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Paper for the House Committee meeting on 18 February 2011

Report of the Subcommittee on Minimum Wage (Criteria for Approved Assessors) Notice and Minimum Wage (Assessment Methods) Notice

Purpose

This paper reports on the deliberations of the Subcommittee on Minimum Wage (Criteria for Approved Assessors) Notice and Minimum Wage (Assessment Methods) Notice.

Background

2. Schedule 2 to the Minimum Wage Ordinance (Cap. 608) ("MWO") provides a special arrangement whereby persons with disabilities ("PWDs") and whose productivity may be impaired by their disabilities may choose to have their productivity assessed to help determine whether they should be remunerated at not lower than the statutory minimum wage ("SMW") level or at a rate commensurate with their productivity. A PWD is defined in MWO as a person who holds a valid Registration Card for People with Disabilities issued by the Central Registry for Rehabilitation. Under the special arrangement, a trial period of employment not exceeding four weeks¹ is provided for an assessment to be made of the degree of productivity of a PWD in performing his work in the actual workplace to help determine his SMW rate which is commensurate with his productivity.

3. The productivity assessment must be made by an approved assessor. Under sections 1 and 6 of Schedule 2 to MWO, the Commissioner for Labour ("the Commissioner") may, by notice published in the Gazette, specify the kinds

¹ On an application made jointly by the PWD and the employer before the end of the trial period of employment, the Commissioner for Labour may, in exceptional circumstances, extend the length of the trial period by up to four weeks: section 2(5) of Schedule 2 to MWO.

of persons who are eligible to become approved assessors, the requisite lengths of experience such persons must have in the provision of vocational rehabilitation or other services in relation to the employment of persons with a disability ("relevant services"), and the methods of assessment. On 7 January 2011, the Administration published in the Gazette the Minimum Wage (Criteria for Approved Assessors) Notice and Minimum Wage (Assessment Methods) Notice ("the Notices"). The Minimum Wage (Criteria for Approved Assessors) Notice specifies the kinds of persons and the lengths of experience in the provision of vocational rehabilitation or other services in relation to the employment of PWDs for the purposes of the definition of approved assessor in Schedule 2 to MWO. The Minimum Wage (Assessment Methods) Notice specifies the methods for assessing the degree of productivity of a PWD in performing the work required under his contract of employment. These Notices will come into operation on the day on which Schedule 2 to MWO comes into operation, i.e. 1 May 2011.

The Subcommittee

4. At the House Committee meeting on 14 January 2011, Members formed a subcommittee to study the Notices. The membership list of the Subcommittee is in **Appendix I**.

5. Under the chairmanship of Hon TAM Yiu-chung, the Subcommittee has held four meetings with the Administration, including one meeting to receive public views. The list of organizations and individuals who have provided views to the Subcommittee is in **Appendix II**.

6. To allow more time for the Subcommittee to study the Notices, the scrutiny period of the Notices has been extended from 26 January 2011 to 2 March 2011 by a resolution of the Council passed on 19 January 2011.

Deliberations of the Subcommittee

7. The Subcommittee has noted that under the Minimum Wage (Criteria for Approved Assessors) Notice, the following categories of persons may become approved assessors if they have completed satisfactorily the training arranged by the Commissioner for the purpose of making productivity assessments for PWDs -

- (a) a registered occupational therapist who, in that capacity, possesses not less than three years' experience in the provision of relevant services during the immediately preceding seven years;

- (b) a registered physiotherapist who, in that capacity, possesses not less than three years' experience in the provision of relevant services during the immediately preceding seven years;
- (c) a registered social worker who, in that capacity, possesses not less than three years' experience in the provision of relevant services during the immediately preceding seven years; and
- (d) a vocational rehabilitation practitioner being currently engaged, or a veteran vocational rehabilitation practitioner who had been engaged, by one or more organization recognized by the Commissioner for not less than five years in the provision of relevant services during the immediately preceding 10 years, and with the recommendation of such recognized organization(s) to become an approved assessor.

Requirement for a vocational rehabilitation practitioner to obtain a recommendation from a recognized organization²

8. Some members are concerned that under the Minimum Wage (Criteria for Approved Assessors) Notice, the requirement for obtaining a recommendation from a recognized organization only applies to a vocational rehabilitation practitioner but not a registered occupational therapist, registered physiotherapist or registered social worker. These members are of the view that the requirement should be abolished.

9. The Administration has advised that the productivity assessment of PWDs under the SMW regime has been devised after discussions involving PWDs, parent groups, rehabilitation organizations, employers of PWDs, relevant professional associations of approved assessors and the Equal Opportunities Commission. In the course of consultation with stakeholders, there are views that the quality of approved assessors is key to the smooth and effective implementation of the assessment mechanism. Regarding the criteria for approved assessors, the requirement of holding a valid registration or practising certificate under the relevant Ordinances applies to the categories of registered occupational therapists, registered physiotherapists and registered social workers. This requirement of a valid registration or practising certificate does not cover the category of vocational rehabilitation practitioners who may come from a wide variety of background. They are required, instead, to obtain a recommendation from a recognized organization. The requirement for obtaining a

² The Minimum Wage (Criteria for Approved Assessors) Notice refers to such an organization as a "recognized person".

recommendation, like other criteria for the approved assessors, is to ensure the quality of productivity assessments to be conducted under the special arrangement. The Administration will explain in detail the purpose of the requirement and criteria for recommending a vocational rehabilitation practitioner who seeks to become an approved assessor in the briefings to be held for the recognized organizations.

10. Some members are of the view that if the requirement for obtaining a recommendation is not abolished, relevant trade unions should also be allowed to make recommendations for eligible vocational rehabilitation practitioners to become approved assessors. The Administration has advised that as stated in the Legislative Council Brief, any organization, including a trade union, which provides relevant services can be recognized by the Commissioner as a recognized organization.

11. A member has suggested that if a vocational rehabilitation practitioner could not obtain the recommendation of the recognized organization(s) that has engaged him in the provision of relevant services, he should be allowed to use his performance appraisal report issued by the recognized organization as a substitute for the recommendation. The Administration has advised that the past performance appraisal reports of an applicant assessor usually embody a lot of sensitive personal data and the assessments contained therein may not sufficiently and accurately reflect his suitability for undertaking the duties of an approved assessor.

12. A member takes the view that in the event that none of the recognized organizations which have engaged the vocational rehabilitation practitioner agrees to recommend him to become an approved assessor, the applicant should be allowed to refer the case to the Labour Department ("LD") for assistance. The Administration has explained that if LD receives requests for assistance of such a nature, it will contact the recognized organization concerned to follow up as appropriate.

13. Members have noted that the recognized organizations will include the Social Welfare Department, the Hospital Authority, the Vocational Training Council, non-government organizations which have received subvention from the Social Welfare Department during the immediately preceding 10 years to provide vocational rehabilitation services (e.g. New Life Psychiatric Rehabilitation Association, Hong Kong Society for the Blind, Hong Kong Down Syndrome Association, Tung Wah Group of Hospitals, Caritas Hong Kong, Po Leung Kuk), training bodies appointed by the Employees Retraining Board to provide training courses for PWDs and people recovering from industrial accidents during the immediately preceding 10 years (e.g. Hong Kong

Confederation of Trade Unions, Hong Kong Rehabilitation Power, Hong Kong Workers' Health Centre Limited, Hong Kong Society for Rehabilitation, Hong Kong Federation of Handicapped Youth), and self-help groups providing relevant services during the immediately preceding 10 years (e.g. Rehabilitation Alliance Hong Kong), etc. The Administration may add more organizations to the list of recognized organizations with reference to the information collected, for instance, through verifying the information provided by approved assessor applicants on organizations by which they have been engaged in the provision of relevant services. A member is of the view that the list of recognized organizations should be set out in the relevant subsidiary legislation.

14. The Administration has advised that to accommodate the need for updating the list of recognized organizations from time to time in the light of operational experience so as to facilitate the timely recruitment of approved assessors, the Administration does not consider it appropriate to list the recognized organizations in the subsidiary legislation.

Whether the proposed four categories of approved assessors would be adequate

15. Some members are concerned whether there will be a sufficient number of approved assessors to carry out the assessments for PWDs. A member has suggested that arrangements be made for all eligible occupational therapists, physiotherapists and social workers of the Department of Health, Hospital Authority and the Social Welfare Department to undergo relevant training to become approved assessors. Another member has suggested that retired social workers should also be allowed to become approved assessors.

16. The Administration has explained that all approved assessors should possess the requisite experience in providing relevant services, and satisfactorily complete the training arranged by LD. According to MWO, a PWD will not have to undergo any productivity assessment unless he invokes the special arrangement. Serving employees with disabilities may opt before the commencement of SMW on 1 May 2011 for undergoing an assessment under the transitional arrangement provided in the SMW regime. According to the Administration, after a serving employee with disabilities has selected this option, he can reserve the right to undergo the assessment at any time from 1 May 2011 onwards until he is no longer employed by the same employer for the same work. Other employees who are PWDs may at any time, if they so choose, seek to have their degree of productivity assessed under section 5 of Schedule 2 to MWO. The question of whether the pool of approved assessors for carrying out the assessments is sufficient would thus depend on the number of PWDs undergoing trial periods of employment, the number of serving employees with disabilities making an option before 1 May 2011, the number of other PWDs

choosing to have their productivity assessed, as well as the timing of the actual assessments being conducted. In response to the request of members, the Administration has undertaken to highlight in its publicity programmes and materials on the special arrangement that the right to invoke the assessment is vested in PWDs rather than the employers.

Training for approved assessors

17. The Subcommittee has noted that in order to facilitate the approved assessors in completing the assessment aptly and to ensure the quality of the assessment, LD will arrange training for persons eligible to become approved assessors. Some members are concerned about the contents and duration of the training, and whether the trainees are required to pay any training fees.

18. The Administration has advised that no fees will be charged on the training arranged by LD for eligible persons seeking to become approved assessors. The cost of such training will be borne by the Administration. The training to be arranged by LD will assist the assessors to fully appreciate and have a good grasp of the relevant provisions of MWO and relevant subsidiary legislation, the principles of the productivity assessment as well as details of the procedures and methods of the assessment, with a view to ensuring the effective implementation and smooth operation of the assessment mechanism. LD will finalize the content and other details of the training for approved assessors in consultation with stakeholders, including the relevant professional associations of the approved assessors.

Appointment of approved assessors

19. Some members are concerned about the mechanism for the appointment of approved assessors, including how relevant experience is to be counted, whether an approved assessor will be appointed for a fixed period of time, whether the appointment is subject to renewal upon expiry, and the circumstances under which an approval granted to an approved assessor will be withdrawn.

20. The Administration has explained that in order to ensure the quality of approved assessors, the Commissioner will set a validity period for the approval granted to assessors and require those who intend to continue to become approved assessors to complete further training. It plans to appoint the first batch of approved assessors for a term of three years. The Administration may withdraw the approval so granted to an assessor who is considered unable or unfit to carry out his duties owing to poor performance or any justifiable cause. Relevant experience gained on a part-time or full-time basis will be reckoned in the same manner in calculating the aggregate experience. An approved assessor

should, in addition to meeting the other specified requirements, possess the requisite years of experience in the provision of relevant services, such as the provision of vocational training and placement services for PWDs.

21. Some members are concerned about the procedures for the withdrawal of the approval granted to an assessor. The Administration has advised that it will formulate the procedures for withdrawing approval granted to an approved assessor in accordance with administrative law principles. The Administration will provide detailed administrative guidelines and appropriate training for approved assessors to allow them to fully appreciate the responsibilities and requirements when discharging the duties of approved assessor. For a decision to withdraw the approval to be justified and well-grounded, the Administration may regulate the performance of approved assessors through different channels, for example, undertaking surprise checking, monitoring the performance of approved assessors, collecting feedbacks from PWDs and employers, investigating complaints thoroughly, etc. To ensure that any decisions on withdrawal of the approval are made in a fair and impartial manner and are fully justified and on solid grounds, the Administration will set up an advisory committee, with members drawn from stakeholders and relevant professional associations, to advise the Commissioner on whether approval granted to individual approved assessors should be withdrawn. The Commissioner will allow the assessor concerned to make representations which will be taken into account by the Commissioner before arriving at a decision. After coming up with a decision, the Administration will also give the assessor concerned the reasons for the decision and the avenue for appeal. Members have noted that appeals will be considered by the Commissioner and the advisory committee will offer its views to the Commissioner in respect of the appeals. The Administration has confirmed that the procedures described above are administrative in nature and that it would consult the Department of Justice to work out a procedure that would comply with the relevant administrative law principles on procedural fairness.

Register of approved assessors

22. Members have noted that a PWD who decides to invoke the assessment mechanism can select any of the approved assessors from a register to conduct the assessment. Some members take the view that more information about the approved assessors should be provided to PWDs. The Administration has advised that to facilitate PWDs to select the approved assessor to conduct the assessment, the information to be displayed in the register of approved assessors will include the personal particulars of the approved assessors, types of their professions and expertise in providing rehabilitation and other services to PWDs,

relevant working experience, employing and recommending organizations (where applicable), contact details, etc.

Whether an assessment could be conducted by an assessor who works in the same organization as the PWD to be assessed

23. Some members have enquired whether assessment can be conducted by an assessor who works in the same organization as the PWD to be assessed.

24. The Administration has advised that it is incumbent on the approved assessor to ensure that no conflict will arise between his duties involved in conducting the assessment and his other interests. As there will be a conflict of interest if the approved assessor works in the same organization as the PWD to be assessed, approved assessors are not allowed to conduct assessments for PWDs who work for the same employers of the assessors. The Administration has undertaken to highlight this point in its administrative guidelines for approved assessors.

Cost of assessment

25. The Subcommittee has noted that the cost of assessment will be borne by the Government. Some members are concerned how assessors will be remunerated and the remuneration amount for each assessment. The Administration has advised that it plans to pay the assessment fee at a standard rate out of the general revenue to the approved assessor after the completion of an assessment in accordance with MWO and its relevant subsidiary legislation. The Administration is working on the amount of the assessment fee and the financial expenses involved will be reflected in the annual estimates of the relevant years.

Employment protection for PWDs

26. The Minimum Wage (Assessment Methods) Notice provides that if the approved assessor, having regard to all the facts and evidence available, is satisfied that the performance of the PWD and degree of productivity on the day of assessment is adversely affected by any particular circumstances that render him unable to demonstrate his full potential, the approved assessor may adjust upwards the degree of productivity of the PWD. A member is concerned about the protection available to a PWD if the employer disagrees with the adjustment made by the approved assessor and terminate the contract of employment with the employee.

27. The Administration has advised that employees with disabilities are entitled to relevant employment protection in accordance with the Employment

Ordinance ("EO") (Cap. 57) and the Disability Discrimination Ordinance ("DDO") (Cap. 487). When seeking to terminate a contract of employment with an employee, including an employee with disabilities, the employer must comply with EO, other relevant legislation in force and the relevant terms of the employment contract. The exemption from DDO relating to dismissal under MWO is limited to the situation where the dismissal is on account of the outcome of the productivity assessment. If the employee is dismissed on the ground of his disability rather than his failure to satisfy the inherent requirements of the particular employment, MWO does not affect his claim under DDO.

Assessment methods

28. A member has suggested that a PWD should be informed of the requirements and benchmarks for different percentages of productivity before an assessment.

29. The Administration has advised that many job requirements cannot be converted into quantifiable terms and the requirements vary from one job to another. In conducting the productivity assessment, the approved assessor should collect detailed information on the work of the PWD, including the nature, requirements and procedures of the work, through the employer, the PWD and, if appropriate, any other relevant persons familiar with the work of the PWD, such as other employees of the employer performing the same or similar work. Based on the detailed information on the work collected, the approved assessor should exercise his professional expertise and decide on the appropriate factors, namely quality and/or quantity of work, working speed or ability to meet the other requirements of the work, to be considered in the assessment. The Administration has explained that an approved assessor is required under the proposed assessment methods to explain, prior to conducting the assessment, to the PWD and the employer their respective rights and responsibilities under the relevant provisions of MWO, in particular that the right to invoke an assessment is vested in the PWD and not the employer.

Whether an appeal mechanism should be provided

30. Some members take the view that a PWD should be provided with an opportunity for appeal against the result of an assessment. The Administration has advised that the Legislative Council had thoroughly discussed, during the scrutiny of the Minimum Wage Bill, the issue as to whether PWDs who had their degree of productivity assessed should have a review in the form of a second assessment. Since Hong Kong has no experience in the implementation of SMW, particularly the assessment mechanism for PWDs under the SMW regime, the Administration will review the special arrangement for PWDs, including whether

there is a need for an appeal mechanism, in the light of operational experience within two years of the implementation of SMW.

Complaints against assessors

31. Some members are concerned whether there will be any channel for lodging complaints against approved assessors. The Administration has advised that complaints against the assessment mechanism may be lodged with LD. Where appropriate, complaints may also be lodged with the professional bodies concerned.

Requirement for provision of aiding equipment

32. A member is of the view that in addition to providing an assessment of the productivity of a PWD, the Minimum Wage (Assessment Methods) Notice should be amended to require an approved assessor to also advise on the provision of aiding equipment by the employer to the PWD.

33. The Administration has advised that the purpose of the Minimum Wage (Assessment Methods) Notice is to specify the methods of assessment and does not cover requirements on what aiding equipment the employer will have to provide to a PWD. Nevertheless, the Administration will highlight in the administrative guidelines for approved assessors that an assessor may make suggestions on the aiding equipment to be provided by the employer to facilitate the PWD to demonstrate his full potential in the productivity assessment.

Administrative guidelines for approved assessors

34. Noting that the operational details of the productivity assessment will be set out in the form of administrative guidelines to be provided to approved assessors, some members are very concerned about the details of the administrative guidelines to be issued by the Administration. At the request of the Subcommittee, the Administration has provided the draft outline of contents of the administrative guidelines for approved assessors and the draft certificate of assessment. The Administration has advised that the preliminary draft of the administrative guidelines for approved assessors is expected to be available in March 2011. It is consulting stakeholders and relevant professional bodies on the administrative guidelines which cover mainly the application and details of the special arrangement for PWDs under MWO, general duty of approved assessors and fundamental principles to follow, quality control and assessment fee, procedures and operational details of the productivity assessment, administrative procedures of the assessment mechanism, and information and channels for

enquiries on relevant legislation and related matters. Illustrative examples would be drawn up to facilitate the understanding of the approved assessors.

35. At the request of the Subcommittee, the Administration has undertaken to provide the Panel on Manpower the administrative guidelines for approved assessors and the relevant forms contained therein, including the certificate of assessment.

36. A member has requested the Administration to closely monitor the implementation of the productivity assessment mechanism for PWDs and improve the mechanism in the light of operational experience. The Administration has advised that it will closely monitor the implementation of the productivity assessment mechanism and introduce improvements, where necessary, in the light of operational experience. The Administration will review the special arrangement for PWDs, including whether there is a need for an appeal mechanism and the impact of SMW on the employment opportunities of PWDs, in the light of operational experience within two years of the implementation of SMW and report the results to the Panel on Manpower.

Wage subsidy

37. A member is of the view that a wage subsidy of up to 50% should be provided to PWDs whose productivity is assessed to be less than 100%. The Administration has advised that it is not the policy intent of MWO to provide wage subsidy and it has no plan to do so.

Follow-up actions by the Administration

38. The Administration has undertaken -

- (a) to provide the Panel on Manpower its administrative guidelines for approved assessors and the relevant forms contained therein, including the certificate of assessment (paragraph 35 above refers); and
- (b) to review the special arrangement for PWDs, including whether there is a need for an appeal mechanism and the impact of SMW on the employment opportunities of PWDs, in the light of operational experience within two years of the implementation of SMW and report the results to the Panel on Manpower (paragraph 36 above refers).

Advice Sought

39. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
17 February 2011

**Subcommittee on Minimum Wage (Criteria for Approved Assessors) Notice
and Minimum Wage (Assessment Methods) Notice**

Membership list

Chairman Hon TAM Yiu-chung, GBS, JP

Members Hon LEE Cheuk-yan
Hon LEUNG Yiu-chung
Hon LI Fung-ying, SBS, JP
Hon Tommy CHEUNG Yu-yan, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon WONG Ting-kwong, BBS, JP
Hon Cyd HO Sau-lan
Hon CHEUNG Kwok-che
Hon WONG Sing-chi
Hon IP Wai-ming, MH
Hon IP Kwok-him, GBS, JP
Hon Alan LEONG Kah-kit, SC
Hon LEUNG Kwok-hung
Hon WONG Yuk-man

(Total : 15 Members)

Clerk Mr Raymond LAM

Legal Adviser Mr Bonny LOO

Date 21 January 2011

**Subcommittee on Minimum Wage (Criteria for Approved Assessors) Notice
and Minimum Wage (Assessment Methods) Notice**

A. Organizations/individuals which have given oral representation to the Subcommittee

1. Direction Association for the Handicapped
2. Hong Kong Occupational Therapy Association
3. Miss Deborah WAN Lai-yau
4. Mr CHAN Chung-yau
5. Neighbourhood & Workers Service Centre
6. New Life Psychiatric Rehabilitation Association
7. Rehabilitation Alliance Hong Kong
8. The Chronically-ill Patient Minimum Wage Concern Group
9. The Hong Kong Joint Council for People with Disabilities
10. The Mental Health Association of Hong Kong
11. The Parents' Association of Pre-school Handicapped Children
12. Tung Wah Group of Hospitals
13. Union of Hong Kong Rehabilitation Agencies Workshop Instructors

B. Organizations/individuals who have provided written submission only

1. Hong Chi Association
2. Hong Kong Physiotherapy Association Limited
3. Mr YEUNG Wai-sing, Eastern District Council member
4. The Hong Kong Society for the Blind
5. We-Think (Policy Research) Network