Submission on "Policies relating to foreign domestic helpers and regulation of employment agencies" – for Legco Panel on Manpower, 21 February 2014

When formulating policies on migrant domestic workers (MDWs), the Administration has failed to strike a reasonable balance between the interests of employers and employees. The recent cases of Erwiana Sulistyaningsih and Kartika Puspitasari were exceptional in their brutality, but it is important to understand the policy failures which made them vulnerable and which facilitate lesser yet nevertheless serious abuses on a much wider scale. Hong Kong's policies on MDWs fall far below accepted international minimum standards. The difference between decent conditions of work or slavery-like conditions is a question of luck for MDWs. Respect for human rights cannot be left to the will of employers.

1. Unfair immigration policy

In the June 2013 discussion paper provided to this Panel by the Labour and Welfare Bureau,[1] it is stated, "The 'two-week rule' is required for maintaining effective immigration control, preventing job-hopping and imported workers working illegally after the termination of contracts. However, it does not preclude the workers concerned from working in Hong Kong again after returning to their place of domicile. Under some special circumstances such as the worker's previous employer being unable to continue with the contract because of migration, death or financial difficulty; or there is evidence that the worker has been abused or exploited, the Government may allow the worker to change employer in Hong Kong without having to return to the place of domicile."

Neither of the stated ends is achieved fairly by the current policy.

Illegal work

The two-week rule was introduced in April 1987, under the "New Conditions of Stay" (NCS). At the time, workers with 6-month visas who terminated their contracts prematurely were permitted to remain for the duration of their visa. This gave rise to a minority of individuals terminating their contracts shortly after arrival and taking up illegal employment for the remainder of the six months. The two-week rule dealt with this problem, but disproportionately limited the time available for a worker to find a new employer, increasing fears about job-insecurity. A four-week or six-week rule would achieve exactly the same result without unfairly penalising workers who find themselves unemployed.

[1] LC Paper No. CB(2)1356/12-13(03)

Ironically, having a two-week rule encourages illegal work as many workers find themselves having overstayed the unreasonably short time limit in their search for a new employer. Once their immigration status becomes illegal, they may take up illegal employment and/or file non-refoulement claims in order to delay being removed from Hong Kong upon arrest. Applicants from Indonesia and the Philippines now make up about one quarter of all non-refoulement applicants.

Job hopping

The fact is that MDWs still pay the majority of the costs of their recruitment and face significant disincentives to prematurely terminating their contracts in terms of loss of income between jobs. There is no reason to believe that workers derive any personal benefit from job-hopping or that they would choose to change employers unless the conditions of work were so undesirable as to force them to do so. Heaping further penalties upon them is unacceptable and only makes them vulnerable to employers who would exploit their precarious immigration status.

The NCS is a punitive policy expressly designed to penalise individuals whose contracts are prematurely terminated, even through no fault of their own. This is achieved by requiring them to leave Hong Kong after termination (even if they can find a new employer within 14 days and lodge an application to change employer in time) and thus incur longer periods of unemployment and higher agency fees than if they were allowed to change employer in Hong Kong. The express rationale is that this will discourage workers from job-hopping, revealing the Hong Kong Government's wish to protect the interests of employers, even when this exposes workers to higher risks of exploitation and abuse and violates the principle of freedom of contract.

Victims of exploitation or abuse who do terminate their contracts are further discouraged from bringing legal claims against their employers because they will invariably be denied permission to change employer until they can show evidence of being abused or exploited. In practice, this means enduring at least 6 months to one year of unemployment in Hong Kong while pursuing their claims in the Labour Tribunal before a legal determination is reached. Where criminal charges are laid against the employer, this period can stretch even longer as Labour Tribunal hearings are adjourned. Meanwhile, the worker has to rely on charity or pay for food and accommodation herself as well as $160 each time she renews her visa in preparation for the next hearing. As a result, even when a worker does file a claim against her employer, claims are typically settled prematurely for a fraction of the worker's entitlements so that she can return to work to support her family and prosecution cases collapse.

Time for review

Unsurprisingly, Hong Kong's unfair immigration rules towards MDWs have been the subject of repeated criticism from international human rights bodies such as the HRC,[2] CESCR,[3] CERD,[4] CEDAW,[5] and the ILO,[6] as well as the US Department of State's Trafficking in Persons Report.[7] The HKSARG claims that the legality of the two-week rule was confirmed by the Privy Council before 1 July 1997 in the case of *Vergara & Arcilla v Attorney General* ([1989]1 HKLR 233).[8] This is intentionally misleading. The judicial review was brought before the introduction of the Basic Law and the application of the proportionality test in public law cases.[9] What the Government does not mention is that their Lordships found that, "It is certainly true that the F.D.H. vulnerability, vis-à-vis her employer, was increased by the change of policy." It is therefore ripe for a fresh legal challenge for being discriminatory.

Interestingly, the letter to the Panel dated 7 October 2013 from the Commissioner of Labour explains a new policy for preventing job-hopping by scrutinising the number of and reasons for premature contract termination within 12 months, with a view to detecting any abuse of the arrangements for premature contract termination.[10] With this new policy in place, the rationale for introducing the two-week rule in 1987 is obsolete and it is time to review the NCS. Isolated cases of abuse by a minority can be addressed without the need to deny human rights to all. **It is therefore recommended that the Immigration Department introduce a policy of allowing workers at least 4 weeks to find a new employer and permit change of employer in Hong Kong.**

2. Intermediary Charges

For workers from Indonesia

Until 2013, Indonesian workers paid HK$21,000 over seven months to Hong Kong money lenders ($18,000 plus $3,000 interest at 50% APR). This money was shared between the Indonesian agency and the Hong Kong agency so that Hong Kong

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[2] CCPR/C/CHN-HKG/CO/3, 29 April 2013, para 21
[3] E/C.12/1/Add.107, 13 May 2005, paras 78(c) and 95. Also see the List of Issues for the upcoming review: E/C.12/WG/CHN/Q/2, 13 June 2013, para 40.
[4] CERD/C/CHN/CO/10-13, 15 September 2009, para 30
[5] CEDAW/C/CHN/CO/6, 26 August 2006, paras 41-42
[6] Observation (CEARC) on C097, adopted 2012
[7] US Department of State, Trafficking in Persons Report 2013 – Hong Kong (Tier 2)
[8] Available at http://www.bailii.org/uk/cases/UKPC/1988/1988_11.html. See LC Paper No. CB(2)796/06-07(05), para 14
[9] *Vergara* was decided under the *Wednesbury* principle. The introduction of the Bill of Rights in 1991 is ignored here because of the exclusion that applies to the application of immigration legislation.
[10] Further details in the HKSARG's press release dated 30 August 2013, available at http://www.info.gov.hk/gia/general/201308/30/P201308300757.htm

agencies could continue to charge employers unreasonably low fees (typically $3,000-$4,000). Shame on Hong Kong for turning a blind eye to this abuse for so long.

Since 2013, Indonesia has implemented a decree from the Ministry of Manpower (Kepmenakertrans 98/2012) which provides that Indonesian migrant workers should pay a maximum of HK$13,436 for training and placement in Hong Kong. With finance charges, this typically amounts to around $16,000. While this is an improvement on the previous situation, continued monitoring for overcharging is essential to prevent Hong Kong agencies from extracting illegal commissions from the workers. Interest rates charged by the Hong Kong money lenders and collection practices also need monitoring.

For workers from the Philippines

In 2006, the Governing Board of the Philippines Overseas Employment Administration (POEA) resolved to prohibit the collection of any placement fee from household workers (Governing Board Resolution No 6 of 2006). Although this was in line with standards of international law as discernable from ILO Convention No 181, that the job-seeker should not pay the costs of recruitment, the Hong Kong Government apparently protested this to the Philippines' Government to minimize the impact on employers.[11]

The irony is that the POEA's order has never been enforced in practice. It is well documented that Filipino migrant workers usually pay significant pre-departure fees to the Philippines' agency.[12] They then incur further debts upon arrival in Hong Kong when they face repayment demands from a Hong Kong money lender for money they never saw for their placement fee. As such, Hong Kong agents can continue to collect illegal commissions through money lenders and avoid any legal repercussions.[13]

For renewal / change of employer in Hong Kong

Again, surveys reveal significant overcharging of migrant domestic workers upon change of employer in Hong Kong, typically escalating if the worker is sent to Macau or China while waiting for the visa to be approved, as costs that can be incurred are unregulated.

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[11] LC Paper No. CB(2)1356/12-13(03), paragraph 9

[12] 'Forced Labour and Debt Bondage in Hong Kong, A Study of Indonesian and Filipina Migrant Domestic Workers', Peggy W.Y. Lee & Carole J. Petersen, HKU (2006)

[13] Although it is illegal under s.57 Employment Ordinance (Cap. 57) to receive excessive fees from the job-seeker "directly or indirectly", the lack of a paper trail of payments between the money lenders and agencies makes enforcement difficult.

The Indonesian Government requires employment contracts to be endorsed by the Indonesian agency, which is responsible for helping the worker to obtain personal insurance. In principle, this is unobjectionable provided the fees charges are reasonable. In practice, the Indonesian agency charges relatively little for this service. However, the Hong Kong agents use this unregulated area as an excuse to charge Indonesian workers exorbitant fees of up to $9,000 to process their contracts and pocket the difference. As there is no paper trail, it is difficult for the worker to prove they have been overcharged and, even if they can, the Hong Kong agency avoids liability by falsely claiming that the fees were charged by the Indonesian agency. These abuses are less common among Filipino workers because of the POEA's no-fee policy and the absence of any requirement from the Philippines' Consulate that a Philippines' agency endorse the employment contract. **Hong Kong could deal with this matter very simply by the ImmD not requiring that Consulates endorse employment contracts before approving employment visas.** There is no legal requirement for this policy, which does not apply to other foreign workers.

Ultimately, there must be a realisation that free market economics do not work in this industry, where competition between agencies is primarily for business from employers. This is why the 10 percent law is necessary to prevent exploitation of job-seekers, and applies to all sectors. Some agencies do not even charge employers enough to cover the employer's own contractual obligations under the standard employment contract.[14] **Consideration should be given to introducing a fee-scale payable by employers which more realistically reflects the costs of operating an agency in Hong Kong and therefore avoids unscrupulous agencies undercutting the market by illegally recouping their profit costs from the job-seeker through money lenders.**

The practical consequences of intermediary fees and the two-week rule

The Hong Kong Government's policy clearly favours migrant domestic workers shouldering the costs of recruitment in their home country, even if employers remain legally responsible for the bulk of the Hong Kong agency's fees. The reality is that workers will continue to pay significant fees to come to Hong Kong for the foreseeable future and this must inform immigration policy.

We have seen that the New Conditions of Stay penalise workers who wish to leave exploitative or abusive employment situations. Many of the worst cases of abuse, like Erwiana's, occur during the initial months of employment because workers are under debt-bondage to their employers because of their immigration status. **This modern-day slavery can be ended by abolishing the New Conditions of Stay**

[14] Clauses 7 and 8 provide that the employer is responsible to pay for the air ticket and daily travel allowance from the country of origin as well as medical examinations, consular, visa and insurance fees.

and implementing a balanced new regime which i) *reasonably limits* the period of stay upon termination to prevent illegal work; ii) allows scrutiny by ImmD to refuse granting a visa where there is *evidence of job-hopping*; and iii) otherwise allows workers to change employer in Hong Kong so as not to incur additional inhibitory agency fees.

3. Maximum working hours and 24-hour rest days

In respect of live-in domestic workers, the Secretary for Labour and Welfare has stated, "The distinctive working pattern - round-the-clock presence, provision of service-on-demand and the multifarious domestic duties expected of live-in domestic workers - makes it impossible to ascertain the actual hours worked…"[15]

One could not have imagined an official in any modern liberal society having the audacity to stand up and approve what amounts to slavery-like working conditions in public, but in Hong Kong it was even published as a Government press release. It just goes to show how far the Administration is from respecting international labour norms as human rights.

Other countries regulate maximum working hours of domestic workers. Hong Kong cannot justify not doing what the rest of the international community is able to do. A 2013 ILO policy brief on working time of live-in domestic workers demonstrates how this can be achieved.[16] Interestingly, the brief cites a study in Chile from 2000 as the most egregious example of long working hours, at 67.6 per week. Amnesty International's 2013 survey of 94 Indonesians in Hong Kong revealed an average working day of 17 hours, or *over 100 hours* per week.[17]

Even if we abolish the live-in requirement, the reality is that the vast majority of employees are still going to reach a mutual agreement with their employers to live in. It is disingenuous of the Government to recognise the need for a MAW and a standard employment contract while suggesting that working hours is one of the terms and conditions of employment which is to be agreed between employers and employees in the light of market conditions. Having accepted the need to prevent exploitation, **Hong Kong is obliged by international treaties to ensure fair conditions of work, which includes maximum working hours – ILC97 Art. 6(1), ICESCR Art. 7(d), Basic Law Art. 39.**[18]

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[15] HKSARG press release, *Government honours pledge to legislate for minimum wage*, 24 June 2009, available at http://www.info.gov.hk/gia/general/200906/24/P200906240220.htm

[16] Available for download from http://www.ilo.org/travail/info/WCMS_155773/lang--en/index.htm

[17] Available at http://www.amnesty.org/en/library/asset/ASA17/029/2013/en/d35a06be-7cd9-48a1-8ae1-49346c62ebd8/asa170292013en.pdf, page 55.

[18] One cannot argue that the rules on working hours are no less favourable than those enjoyed by local workers as the situation of live-in domestic workers is unique. Although there are strong reasons to introduce statutory

As the majority of FDHs are and will undoubtedly continue to be live-in, the Labour Department is obliged to **raise public awareness of the fact that a rest day is by law a 24-hour uninterrupted period**. Sadly, only a small minority of workers receive genuine rest days. If unreasonable curfew hours are imposed on a worker, or the worker is requested to perform any duties before leaving home or after returning on her rest day, the employer remains liable to pay the worker's salary for that day and the Labour Tribunal should recognise such claims.

Hong Kong residents cannot deny others their right to decent working conditions just to make their own lives more convenient. Very few employers legitimately require a round-the-clock presence with on-demand service, which in no case should be the burden of a single worker. Slavery is illegal. Why do we still condone slavery-like conditions in Hong Kong?

4. The live-in requirement

The Labour and Welfare Bureau has stated, "[P]rescribing "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."[19]

The Administration is obfuscating the matter by failing to distinguish between full-time domestic workers and full-time live-in domestic workers. While it is indisputable that the importation of MDWs meets demand for affordable full-time domestic workers (not available locally[20]), the question of where they choose to sleep or rest outside of working hours is simply irrelevant to this consideration unless they are to be treated not as workers but as slaves.

It's interesting that the "cornerstone" of the Government's policy on migrant domestic workers was subject to exception prior to 1 April 2003. The fact is that many employers who require full-time domestic workers simply do not have enough space at home to provide decent living conditions for the worker. As such, many workers find that the living arrangements they encounter do not match the representation made to the Immigration Department made by the employer. Due to the loss of income incurred from terminating the contract and changing employer (an extended period while the Immigration Department investigates their allegation

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maximum working hours to cover all workers, this submission merely envisages inserting a provision into the Standard Employment Contract (ID407).

[19] Legislative Council Brief, Minimum Wage Bill, June 2009 (File Ref.: LD SMW 1-55/1/4(C)), p7.

[20] Report of the Task Force on Population Policy, February 2003, para 2.31

before exceptionally approving change of employer, that is in the event they manage find a new employer within 14 days and do not have to restart the recruitment process from their home country with all of the additional expense that involves), many workers suffer inadequate living conditions in silence.

While market demand will mean that the vast majority of MDWs continue to live in, this must be a choice to be made by each employer and employee. **The HKSARG cannot justify denying all migrant workers their human right to decent living conditions and the right to choose their place of residence under ICESCR Article 11(1) and ILC97 Art. 6(1)(a)(iii), Basic Law Art. 39.**

5. Inaccurate travel documents

A significant number of MDWs currently in Hong Kong possess travel documents and identity cards which bear inaccuracies, typically regarding their date of birth. Such inaccuracies were generated by the agencies in the country of origin in order to make the job-seeker's profile more desirable to employers.

The job-seekers were usually unaware of this false representation until shortly before departure, when they see their travel documents for the first time. At this stage, a job-seeker cannot withdraw from the recruitment process without paying the agency fee, which she cannot possibly do without working overseas. Under economic and emotional duress applied by the agency, the worker has no option but to depart with the travel document provided.

If an individual later approaches the Immigration Department seeking to correct their personal identity records, she will be prosecuted for the false representation and faces imprisonment for 12 months. This is on par with a person who has used a false passport to conceal his or her identity in order to enter Hong Kong. This is obviously unjust. It prevents many victims of abuse from coming forward to make legal claims because they do not want to use a false date of birth in court. In some cases, employers have even used this knowledge to blackmail them in order to prevent them leaving abusive situations.

This problem was most common several years ago among Indonesian domestic workers and tied to the very high agency fees they had to pay. Fortunately, it is becoming less common. The Immigration Department should amend its prosecution policy to ensure fair treatment of MDWs who have been victims of duress by the agency and who come forward voluntarily to amend minor inaccuracies in their identity documents.

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