has accepted all recommended rates from LPC and the UK Parliament has never rejected the proposed NMW rates.

Industry coverage of minimum wage (i.e. “Basic Wage”) in Taiwan

- According to the Labour Standards Act, wages should be determined through negotiations between employers and employees, but the level shall not fall below the Basic Wage.
- Basic Wage is a single rate applicable to all forms of employment relationships in the following lines of business stipulated under the Labour Standards Act:
 - ✧ Agriculture, forestry, fishery and animal husbandry;
 - ✧ Mining and quarrying;
 - ✧ Manufacturing;
 - ✧ Construction;
 - ✧ Water, electricity and gas supply;
 - ✧ Transportation, warehousing and telecommunications;
 - ✧ Mass communication; and
 - ✧ Other lines of business as designated by the Central Competent Authority (e.g. publishing industry, film production industry, banking industry, trust and investment industry, finance and related industry, insurance industry, etc).
- Basic Wage shall not be applicable to the designated lines of business or work as promulgated by the Central Competent Authority should there be any genuine difficulties in the application of the Act for the reasons relating to the mode of operation, management system, characteristics of the work, etc (e.g. domestic carers, whose wages should be determined in accordance with the mutual agreements between employers and employees).

Table 6 – Overall comparison of the minimum wage system in selected places

	Australia	France	Guangdong	Shenzhen	Japan	South Korea	Taiwan	The United Kingdom	The United States	Singapore
Introduction of the current minimum wage system										
Year of establishing the current minimum wage system	1907.	1950.	1994.		1959.	1988.	1984.	1999.	1938.	Not applicable.
Legislation for establishing the current minimum wage system	Conciliation and Arbitration Act.	Minimum Wage Law.	Minimum Wages Regulations.		Minimum Wage Law.	Minimum Wage Act.	Labour Standards Act.	National Minimum Wage Act.	Fair Labor Standards Act.	Not applicable.
Coverage of the minimum wage system										
Eligibility of minimum wage	The minimum wage system applies to most workers, excluding workers who are not covered under the Workplace Relations Act 1996.	The minimum wage system applies to most workers, excluding trainees, apprentices and prisoners.	The minimum wage system applies to most workers, excluding domestic workers.		The minimum wage system applies to most workers, excluding trainees.	The minimum wage system applies to most workers, excluding domestic workers.	The minimum wage system applies to most workers, excluding fishermen.	The minimum wage system applies to most workers, excluding persons such as nannies, trainees, fishermen and prisoners.	The minimum wage system applies to most workers, excluding professionals and fishermen.	Not applicable.
Whether the minimum wage system covers disabled employees	Yes, a disabled employee is assessed for his or her productive capacity and receives wages corresponding to a percentage of the federal minimum wage rate.	No.	No.		Yes, a disabled employee who can perform the job duties is entitled to receive the minimum wage rate.	No.	Yes, a disabled employee is assessed for his or her productive capacity and receives wages corresponding to a percentage of the minimum wage rate.	Yes, if a disabled employee is categorized as a "worker", he or she must be paid the minimum wage rate.	Yes, a disabled employee is assessed for his or her productive capacity and receives wages corresponding to a percentage of the federal minimum wage rate.	Not applicable.

Source: Research report on the minimum wage system in selected places prepared by the Research and Library Services Division of the Legislative Council Secretariat

Table 6 – Overall comparison of the minimum wage system in selected places (cont'd)

	Australia	France	Guangdong	Shenzhen	Japan	South Korea	Taiwan	The United Kingdom	The United States	Singapore
Minimum wage rate and characteristics of minimum wage workers										
Hourly minimum wage rate	In 2007, hourly minimum wage rate: HK\$80.4. A percentage of the hourly minimum wage rate for junior employees, trainees and apprentices.	In 2007, hourly minimum wage rate: HK\$82.5. A percentage of the hourly minimum wage rate for young workers and apprentices.	In 2008-2009, five monthly minimum wage rates which range between HK\$541 and HK\$877. Five hourly minimum wage rates which range between HK\$5.2 and HK\$8.5.	In 2007-2008, two monthly minimum wage rates: HK\$765 and HK\$867. Two hourly minimum wage rates: HK\$4.4 and HK\$5.0.	In 2007-2008, hourly national prefectural minimum wage rate: HK\$45.0. Hourly national industrial minimum wage rate: HK\$51.2.	In 2008, hourly minimum wage rate: HK\$30.5. HK\$27.5 for workers on probation. HK\$24.4 for security guards and caretakers.	In 2007-2008, hourly minimum wage rate: HK\$23.5. HK\$16.4 for apprentices.	In 2007, hourly minimum wage rate: HK\$79.1. HK\$65.9 for workers aged 18 to 21. HK\$48.7 for workers aged 16 to 17.	Higher of the federal minimum wage rate and the state minimum wage rate: (a) in 2007, federal hourly minimum wage rate: HK\$45.4; and (b) state hourly minimum wage rate ranges between HK\$45.4 and HK\$61.6. For youth employees, HK\$33.0. For students, a percentage of the federal minimum wage rate.	Not applicable.
Whether relief measures are implemented	No.	Yes, companies are eligible for exemption in social security contribution.	No.		No.	No.	Yes, major relief measures included: (a) providing financial subsidies to employers; and (b) reimbursing up to 80% of the cost of employee training.	No.	No.	Not applicable.
Real value of the minimum wage rate	Has been appreciating since 1997, except for year 2001.	Appreciated between 2002 and 2005. Under law, the percentage increase of the minimum wage rate cannot be lower than the inflation rate.	Has been appreciating since 2000.		Has been appreciating since 2000.	Has been appreciating since 2000.	Depreciated between 1997 and 2007.	Has been appreciating since 2001.	Depreciated between 1979 and 2006.	Not applicable.
Minimum wage relative to the average wage	Minimum wage relative to the average wage of manufacturing workers: 48% in (2005).	Minimum wage relative to the average wage: 47% (in 2005).	Minimum wage relative to the average wage: about 30% (in 2007).		Average prefectural minimum wage relative to the average wage of manufacturing workers: 32% (in 2007).	Minimum wage relative to the average wage: 28% (in 2007).	Minimum wage relative to the average wage of manufacturing workers: 42% (in 2007).	Minimum wage relative to the average wage: 35% (in 2005).	Minimum wage relative to the average wage: about 31% (in 2006).	Not applicable.
Number of minimum wage workers	101 500 minimum wage workers.	About 2.5 million minimum wage workers (16.8% of the labour force).	About 23 million minimum wage workers.	More than 4.3 million minimum wage workers.	Small number of minimum wage workers.	About 2.1 million minimum wage workers (13.8% of the labour force).	About 1.4 million minimum wage workers (13.3% of the labour force).	About 1.3 million minimum wage workers (5.1% of the labour force).	About 1.7 million minimum wage workers.	Not applicable.
Characteristics of minimum wage workers	Mainly young workers without post-school qualifications and engaging in part-time casual jobs in the retail and hospitality sectors.	About 44% of the minimum wage workers employed in domestic work, 32% in agriculture.	Mainly rural migrant workers; most of them are young female workers who work in labour-intensive industries such as toys, garments, plastics and electrical appliances.	Mainly young female workers who come from inland provinces; employed in labour-intensive industries such as toys, garments, plastics and electrical appliances.	Mainly elderly female workers employed in small-sized companies.	Mainly middle-aged and elderly female workers who are engaged in the manufacturing and retail sectors.	About 65% of the minimum wage workers are women who are mainly in the age groups of 16 to 20, and 55 or above; employed in food and beverages, and retail businesses.	About 66% of the minimum wage workers are women and 60% of the minimum wage jobs are part-time in nature.	Mainly young workers who are employed in service occupations, mostly food preparation and service jobs.	Not applicable.

Table 6 – Overall comparison of the minimum wage system in selected places (cont'd)

	Australia	France	Guangdong	Shenzhen	Japan	South Korea	Taiwan	The United Kingdom	The United States	Singapore
Process of determining the minimum wage rate										
Authority for determining the minimum wage rate	Australian Fair Pay Commission.	Council of Ministers.	Guangdong Bureau of Labour and Social Security.	Shenzhen Labour and Social Security Bureau.	Prefectural labour bureau determining both the prefectural and industrial minimum wages.	Minister of Labour.	Council of Labour Affairs of the Executive Yuan.	Parliament.	Congress determining the federal minimum wage rate. Individual state legislatures setting their own minimum wage rates.	Not applicable.
Advisory body	None.	National Collective Bargaining Commission.	Local trade unions, enterprise unions and entrepreneur associations, but no single advisory body.		Prefectural minimum wage council.	Minimum Wage Council.	Basic Wage Deliberation Committee.	Low Pay Commission.	None.	Not applicable.
Membership of the advisory body	Not applicable.	40 members: four from the government, 18 from five national labour unions and 18 from employer associations.	Information not available.		15 – 20 members who come from the government, employer associations, labour unions, academic institutions and social welfare organizations.	27 members: nine employer association representatives, nine labour union representatives and nine independent members representing the public interests.	17 – 23 members who come from the government, employer associations, labour unions, academic and business research fields.	Nine members who come from employer associations, labour unions and the academic field.	Not applicable.	Not applicable.
Criteria for determining the minimum wage rate	Four criteria: (a) cost of living; (b) consumer price index; (c) economic performance; and (d) wages of comparable workers.	Four criteria: (a) needs of workers; (b) wages of comparable workers; (c) inflation rate; and (d) economic performance.	Seven criteria: (a) minimum living standards of employees and their dependants; (b) average wage of workers; (c) current economic situation; (d) labour productivity; (e) local employment situation; (f) amount of social security benefits; and (g) differences in the level of economic development within the region.		Four criteria: (a) cost of living; (b) consumer price index; (c) economic performance; and (d) wages of comparable workers.	Seven criteria: (a) cost of living; (b) economic growth rate; (c) average wage level; (d) labour productivity; (e) employment rate; (f) consumer price index; and (g) income distribution.	Six criteria: (a) current economic performance; (b) consumer price index; (c) employment situation; (d) labour productivity; (e) workers' wages in different industries; and (f) survey and statistical figures on household income and expenditures.	Six criteria: (a) economic conditions; (b) pay differentials; (c) business costs; (d) competitiveness of economy; (e) inflation rate; and (f) employment level.	Three criteria: (a) cost of living; (b) productivity and wages of comparable workers; and (c) ability of employers to absorb wage increases.	Not applicable.
Procedures for determining the minimum wage rate	The Commission conducts an annual minimum wage review.	The minimum wage rate is adjusted in accordance with changes of the national price index every July. During the interim period, if the nation price index changes by 2% or more, the minimum wage rate will be adjusted automatically.	The provincial labour and social security authorities may adjust the minimum wage rate. The revised minimum wage rate, if any, will be provided to the Ministry of Labour and Social Security for record purpose.		The prefectural minimum wage council recommends the adjusted prefectural and industrial minimum wages for the prefectural labour bureau for approval.	The Minimum Wage Council proposes an adjusted rate to the Minister of Labour for approval.	The Basic Wage Deliberation Committee submits the adjusted basic wage to the Council of Labour Affairs for final approval.	The government determines the minimum wage rates with the advice of the Low Pay Commission, subject to Parliament's approval.	The federal minimum wage rate is adjusted by legislation and any Congressman can introduce a bill to effect an adjustment.	Not applicable.
Frequency of adjustment	Annual basis.	Annual basis.	Annual basis.		Annual basis.	Annual basis.	Irregular adjustment.	Annual basis.	Irregular adjustment.	Not applicable.

Table 6 – Overall comparison of the minimum wage system in selected places (cont'd)

	Australia	France	Guangdong	Shenzhen	Japan	South Korea	Taiwan	The United Kingdom	The United States	Singapore
Enforcement and penalty										
Enforcement agency	Office of the Workplace Ombudsman.	Ministry of Labour, Labour Relations and Solidarity.	Guangdong Bureau of Labour and Social Security.	Shenzhen Bureau of Labour and Social Security.	Prefectural labour bureau.	Ministry of Labour.	Council of Labour Affairs.	Her Majesty's Revenue and Customs.	Department of Labor.	Not applicable.
Penalty for failing to pay the minimum wage rate	For individuals, not exceeding HK\$38,580; for corporations, not exceeding HK\$192,900.	Standard penalty of HK\$14,655.	Between HK\$5,100 and HK\$51,000.		Not exceeding HK\$1,338 per worker.	Not exceeding HK\$162,000 or imprisonment for not more than three years, or both.	Between HK\$484 and HK\$4,840.	Not exceeding HK\$71,650.	Not exceeding HK\$85,448; with a second penalty possibly resulting in imprisonment.	Not applicable.
Penalty for making a false report to the enforcement agency	Information not available.	Information not available.	Information not available.		Not exceeding HK\$669 per worker.	Not exceeding HK\$81,600.	Between HK\$2,420 and HK\$12,100.	Information not available.	Information not available.	Not applicable.