

HELPERS FOR DOMESTIC HELPERS ("HDH")

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**SUBMISSION BY HDH TO THE PANEL ON
MANPOWER OF THE LEGISLATIVE COUNCIL ON
POLICIES RELATING TO FOREIGN DOMESTIC WORKERS
AND REGULATION OF EMPLOYMENT AGENCIES**

1. Introduction

- 1.1 HDH is a nonprofit organisation that provides advice and assistance to foreign domestic workers ("FDW").
- 1.2 Over the years since its inception HDH has dealt with thousands of cases of domestic workers being abused and exploited or prosecuted for various offences. In recent years, over 60% of the cases dealt with by HDH involved exploitation by employment agencies. However, there are also a large number of cases of ill treatment and gross violations of FDW's rights by employers.
- 1.3 In light of the recently publicized cases of Indonesian domestic workers, Erwiyana Sulistianingsih, who alleges that she was tortured by her employer, and Kartika, whose employers were convicted of abusing her, the Labour Department has announced a plan to educate FDWs on their rights. There has been no mention of any plan to educate employers on respecting the rights of their domestic workers. In addition, while there are laws in place to protect all workers in Hong Kong, we believe that the laws do not go far enough in safeguarding the rights of FDWs and some existing regulations even limit their ability to gain access to justice.
- 1.4 Below are some of the significant issues faced by FDWs

2. Exploitation by employment agencies

- 2.1 While the Employment Ordinance (Cap. 57) and the Employment Agency Regulations limit the amount of commission that may be received by an employment agency to 10% of a job applicant's first month's wages, it is common knowledge that FDWs are charged several times more than the legal limit by agencies, not only in the FDWs' country of origin but also in Hong Kong. Various modi operandi are used by unscrupulous agencies, including colluding with

lending companies that use intimidatory tactics to extort money from FDWs.

- 2.2 In a reply by the Secretary for Labour and Welfare, Mr. Matthew Cheung Kin-chung, to questions from Hon Leung Kwok-hung in the legislative council on 12 February 2014, he states that *"If ImmD receives notification from employers that they are harassed owing to their FDH's indebtedness, ImmD will keep the information on record. The record will be one of the considerations to be taken into account in future assessment of the relevant FDHs application for visa extension of stay"*. This very statement can be used by rogue agencies conspiring with money lenders to force FDWs to pay bogus loans arranged to disguise the collection of illegal commission. Like the two-week-rule, this policy will contribute to the vulnerability of FDWs to exploitation.
- 2.3 We refer to the HDH submission dated 10 June 2013 which sets out details of agencies' *modi operandi* and a list of recommended measures needed to deal with the problem. We reiterate those recommendations here and provide additional practical and concrete ones:
- (1) The law regulating the collection of placement commission by employment agencies (Part XII of the Employment Ordinance (Cap. 57) and Employment Agency Regulations (EAR)) should be stringently enforced and the operation of agencies against which multiple complaints have been made should be suspended pending the conclusion of the investigation.
 - (2) As FDWs are understandably afraid to complain against their recruiter in the first few months of their employment, the time limit for prosecuting erring employment agencies should be extended from six months to one year from the date the offence of overcharging was committed.
 - (3) There should be greater coordination between the Employment Agencies Administration (EAA), the Police, the Justice Department and the Immigration Department (ImmD) to ensure that in suitable cases, investigations can be fully conducted and victims are able to stay in order to provide relevant information and, if necessary, testify in court.
 - (4) FDWs who agree to testify against agencies should be allowed to take up employment during the investigation and prosecution proceedings which generally take a long time.
 - (5) The maximum penalty of HK\$50,000 imposed on agencies found guilty of overcharging is too low to serve as a deterrent, the penalty should be increased to at least HK\$100,000.

- (6) There should be more stringent licencing requirements for agencies that recruit FDWs, including greater responsibilities for protecting their rights and welfare.
- (7) In addition to the EAR, agencies must be required to abide by an ethical code of conduct in recruiting and placing FDWs with employers.
- (8) The EAR should be amended so that certain acts other than overcharging by agencies such as retaining FDW's' passport and other personal documents as security for placement fees or loans, and colluding with money lenders, are prohibited and criminalised.
- (9) Employers should be informed in writing of the maximum commission that may be charged by agencies to FDWs when they submit an application to employ one. They should also be warned not to cooperate with agencies that try to enlist their help in facilitating the collection of illegal placement fees.
- (10) Employers should be prohibited from paying domestic workers' wages through employment agencies.
- (11) The Labour Department should commit resources to develop a comprehensive action plan to reduce the prevalence of exploitation of FDWs by employment agencies. The Hong Kong government should seek the cooperation of the government of FDWs' countries of origin in achieving this goal.

3. New Conditions of Stay

- 3.1 Since the implementation of the New Conditions of Stay (also known as the Two Week Rule) in 1987, various organizations have advocated for it to be abolished on the grounds that it has made FDWs more vulnerable to abuse and exploitation. Under this rule, a FDW whose employment has been terminated prematurely will not normally be permitted to remain in Hong Kong to take up new employment and will have to leave within two weeks after the date of termination.
- 3.2 Exceptions to the rule are where the employment was terminated due to the employer's financial difficulty, emigration or death, or where there is evidence that the FDW was abused or exploited by the previous employer. FDWs may also be granted a visitor's visa and extension of stay on presentation of specific official documents proving that they are involved in a labour or criminal case.
- 3.3 The government's justification for implementing the Two Week Rule is to prevent "job hopping" and FDWs working illegally after termination of contract. The justification implies that the worker terminates her employment in order to work

for another employer and does it repeatedly with a series of employers. This perception shows lack of understanding of the real situation of FDWs. In fact, there is little incentive for an FDW to change employers repeatedly unless she is being subjected to abuse or poor work condition. Quite the contrary, it is costly for them to job hop because of the exorbitant placement fees they have to pay to find another employer. One of the most common causes of distress for clients of HDH is being mired in debts incurred to obtain a job in Hong Kong and losing their employment within a few months before they are able to recoup their expenses.

4. Unintended effects of the Two Week Rule

4.1 *It deters FDWs from seeking redress when they are abused or when their rights are violated because doing so would inevitably result in their termination and having to leave Hong Kong within 2 weeks.*

(1) Time and again this concern has been raised to the government by various local and international organizations and innumerable papers have been written about it. However, the government, while reiterating the justification for the Two-Week-Rule, has failed to address this specific concern.

(2) While those who have been abused by their employer may be exempted from the Two Week Rule, the difficulty and often complicated and long process of obtaining evidence of abuse required by the Immigration Department (eg. criminal conviction of employer or an award or order issued by the Labour Tribunal in favour of the FDW) prevents FDWs from pursuing their rights and they are therefore often unable to persuade the ImmD to allow them to apply for change of employment without having to first leave Hong Kong.

4.2. *It restricts FDWs' access to justice*

(1) FDWs who decide to seek legal redress are generally prohibited from taking up employment while their case is ongoing. Many of these cases take months if not years to be resolved. Faced with prolonged unemployment as their case drag on and having to rely on charity for their continued stay in Hong Kong, many FDWs are discouraged from pursuing their case.

(2) Those who have the wherewithal to pursue their case are sometimes prevented from doing so as they are denied extension of stay by the ImmD at the end of two weeks following their termination, unless the FDW can produce an official document from relevant government agencies to prove that they have either an ongoing labour case or a police case.

- (3) A common dilemma faced by HDH clients, who were victims of criminal acts, is the requirement by the ImmD to provide a memo from the police to prove that their case is being investigated in order to be granted permission to stay, and being refused such a memo by the police as there is no official policy requiring the police to provide one. This lack of coordination between the two departments and strict bureaucratic requirements leave FDWs in quandary and ultimately leads to the denial of access to justice.
- (4) FDWs who have filed claims with the Small Claims Tribunal or complaint with the Equal Opportunities Commission are also often denied visa extensions. As far as the Immigration Department is concerned, these are not labour cases that merit extension of stay even though the claims are almost always related to their employment. It is hard to see the justification for such an arbitrary division that has, as far as we are aware, no legal authority to substantiate it. The failure to recognize that cases relating to questions affecting employment are heard in a variety of different courts amounts to a denial of access to the courts and to judicial remedies as protected Under Article 35 of the Basic Law.
- (5) Even if a FDW is able to stay and start proceedings in court, she will be required to apply for an extension to her visa at a cost of \$160 per application. Such extensions are granted for just a few weeks at a time, even though it is known that her case will take some or many months to come to trial. This adds to her financial burden when she has no means of supporting herself and, in our experience, leads many FDWs to give up their cases before trial. Again the result is a denial of justice to many FDWs, because of the cost of applying for repeated visa extensions and means that FDWs are effectively in a different position from other residents of the HKSAR when it comes to access to legal remedies through the courts. We would suggest that the obstacle presented by having to pay \$160 every few weeks to pursue a case in the Hong Kong courts amounts to a breach of Articles 25 (equality before the law) 35 (access to justice) and 38 (protection of rights and freedoms) guaranteed under the Basic Law. It is arguable also that the imposition of this fee amounts to a penalty to FDWs in the pursuit of justice.
- (6) Furthermore, it is not uncommon for FDWs to be falsely accused of criminal acts by employers in an attempt to avoid paying statutory entitlements. Again, police investigation of such cases often takes months during which the FDW may not be permitted to leave Hong Kong but is also not allowed to work and yet is expected to repeatedly pay for extensions of stay even though she is not staying in Hong Kong of her own volition.

5. Human Trafficking

- 5.1 Hong Kong has failed to address the issue of trafficking in persons for labour as it lacks the relevant law to deal with such cases. Human trafficking is narrowly defined under Hong Kong law as the movement of people to and from Hong Kong for the purpose of prostitution. This means FDWs who are subject to forced labour, underpayment and debt bondage are not recognized as victims of human trafficking and in some cases are even criminalized and prosecuted instead of being protected.
- 5.2 The US State Department's Trafficking in Persons Report in 2013 downgraded Hong Kong to Tier 2 due to its failure to comply with the minimum standards in combating all forms of trafficking. Under the report FDWs in Hong Kong are clearly identified as being vulnerable and often victims of human trafficking under international standards and the UN Trafficking in Persons 2000 Protocol, however due to the lack of criminal prohibition of forced labour under Hong Kong law, law enforcers, prosecutors and judges have no basis for prosecuting labour traffickers.

6. Additional recommendations

- (1) In addition to educating FDWs on their rights, there must be a campaign to educate employers on respecting the rights of domestic workers.
- (2) Amend the New Conditions of Stay if not abolish the two-week rule outright to encourage FDWs to remove themselves from abusive situation and seek help.
- (3) Amend the definition of human trafficking in line with the 2000 UN Trafficking in Persons Protocol so that victims of forced labour and debt bondage are provided avenues for redress and protected and traffickers are criminally prosecuted.
- (4) Allow FDWs who have been identified as victims of trafficking to take up employment pending litigation.
- (5) Review and amend the policy to charge foreign domestic workers a fee for extending their visas to remain in Hong Kong to pursue legal cases: either waive the fee or grant an extension to cover the whole period up until and including the trial.
- (6) Ratify ILO Convention on Domestic Workers (C189) which provides comprehensive guides and recommendation for the protection of domestic workers.

- (7) Develop a multi-pronged strategy for protecting FDWs in consultation with the various stake holders including FDWs, employers and NGOs.

Helpers for Domestic Helpers
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