



# DWRT

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DOMESTIC WORKERS ROUNDTABLE



## Summary of Issues and Recommendations for COP Legislation vs. Enforcement

Supplement to “Consolidated Submission by the Domestic Workers Roundtable Issues and Recommendations re. Public Consultation on Draft Code of Practice for Employment Agencies” (“Consolidated Submission” dated 16 April 2016)

29 September 2017

*“Financial gain is the driving force behind the exploitation of Workers.”*

We are encouraged by the announcement in the 2017 Policy Address concerning the planned amendments to the Labour Ordinance. Increasing penalties for agents who overcharge is clearly a positive step. However, we note with concern that existing legislation dealing with offences related to the abusive conduct by agents against domestic workers has not been adequately enforced. The lack of resources allocated to investigating and prosecuting criminal offences, the lack of overall transparency and the apparent weak cooperation and coordination between the Labour Department and the Police in this regard is particularly troubling. Regardless of the intended outcome of the amended Code of Practice legislation, the current weak state of enforcement means any desired deterrent effect cannot be achieved.

While there remain numerous areas where the Labour Ordinance could be strengthened, some of which have been elaborated in the “Consolidated Submission by the Domestic Workers Roundtable Issues and Recommendations re. Public Consultation on Draft Code of Practice for Employment Agencies” (“Consolidated Submission”) dated 16 April 2016 (See for example: Summary of Issues and Recommendations for COP, pages 12-17), the entire amendment exercise will be pointless if the lack of enforcement continues to remain unaddressed.

In the current environment of weak enforcement, the Agencies are able to exploit both domestic workers and employers alike. Amongst the three most common unlawful acts agencies engage in are: (i) overcharging of domestic workers for placement fees, (ii) requiring employers to withhold domestic worker salary and transfer said salary directly back to the agency to pay off illegal placement fee debt (the practice of which has been recently confirmed in Hong Kong courts as an illegal salary deduction under the Employment Ordinance); (iii) interference in domestic workers' financial affairs, including the placement of loans to repay illegal charges and conspiracy in the unauthorized and unlawful deductions of wages, (iii) detention of identity documents including passports and HKID cards, and (iv) breach of fiduciary agency obligations by intentionally lying to employers about domestic worker skills and suitability recklessly creating discord in homes and instigating early terminations and "job hopping" in what can only be construed as an effort to obtain more illegal placement fees via new worker placements. It is understood that the Code was created to help address this behaviour. This continued unlawful behaviour represents a clear failure of enforcement, and as such the Code does not address these problems, nor will the proposed amendments to the Labour Ordinance.

Very simple techniques can be employed to catch agents in the process of committing illegals act and acquire sufficient evidence to (a) allow Labour Department officials to apply sanctions for offences under their purview (e.g. the Labour Ordinance) or (b) allow the Police to lay criminal charges for offences that fall under the Crimes Ordinance. Such techniques have proven very effective. In a recent project by HKU students who posed as potential clients of agencies were able to document accurately and in unequivocal terms the extremely high degree of criminal offences being committed in Hong Kong by agencies operating here.

We note our collective surprise and shame that university students were so upset by the current status quo that they risked their own personal safety in order to record illegal agency behavior. It is unacceptable that our young people feel that the agencies' egregious behaviour and the weak enforcement in Hong Kong are so dire that they should be compelled to do this dangerous work on their own. The Labour Department must address these issues directly and immediately so as to protect our youth from feeling the need to continue their clandestine inquiries.

We therefore make the following 3 recommendations to the LD:

1. In consultation with Public Interest Groups, establish a clear set of transparent targets for enforcement and a more precise framework for measuring performance. In addition to the number of agency inspections made annually, targets could include objectives such as capturing specific offences, both "civil" and "criminal". As well, the procedure for these inspections and the results of the inspections should be open to public discussion (see recommendation 7 of the Consolidated Submission).

2. Establish a budget for improving the efficacy of inspections, including staff retention and training.
3. Establish a Working Group with the Police, which not only oversees follow-up of LD investigations which have been referred to the Police, but participates in regular consultations with Public Interest Groups (see recommendation 16 of the Consolidated Submission).

The way forward involves more regular cooperation between the Labour Department and both the Police and Public Interest Groups. While we recognize that investigations are a confidential and protected process, there must be more transparency around the objectives of the investigations, the procedures engaged in the conduct of the investigations, the numbers of investigations, and the results of the investigations. We acknowledge that some of this information is available upon request (e.g. number of investigations), however such data is meaningless without more detail on the nature of the investigations and why the efficacy has been low in terms of evidence gathering, follow-on Police investigations and prosecutions.

To improve the efficacy of Labour Department investigations, there must be an oversight mechanism that assesses the quality of the investigations against the enforcement targets allowing for assessment and improvements of the investigation process. Highly functional and relevant oversight models exist in Hong Kong – the ICAC model for instance. Oversight is critical to ensuring both the efficacy and the accountability of Labour Department investigations.

As an extension of the oversight function, public appeals into the investigation process should be heard when investigations which have been initiated on public complaints fail to yield results. An improved anonymous complaints mechanism similar to the complaints reporting system operated by the ICAC must also be put in place.

It has been proven that there is a high level of criminality amongst agencies in Hong Kong. Yet, according to the Labour Department, in 2015 there were 12 prosecutions of agencies following 1,300 inspections out of the approximately 1,400 agencies operating in Hong Kong. These results are both unconscionable and fiscally unjustifiable. The tools exist to deal with the evidence problem and it is difficult to understand why there should be any further delay in engaging these tools.

Ultimately, the value and impact of any legislation rests on enforcement. The Labour Department does not need to feel that you are alone in this dealing with this issue. There are many simple actions that can be taken to improve the quality of the evidence that is being gathered. Hong Kong Public Interest Groups have highly relevant expertise and are willing to share this with the Labour Department. There is also a strong willingness to cooperate with the Police on investigations. These resources are free and easily accessible.

Furthermore, the Amended EO should add a provision concerning time limitations or statute of limitations for bringing claims under the EO, particularly claims against EAs based on violations of the Code of Practice, the EO, or the terms of their EA licensing. The EO currently does not include such a time limit provision, and as a result most claims against EAs are only allowed if submitted within 6 months from the time of the offense, which is not enough time for most claims. According to the LD and EAA, this is one of the largest impediments to enforcing claims against EA illegal behavior.

One of the critical impediments inhibiting the prosecution of unethical and illegal EA practices is the lack of a relevant and specific time limit provision. And by not including a specific time limit provision in the Amended EO, the LD and EAA have proposed an Amendment and COP *that cannot be effectively enforced*. Under the proposed Amendment, most claims against employment agencies must be made ***within 6 months of the event/injury***. For many reasons, that 6 month time limit is insufficient. *As a result, many legitimate claims against illegal EA behavior go uninvestigated and unprosecuted simply because there is not enough time to do so.* The LD and EAA have both admitted that the short time limit is one of the biggest obstacles they have to successfully prosecuting illegal EA behavior.

There is no reason to spend time amending the EO unless the amended law is enforceable. Accordingly, we recommend:

- A specific provision be included in the Amended EO providing a time limit for bringing claims against EAs for violation of the EO and the Code of Practice. Without such a provision, *the Amended EO and COP cannot be very effective, because the LD/EAA will not have the requisite time needed to enforce such laws*. We recommend the time limit be 6 years from the date of learning of the illegal behavior, as that is the time limit normally ascribed to similar crimes in Hong Kong.
- The time limit mentioned above should begin to run when the offense is discovered rather than when it occurs, as is customary in HK law for similar torts and violations.

This is a very solvable problem. The HK government has already taken several steps to improve the situation. With improved enforcement, and some slight amendments to existing laws, this problem could cease to exist in a very short amount of time. But it will require real, sustained commitment from the HK government.