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Report of the Bills Committee on Minimum Wage Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Minimum Wage Bill.

Background

2. There have been calls for decades, notably from pro-labour groups, for the introduction of a statutory minimum wage ("SMW") in Hong Kong. Prompted by cases of local workers being paid excessively low wages, and there being a lack of a consensus on whether a legislative approach should be adopted in preventing excessively low wages, the Administration launched a two-year voluntary Wage Protection Movement for Cleaning Workers and Security Guards in 2006. The overall review conducted in October 2008 showed that while the Movement had brought about a culture change with the community acquiring a new understanding of wage protection and greater acceptance of corporate social responsibility, there were limitations in promoting wage protection through voluntary participation. The Chief Executive ("CE") therefore announced in his 2008-2009 Policy Address that a bill on SMW would be introduced into the Legislative Council ("LegCo").

The Bill

3. The Bill seeks to provide for an SMW at an hourly rate for certain employees, to establish a Minimum Wage Commission ("MWC") and to repeal or make consequential amendments to relevant legislation.

4. To preserve training opportunities for student interns, students undergoing internship programmes for training and education purposes are exempted from the Bill. Moreover, the SMW exempts all live-in domestic workers (local or foreign) due to their distinctive working pattern, enjoyment of in-kind benefits and other reasons.

5. Special arrangements are proposed in the Bill in respect of persons with disabilities ("PWDs") in recognition of the possible employment difficulties encountered by some PWDs so as to minimize any possible adverse impact of SMW on their employment opportunities. A mechanism will be set up to assess a PWD's

productivity in the actual workplace during a trial period of employment to help determine whether SMW applicable to him could be discounted at a rate commensurate with his productivity. The right to invoke the assessment is vested in the PWD but not the employer.

The Bills Committee

6. At the House Committee meeting on 10 July 2009, Members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

7. Under the chairmanship of Hon TAM Yiu-chung, the Bills Committee has held 30 meetings (comprising 37 two-hour sessions) with the Administration, and received the views of deputations at one of the meetings (comprising four two-hour sessions). A list of deputations which have submitted views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

Policy objectives of the Bill

8. According to the Administration, the main objective of the Bill is to introduce an SMW regime which, by providing a wage floor at an hourly rate, can prevent individuals from receiving excessively low wages for the work they do but without unduly jeopardizing the labour market flexibility and economic competitiveness and without causing significant adverse impact on the employment opportunities for the vulnerable workers.

9. Some members are of the view that the determination of the SMW rate should include the principles enshrined in Article 7 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the requirements under international labour conventions referred to in Article 39 of the Basic Law ("BL39") that workers are remunerated with reasonable wages that enable them to maintain a living with dignity. The Administration has advised that the Bill is introduced in response to community demand for preventing excessively low wages. Given Hong Kong's high degree of external economic orientation and the linked exchange rate system, flexibility of wages and prices are crucial to its competitiveness and resilience to external shocks. Nevertheless, safeguarding the interests of the vulnerable groups and enhancing social harmony are equally important. The Bill seeks to establish a system in determining the hourly SMW rate by striking a sensible balance between the objectives of forestalling excessively low wages and minimizing the loss of low-paid jobs and sustaining Hong Kong's economic growth and competitiveness.

10. Some members take the view that the Bill should seek to ensure that workers would be paid at a reasonable level so as to sustain the basic living of a worker's family. Some other members are however of the view that the Bill should seek to provide a

wage floor instead of combating poverty. They consider that the problem of in-work poverty should be addressed by other vehicles such as social welfare measures instead of SMW.

11. The Administration has advised that wages are returns for individual employees' labour. Also, the size and needs of different families, and in turn overall family expenses, can vary greatly. Families that are in need may obtain financial assistance from the Comprehensive Social Security Assistance ("CSSA") Scheme which provides, among others, financial support to eligible low-income households. Hence, the policy objective of SMW is to provide a wage floor rather than a living wage.

Consistency of the Bill with Article 5 of the Basic Law

12. A member has expressed concern about the consistency of the Bill with BL5, which provides, among others, that the previous capitalist system and way of life in Hong Kong shall remain unchanged for 50 years.

13. The Administration has explained that BL5 only provides for a general principle of maintenance of the previous capitalist system and way of life for 50 years. It does not provide for the details as to what such system would cover. However, following the approach of constitutional interpretation laid down by the Court of Final Appeal in *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 and *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533, it would be appropriate to consider any relevant domestic legislation at the time of the adoption of BL on 4 April 1990 in order to ascertain the context of BL5. Applying this to the SMW context, the Administration has advised that there has been a relevant domestic legislation, the Trade Boards Ordinance (Cap. 63) ("TBO"). Enacted in 1940, TBO provides that CE in Council may, at any time he thinks fit, fix minimum wages for any trade if he is satisfied that the minimum wages being paid to workers in that trade are unreasonably low. It also provides for the establishment of Trade Boards which CE may authorize to advise him in connection with the fixing of any minimum wage. The Court of First Instance has decided in *Chan Noi Heung v Chief Executive in Council* (HCAL126/2006) that section 2(1) of TBO provides CE in Council with the discretion to determine the appropriate circumstances in which, if at all, a minimum wage for any occupation should be fixed. Section 2(2) of TBO also provides CE with the discretion to establish a Trade Board at any time. The decision of the Court of First Instance was subsequently affirmed by the Court of Appeal. As there was already domestic legislation when BL was adopted in 1990 to combat unreasonably low wages in the workplace by the imposition of minimum wages, the Bill is consistent with BL5 in maintaining the previous capitalist system, including legal measures for the fixing of minimum wages.

14. The Administration has further pointed out that under BL147, the Hong Kong Special Administrative Region ("HKSAR") shall on its own enact laws and formulate policies relating to labour. The Bill, being legislation which addresses the problem of excessively low wages by providing for a minimum wage, is within the legislative competence of the HKSAR by virtue of BL147.

Consistency of the Bill with Article 39 of the Basic Law and Article 7 of the International Covenant on Economic, Social and Cultural Rights

15. BL39 provides, among others, that ICESCR and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR. Some members have pointed out that Article 7 of ICESCR sets out the principle that workers should be provided remuneration which provides, as a minimum, a decent living for themselves and their families. These members are concerned about the consistency of the Bill with the principles enshrined in Article 7 of ICESCR and the international labour conventions referred to in BL39.

16. The Administration has advised that although reference is made in BL39 to ICESCR and international labour conventions, it does not have the effect of direct incorporation into domestic laws. Under BL8, the laws previously in force in Hong Kong, including the common law, shall be maintained. Under the common law, an international covenant does not form part of the domestic law unless it is incorporated into domestic legislation.

17. The Administration has pointed out that Article 7 of ICESCR should be read in conjunction with Article 2(1), which is the obligation clause of ICESCR, and the nature of economic, social and cultural rights. Under Article 2(1) of ICESCR, States parties have undertaken international obligations to take steps to the maximum of their available resources to achieve full realization of the rights guaranteed under ICESCR. The wording of Article 2(1) indicates that ICESCR does not create immediately enforceable rights but allows States parties to take steps progressively, to the maximum of resources available, to achieve the rights guaranteed therein. Article 2(1) pronounces that ICESCR only creates binding obligations on the HKSAR in international law to take steps, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in ICESCR by all appropriate means, including the adoption of legislative measures. There is no obligation under ICESCR to implement its rights by legislation. The Administration has stressed that the enactment of the Bill would only strengthen the rights protected under Article 7 of ICESCR, but not undermine them. The Bill is in conformity with BL39 and Article 7 of ICESCR.

Whether the statutory minimum wage should be expressed on an hourly basis

18. Some members are of the view that the main difficulties involved in implementing the proposed SMW arise from the fact that many employees in Hong Kong are paid on a monthly basis, while SMW is expressed on an hourly basis in the Bill. They have asked whether there are any other jurisdictions operating under a framework of monthly wage payment with SMW denominated on an hourly basis.

19. The Administration has advised that similar to the Bill, the national minimum wage of the United Kingdom ("UK") is expressed under the National Minimum Wage Regulations 1999 as an hourly rate and the pay reference period (i.e. wage period) is a month or, in the case of a worker who is paid wages by reference to a period shorter than a month, that period. As for the Bill, the SMW rate is expressed as an hourly rate to help ensure that employees' pay would be commensurate with the duration that they are at work, and minimum wage is derived by multiplying the total number of hours worked by the employee in a wage period by the SMW rate. Studies of other SMW

jurisdictions also indicate that the most common practice is to set the SMW on an hourly basis as it is fair, easy to calculate and can cater for the specific situation of part-time and casual workers as well.

Persons exempted from the statutory minimum wage regime

20. Under the Bill, two categories of employees are exempted from the SMW requirement. Live-in domestic workers, local or foreign, will be exempted. Student interns undergoing a period of work arranged or endorsed by a specified education institution in connection with an accredited programme for which the work is a compulsory or elective component of the programme requirements will also be exempted.

Live-in domestic workers

21. Some members consider that live-in domestic workers, including live-in foreign domestic helpers ("FDHs"), should not be exempted from the Bill. Some other members, however, support the proposed exemption of live-in domestic workers in view of their distinctive work pattern, the difficulty in determining their working hours and the in-kind benefits enjoyed by these workers but not the non-live-in workers.

22. The Administration has advised that domestic workers in Hong Kong are broadly divided into domestic helpers and other workers such as gardeners, chauffeurs and boat-boys etc. To date, domestic helpers make up the bulk of the domestic working population in Hong Kong. The number of households employing FDHs stood at some 207 500 in the fourth quarter of 2008, whereas the number of households employing local live-in domestic workers was about 1 100 in 2006. With the large number of households at stake, it is expected that there would be community-wide concern over the inclusion of live-in domestic workers in the SMW regime. Stakeholders including employer groups, employee groups and labour unions have expressed different views on the exemption or otherwise of live-in domestic workers under the SMW regime. Having carefully considered all relevant factors and circumstances as well as the views of stakeholders, the Administration proposes to exempt all live-in domestic workers, local or foreign, from the coverage of SMW in view of the following considerations -

(a) the distinctive working pattern of live-in domestic workers, especially working and resting in the employer's household, will give rise to insurmountable practical difficulties in bringing them under SMW. Domestic duties are multifarious and can vary day in day out, depending on the prevailing needs of the employer and his family members. Since the proposed SMW would be calculated on an hourly basis, it would be impossible to ascertain the actual hours worked and hence the wages to be paid;

(b) the remuneration package for live-in domestic workers is usually distinctive in that it includes in-kind benefits not available to non-live-in workers. For example, live-in domestic workers are given free accommodation. Since they live in their employers' residence, such workers are also spared the cost of commuting between home and

workplace. It is also common for employers to provide free food given the continuous presence expected of live-in domestic workers. As the distinctive employment terms of live-in domestic workers provide for, on top of wages, in-kind benefits not available to non-live-in workers, live-in domestic workers enjoy a comparatively higher disposable income. For FDHs, the Administration has also long prescribed a Standard Employment Contract and a minimum allowable wage ("MAW");

(c) there are many families which have a genuine need for the service of live-in domestic workers, such as working couples with children and/or elderly at home who require the continuous presence of live-in domestic workers at home. Bringing live-in domestic workers, including FDHs, under the SMW regime could cause financial hardship to many families and which is hardly justified given the explanations in paragraphs (a) and (b) above. For families that need to stop employing live-in domestic workers owing to increased cost, either a working spouse (more likely the wife) would be forced to leave the workforce and stay home. Against an ageing population in Hong Kong, it should be mindful of any measure that may reduce the labour participation rate of those within the economically active age brackets. The effect would likely be particularly acute for women (aged 25 to 45) whose labour participation rate has risen from 67.6% in 1999 to 77.3% in 2009; and

(d) apart from inclusion under the SMW, it has been suggested by some stakeholders that the Government should prescribe "standard working hours" and remove the "live-in" requirement for FDHs to enable computation of working hours. However, both of these would amount to a significant departure from the existing FDH policy which has been put in place for good policy reasons and necessary immigration control. Also, to alter the existing FDH employment terms in such a drastic manner would certainly cause much distress to many families.

23. Some members have asked the Administration to consider including in clause 6(3) a reference to the distinctive working pattern and the complete range of in-kind benefits of live-in domestic workers. The Administration has pointed out that clause 6(3) seeks to provide a clear and objective principle to define the exempted category of live-in domestic workers under the Bill. It is neither necessary nor appropriate for the Bill to set out in detail the various policy considerations, including those relating to the distinctive working pattern and in-kind benefits of live-in domestic workers, that have led to, and justify, the exemption. The Bill needs only to define the exempted category of live-in domestic workers for legal purposes, as is provided in clause 6(3).

24. Some members have requested the Administration to consider whether live-in domestic workers can be included under the coverage of the Bill by providing a formula for calculating the hourly wage rate of a live-in domestic worker from his monthly wage rate, taking into account the complete range of in-kind benefits of the live-in domestic worker. The Administration has advised that the Bill does not seek to regulate the number of hours that employees work and it is not feasible to set such an hourly wage

rate of live-in domestic workers since the actual hours worked and the monetary value of in-kind benefits can vary greatly from one live-in domestic worker to another.

25. Some members are concerned whether boat-boys or domestic workers engaged under different employment conditions would be exempted from the coverage of SMW. The Administration has advised that clause 6(3) seeks to provide a clear, objective and generic principle to set out the kind of live-in domestic workers who are exempted from the Bill. Provisions in the Employment Ordinance (Cap. 57) ("EO") pertaining to domestic servants do not specify a definition for a boat-boy or a household either. The employment terms of individual employees depend largely on the agreement between the parties concerned. As boat-boys or domestic workers may have different terms and conditions of employment, the question as to whether they are employed in or in connection with a household and dwell free of charge in their employing household, and thus exempted from the coverage of the Bill, must be decided by reference to all the facts and circumstances of each case.

Whether a monthly statutory minimum wage should be provided in the Bill for live-in domestic workers

26. A member has suggested providing a monthly SMW rate in the Bill for live-in domestic workers. The Administration has advised that the object of the Bill is to provide for SMW at an hourly rate. In arriving at the proposed exemption of live-in domestic workers from the Bill, the Administration has explored, and decided against, the option of introducing a monthly SMW rate for live-in domestic workers proposed by some stakeholders. It has noted that a monthly SMW will give rise to practical difficulties and significant policy implications in the longer run. It is quite infeasible to set/assume the initial monthly SMW rate because the free accommodation and free food presently enjoyed by live-in domestic workers, including FDHs, vary from one worker to another, meaning that they could have very different wages in real terms. In addition, the genuine risk of a fundamental erosion of the FDH policy (which distinguishes it from other more restrictive policies for importation of low-skilled workers generally) could not be underestimated.

27. The Administration has pointed out that MAW has been in place since the early 1970s, long before the proposed introduction of SMW, to safeguard the interests of FDHs. While the current MAW is not statutory, it is mandatory through the stipulation in the Standard Employment Contract for FDHs, alongside other in-kind benefits not available to local workers.

28. Hon LEE Cheuk-yan will move Committee stage amendments ("CSAs") to include live-in domestic workers under the coverage of the Bill and provide them with a daily SMW calculated from the hourly SMW with a conversion multiplier.

Whether the exemption of live-in domestic workers is consistent with the constitutional protection of human rights in the Hong Kong Special Administrative Region

29. A member has queried whether the exemption of live-in domestic workers is consistent with the constitutional protection of human rights in the HKSAR.

30. The Administration has pointed out that the exemption is compatible with BL25 and Article 22 of the Hong Kong Bill of Rights. The exemption is legally tenable as there is a justifiable difference in treatment between live-in domestic workers and other workers. The exemption reflects the differences in the nature of work and employment/remuneration package between live-in domestic workers and workers who are not employed to work and live in their employer's household free of charge.

31. The Administration has advised that the difference in treatment takes into account the fact that "live-in" is an essential element defining a live-in domestic worker's job. A live-in domestic worker is employed to work and live in his employer's household because he is expected to be present continuously to provide service on demand, if required, such as taking care of the elderly or newborns. It is also common knowledge that domestic duties are multifarious and can vary day in day out. In the circumstances, it would be extremely difficult, if at all possible, to ascertain the actual hours worked so as to calculate live-in domestic workers' wage on an hourly basis.

32. The Administration has stressed that wage is only one of the elements of the employment/remuneration package of live-in domestic workers. Apart from wage, such workers are also remunerated in kind, through provision by employers of free accommodation and usually free food, and through savings on travelling expenses and time between home and work. In the case of FDHs, the protection of the mandatory Standard Employment Contract guarantees them not only MAW and free accommodation and food (or food allowance in lieu), but also free passage and free medical treatment, etc.

Whether the exemption of live-in domestic workers would amount to indirect discrimination under the Sex Discrimination Ordinance (Cap. 480) ("SDO") and Race Discrimination Ordinance (Cap. 602) ("RDO")

33. Some members have pointed out that most live-in domestic workers are female and FDHs. These members are concerned whether the exemption of live-in domestic workers in clause 6(3) would constitute indirect discrimination under SDO and RDO.

34. The Administration has advised that unlike BL or the Hong Kong Bill of Rights Ordinance, SDO and RDO have no constitutional status under the laws of Hong Kong. As a piece of ordinary legislation, neither SDO nor RDO can restrict the legislative competence of the legislature. Once the Bill is enacted, a complainant cannot rely on SDO or RDO to challenge the constitutionality of the exemption.

35. The Administration has pointed out that to establish a prima facie case of indirect discrimination under SDO or RDO, a complainant has to establish the existence of a requirement or condition which a considerably smaller proportion of his sex or racial group can comply with and which the complainant himself cannot comply with and as a result suffers from a disadvantage. If the complainant succeeds in proving all of these, the burden would be shifted to the other party, such as an employer or a service provider, to establish that the application of the requirement or condition is justifiable. The exemption in clause 6(3) is not a requirement or condition which a complainant has to comply with in order to enjoy SMW. As the exemption does not constitute a requirement or condition under section 5(1)(b) of SDO or section 4(1)(b) of RDO, the

constitutionality issue aside, it would not constitute indirect discrimination under SDO or RDO in any case.

Legal tenability of the exemption of live-in domestic workers from the Bill

36. Some members have expressed concern about the possibility of live-in FDHs seeking judicial review on their exemption from the Bill. These members are concerned whether the proposed exemption of live-in domestic workers is legally tenable.

37. The Administration has advised that according to legal advice, the exemption of live-in domestic workers from SMW legislation is legally tenable as there is a justifiable difference, mainly involving different working patterns and provision or not of in-kind benefits arising from dwelling in the households of their employers free of charge, between live-in domestic workers and other workers who would qualify for SMW. Specifically, live-in domestic workers are not in an analogous position with other employees because of their distinctive working pattern and their enjoyment of in-kind benefits not available to non-live in workers. Such different working pattern (especially working and resting in the employer's household) and enjoyment of in-kind benefits (viz. free accommodation, savings in transport between home and workplace, etc.), which form important considerations, stem from the very fact that live-in domestic workers live in the employer's household.

Whether domestic workers are exempted from the coverage of statutory minimum wage legislation in other jurisdictions

38. Some members have enquired whether the SMW legislation of other jurisdictions exempt live-in domestic workers from the SMW regime.

39. The Administration has pointed out that the National Minimum Wage Regulations 1999 of UK provides for the exemption of live-in domestic workers from the national minimum wage. The Regulations specify the requirements under which workers who live in the family home of the employer but are not members of the family do not need to be paid the national minimum wage for work done relating to the employer's family household. As regards Canada, the Administration has advised that the national Canada Labour Code has no particular provisions to deal with live-in domestic workers concerning employees' entitlement to SMW. Down from the federal level, all the provinces and territories in Canada have enacted their own minimum wage laws to suit their local circumstances and in New Brunswick and the Northwest Territories, domestic workers are exempted.

40. The Administration has stressed that the local circumstances in Hong Kong, including the unique situation such as the working pattern and employment/remuneration package of live-in domestic workers and the local socio-economic environment, should be the prime considerations in exempting such workers from the Bill.

Student interns

41. Clause 6(4) exempts student interns from the coverage of the Bill. A student intern is defined in clause 2 as a student undergoing a period of work arranged or endorsed by an education institution specified in Schedule 1 in connection with an accredited programme being provided by the institution to the student for which the work is a compulsory or elective component of the requirements for the award of the academic qualification to which the programme leads.

42. Members are concerned about the circumstances under which a student intern or a volunteer would be regarded as having entered into an employer-employee relationship. The Administration has explained that whether a person is an employee engaged under a contract of employment is a mixed question of fact and law. 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. According to the decisions of the English Employment Appeal Tribunal in a few relevant cases, it appears that a person/volunteer who agrees to carry out work with an organization (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 or intention to create legal relations. The Bill, being aligned with EO, does not apply if there is no contract of employment.

43. A member is concerned whether a pupil barrister is regarded as an employee. The Administration has pointed out that it is generally accepted that there is no employer-employee relationship between a pupil master and a pupil barrister. 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 pupilage arrangements. The English Court of Appeal decided in a case 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 SMW. There is also English case law where an articled clerk has been held to be engaged under a dual system whereby he was articled 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.

Scope of student internship exempted from the Bill

44. Some members have suggested exempting all student interns from SMW. The Administration has advised that providing a blanket exemption for all students from the SMW regime would be prone to abuse and exploitation. Bona fide jobs may be turned into internships to circumvent SMW, and low-skilled workers could be displaced as a result. An unconditional exemption would also be against the interests of students who would otherwise be protected by SMW when they are in employment not necessitated by their curricula, such as in their summer or part-time jobs. Thus, clause 6(4) serves to

exempt employees who are students undergoing internships arranged or endorsed by specified education institutions in connection with full-time locally-accredited programmes for which the work is a compulsory/elective component of the requirements for the award of the concerned academic qualifications.

45. Some members have pointed out that there are many local students who study in universities abroad and undertake internships in Hong Kong. They consider that such students should also be exempted from the coverage of the Bill. A member is however concerned that the exemption of local students who study in overseas universities and undertake internships in Hong Kong may be open to abuse.

46. After consideration, the Administration has advised that in response to the requests and suggestions made by members and some stakeholders to widen the exemption for student-employees so as to preserve their internship opportunities, it will propose CSAs to provide additional exemptions as follows -

(a) an intern employee who is a Hong Kong resident pursuing full-time non-local education programme at undergraduate level or above and undertaking internship in Hong Kong which is arranged or endorsed by his institution and forms a compulsory or elective component of the requirements for the award of the academic qualification will also be exempted from SMW; and

(b) an intern employee who is either studying in a full-time locally-accredited programme in an education institution specified in Schedule 1 or a Hong Kong resident pursuing full-time non-local education programme at undergraduate level or above, irrespective of whether the internship is curriculum-related and whether there is involvement of the institution in arranging the internship, will also be exempted from SMW, subject to the conditions that the employment is for 59 calendar days or less and the employee is below 26 years of age at the beginning of the employment. The exemption from SMW is limited to once in a year for each intern employee.

47. The Administration has pointed out that the exemption proposals related to non-local education programme is confined to student-employees who are Hong Kong residents. The Labour Advisory Board ("LAB") strongly supports this restriction, as its absence could open a floodgate for people from other jurisdictions to work in Hong Kong under intern status, which would be hard to verify. This would also displace students from those available internship places.

48. The Administration has also proposed that in engaging an intern employee exempted from SMW, the wage and employment records kept by the employer under EO should include the documents containing relevant information issued by the concerned institution. For the existing exemption in the Bill and the additional exemption in paragraph 46(a), the information should indicate that the institution has arranged or endorsed the internship which forms a compulsory or elective component of the requirements for the award of the academic qualification. As for the additional exemption in paragraph 46(b), it should indicate that the employee is studying in the

concerned full-time programme. In addition, the employer shall keep a statutory declaration or copy of the statutory declaration provided by the intern employee in paragraph 46(b) confirming that he has not undertaken any exempt student employment commencing in the same calendar year.

49. The Administration has pointed out that the proposed relaxation seeks to address the grave concerns expressed by members and some stakeholders regarding the impact of SMW on internship opportunities of student-employees. However, it is pertinent to note the following potential enforcement problems -

(a) in extending the exemption to full-time students of non-local institutions, since there are numerous education institutions around the world, it would not be possible to draw up a comprehensive list of non-local institutions for quick and easy determination of whether the student-employees are indeed bona fide full-time students of those institutions as claimed. Offence and complaint investigations in enforcing the SMW provisions would not be easy as the Administration would require the co-operation of those non-local institutions and this could take considerable time; and

(b) for the exemption proposal in paragraph 46(b), the limit on the duration of employment is designed to reduce as far as possible part-time and summer jobs being re-packaged as internship not subject to SMW. However, since the employment is no longer linked to internship which is arranged or endorsed by the education institution and forms a compulsory or elective component of the requirements for the award of the academic qualification, the number of students that could qualify for exemption would be considerably large. The number of full-time post-secondary students stood at 158 220 for the school year 2008-2009. This could pose an enforcement challenge if there are a large number of complaints.

50. The Administration has pointed out that it does not propose exempting secondary school students from SMW since the extent of enforcement problems would be even greater because of their large numbers (231 659 students at secondary four to seven levels for the school year 2008-2009) and the fact that summer jobs taken up by secondary school students are mostly elementary work. As regards the suggestion to exempt graduate-employees on internship from SMW, the Administration considers that since graduates are no longer students, they should, as a matter of principle, be protected by SMW when an employment relationship exists, as is the case with other employees.

51. Some members consider that the Administration's proposed relaxation in respect of non-local education programmes should not be confined to those at degree level or above, but should cover all non-local education programmes at post-secondary level or above. The Administration has advised that such relaxation would be open to abuse, as it would be difficult to verify whether or not an education programme in another place is at post secondary level when the education system is different. Other members are concerned about the impact of such further extension of exemption to non-local post secondary programmes on the labour market.

52. A member takes the view that there should be a lower SMW rate for young people aged below 21. The member has pointed out that in UK, there are two lower minimum wage rates which are applicable to workers aged 18 to 21 and those aged 16 to 17 respectively. The Administration has advised that the local circumstances in Hong Kong should be the prime consideration in determining the SMW regime in Hong Kong.

Hours worked

53. Members have noted that under the Bill, the hours worked by an employee in a wage period must be taken to include any time during which the employee is in attendance at a place of employment as defined in clause 2, irrespective of whether he is provided with work or training at that time.

Computation of hours worked and place of employment

54. Some members have expressed concern about how "hours worked" in the Bill should be computed for SMW purpose under different scenarios in different industries. Some members are concerned about the circumstances under which the travelling time of an employee would be counted as hours worked, if the employee has to commute frequently between Hong Kong and the Mainland. Some members are concerned about the risks of small and medium enterprises and employers in the catering, tourism, airline and medical services industries inadvertently breaching the law. They are of the view that the Administration should enhance the clarity of the definition of hours worked to prevent labour disputes in future and to enable employers and employees to understand how hours worked would be counted for determining whether the remuneration to an employee meets SMW requirements without resorting to adjudication in court as far as possible.

55. The Administration has advised that given the multifarious work patterns of employees, the Bill does not seek to set out an exhaustive list of hours worked for the purpose of computing minimum wage. Clause 3 should be read in conjunction with the definition of "place of employment" in clause 2. Apart from clause 3, the question as to whether any time or period is hours worked by an employee for determining whether the remuneration to an employee meets SMW requirements has to be decided by reference to the agreement or contract between the employer and the employee and to all other relevant circumstances of the case.

56. The Administration has pointed out that under clause 3(1)(a), hours that must be taken to be included in computing minimum wage is the time during which the employee is in attendance at a place of employment. Such time is qualified by the notion of "in accordance with the contract of employment or with the agreement or at the direction of the employer" in the definition of "place of employment" in clause 2. To avoid doubt, the Administration will move CSAs to clause 3 to incorporate this notion into the provision.

57. Some members are concerned whether a place would be regarded as a "place of employment" under different scenarios in different industries. The Legal Adviser to the

Bills Committee has advised and the Administration has concurred that a place of employment can be anywhere which fulfils the definition in clause 2, depending on the facts of the case. For example, in determining whether the time during which a real estate agent is meeting a client in a restaurant instead of the office is hours worked under clause 3, the court would look into all the relevant factors of the case such as the employment contract, the employer's agreement or direction, and any relevant trade practices. It is a question of fact as to whether the place is a place of employment as defined in clause 2 and whether the time is hours worked under clause 3. As another example, if an escort guide accompanying a tour group outside Hong Kong is sleeping at night in his personal time, such personal time is not hours worked under clause 3(1)(a) for the purpose of computing SMW, unless there is contrary agreement with the employer. However, when he is awakened by a phone call from the employer requiring him to do work, the time during which he is awake to do work is hours worked under clause 3(1)(a) for computing SMW. In the same vein, an employee may be called upon from time to time by his employer to do work even during off-duty hours, say at home, but the working time to be counted should be distinct from his other time spent at home even though the home may for the limited duration be a place of employment. The issue of an employee falling asleep during working hours should be more a contractual issue with his employer than a matter which may affect the hours worked for the purpose of calculating the hourly wage rate.

58. Some members are concerned how "in attendance" in the definition of "place of employment" is to be interpreted. The Legal Adviser to the Bills Committee has advised that according to the judgment of the Federal Court of Australia in *Comcare Australia (Defence) v O'Dea* (1997) 150 ALR 318 regarding the interpretation of "in attendance" in relation to a workers' compensation case, the meaning of "in attendance" involves a question of fact, not a question of law.

59. Dr Hon LEUNG Ka-lau will move CSAs to broaden the definition of "place of employment" from "for the purpose of doing work" to "for any purpose related to work", and to provide that certain standby hours in respect of certain type of work are not counted as hours worked for the purpose of determining whether the remuneration to an employee meets SMW requirements.

60. Members are concerned whether the working hours of an employee under a contract of employment should be counted as hours worked for computing SMW under the Bill. A member has cited an example in which the contractual working hours of an employee are from 9 am to 6 pm. The member enquired how the hours worked should be counted on a day the employer directed the employee to be off duty from 4 pm to 6 pm.

61. The Administration has advised that in the example cited by the member, the time from 4 pm to 6 pm does not fall within the scope of clause 3. However, if the employer and the employee, by virtue of the contract of employment or their agreement, regard this period as hours worked by the employee, it is included in the computation of SMW. If the time or period in question is regarded as hours worked by the employee under the employment contract or agreement with the employer, it is included in computing SMW under the Bill notwithstanding that it is not covered by clause 3.

62. A member has suggested spelling out in the Bill that "hours worked" should be taken to include "contract hours". The Administration has advised that the hours worked should be counted for SMW computation if the relevant work is carried out in accordance with the employment contract, or with the agreement or at the direction of the employer.

63. Some members are very concerned that employers and employees of small and medium enterprises may find it difficult to compute hours worked for calculating SMW. They consider that the Administration should launch publicity programmes and draw up industry-based guidelines on the computation of hours worked for SMW purpose.

64. The Administration has stressed that in preparing the Bill, the Labour Department ("LD") has undertaken an intensive and extensive engagement and consultation process with various stakeholders and has taken into account the work patterns of employees in different trades and industries with a view to ensuring that the SMW regime is feasible and strikes a reasonable balance among various interests. Prior to the implementation of SMW, LD will vigorously launch publicity and promotional activities so that both employers and employees would understand the legal provisions and their respective obligations and entitlements under the SMW regime. Its engagement process with stakeholder groups will also continue in respect of the preparatory work for implementation, such as the drawing up of guidelines for the concerned sectors.

65. Hon LEE Cheuk-yan, Hon LEUNG Yiu-chung, Hon Cyd HO, Hon CHEUNG Kwok-che and Hon LEUNG Kwok-hung will move CSAs to provide that the hours worked by an employee include any time during which the employee is travelling between his or her place of residence and his or her place of employment that is not his or her usual place of employment. They will also move CSAs to provide that holiday premium and overtime premium shall not be counted as part of wages for the purpose of determining whether the remuneration to an employee meets SMW requirements.

On-call or standby time

66. Some members are concerned whether waiting time, on-call and standby time should be counted as hours worked, especially for escort guides, flight attendants, cross boundary drivers, property agents and healthcare workers of residential care homes for the elderly. The Administration has explained that there are variations in the arrangements when an employee is on call or standby. If the employee, while on call or standby, is not in attendance at a place of employment as defined in clause 2 for the purpose of doing work or receiving training, the time is not hours worked under clause 3(1)(a). If the employee, while on call or standby, is in attendance at a place of employment according to the contract of employment, or with the agreement or at the direction of the employer, the on-call or standby time is hours worked under clause 3(1)(a). The place of employment as defined in clause 2 is any place at which the employee is, in accordance with the contract of employment, or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving training, and this includes the place as designated by the employer, including the home of the employee if so designated.

67. The Administration has stressed that there are a wide range of on-call or standby arrangements, depending on the terms in the contract of employment or the agreement between the employer and the employee. It is not appropriate for clause 3(1)(a) to classify on-call or standby time as hours worked or not indiscriminately without regard to the multifarious variations in the actual arrangements of different employers and employees. Whether on-call or standby time is hours worked under clause 3(1)(a) must be determined according to the facts and circumstances of each case. Apart from clause 3, the question as to whether any time or period is hours worked by an employee for determining whether the remuneration to an employee meets SMW requirements has to be decided by reference to any agreement or contract between the employer and the employee and to all other relevant circumstances of the case.

Meal break

68. Clause 3(2)(a) provides that the hours worked by an employee in a wage period for computing SMW must be taken not to include any period allowed by the employer for a meal except to the extent, if any, during that period that the employee is doing work in accordance with the contract of employment or with the agreement or at the direction of the employer. Some members are concerned about the possible impact of the clause on an employee whose monthly salary includes paid meal break. They are of the view that clause 3(2)(a) should be deleted. Some other members however support keeping clause 3(2)(a) to set out expressly the exclusion of meal breaks from the hours worked by an employee.

69. The Administration has pointed out that clause 3(2)(a) serves to state the hours that must be taken to be excluded in computing minimum wage under the Bill. It does not change the existing arrangements under EO whereby employers and employees are free to agree between themselves the employment terms on meal break. It is not the policy intent of the Bill to prescribe whether an employee should be remunerated for meal break under his contract of employment, nor is the object of the Bill to regulate meal break arrangements. Such employment issues are subject to the mutual agreement of the employer and the employee. After considering the concerns of members, the Administration will propose CSAs to delete clause 3(2)(a). Some members are, however, of the view that with the deletion of clause 3(2)(a), disputes may arise on whether meal break is regarded as hours worked.

70. The Administration has stressed that the removal of clause 3(2)(a)will not change the spirit of clause 3. Specifically, meal break falling outside clause 3(1) is not hours worked under clause 3 for calculating minimum wage. If meal break is regarded as working hours under the employment contract or agreement between the employer and the employee, it is hours worked in computing minimum wage under the Bill, notwithstanding that it is not covered by clause 3 which does not seek to give an exhaustive list of hours worked for SMW computation. Members have requested the Administration to include examples in the guidelines to be drawn up for the concerned sectors.

Provisions on hours worked in the statutory minimum wage legislation of other jurisdictions

71. In view of the difficulties encountered in the interpretation of hours worked, some members have sought information on how hours worked is defined in the SMW legislation of other jurisdictions and whether there are statutory regulations in these jurisdictions regarding the maximum number of working hours of employees.

72. The Administration has advised that under the Minimum Wage Regulations in the Mainland, minimum remuneration should be payable to a worker by his employer pursuant to the law, provided that such worker has performed normal work within the statutory working time or the time as agreed in the contract of employment which is signed in compliance with the law. Normal work means the work performed by a worker within the statutory working time or the time as agreed in the contract of employment pursuant to that contract which is signed in compliance with the law. In UK, the time when a worker is available at or near a place of work for the purpose of doing work and is required to be available for such work must be included in the calculation of national minimum wage pay under the National Minimum Wage Regulations 1999 (Amendment) Regulations 2000. In relation to a worker who by arrangement sleeps at or near a place of work and is provided with suitable facilities for sleeping, the time during the hours that he is permitted to use those facilities for the purpose of sleeping shall only be treated as being time work when the worker is awake for the purpose of working. The time when a worker is travelling for the purpose of duties carried out by him in the course of time work shall be treated as time work with some exceptions. In the United States ("US"), under the Fair Labour Standards Act, in determining the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which is excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

73. At the request of members, the Administration has explained the application of the provisions relating to hours worked, in attendance at a place of employment and meal break for calculating SMW in the Bill, with examples drawn from various trades and industries. The examples provided by the Administration are in **Appendix III**.

Requirement on keeping record of the total number of hours worked by employees

74. Clauses 20 and 21 require employers to keep records of the total number of hours worked by an employee in a wage period while a prescribed minimum hourly wage rate is in force and to produce those records in a single document with certain other employment records. Some members are gravely concerned that such requirement would incur substantive administrative work and cost on the part of employers. They have requested the Administration to consider providing an exemption clause to the effect that employers would not be required to keep record of the total number of hours worked for employees who earn more than a specified income.

75. The Administration has advised that compliance with the minimum wage requirement is checked by multiplying the total number of hours worked by the employee in the wage period by the SMW rate and comparing against the actual wages

payable during that wage period. It is therefore essential for the total number of hours worked to be included in the wage and employment records required under EO. However, in view of the grave concerns of members and some stakeholders over the related administrative costs of employers, it will move CSAs to exempt employers from recording the total number of hours worked of employees whose monthly wages are not less than an amount to be prescribed in a schedule to EO. The schedule will be subject to negative vetting by LegCo.

76. Some members have suggested requiring an employer to advise an employee, such as through a salary slip, of his hours worked in a wage period. Some other members are, however, concerned that such a requirement would impose undue administrative burden on employers, especially those of small and medium enterprises. The Administration has advised that different sectors have different arrangements and practices in the recording of hours worked. The Administration considers it not appropriate for the Bill to seek to alter such arrangements and practices.

77. A member has enquired whether there is any requirement in UK on the employer to keep records of hours worked under the SMW regime. The Administration has advised that under the National Minimum Wage Regulations 1999 in UK, the employer has to keep employment records sufficient to establish that he is remunerating a worker at a rate at least equal to the national minimum wage in a pay reference period. Any employer who fails to keep the relevant records is liable to prosecution and a fine upon conviction.

78. Hon LEE Cheuk-yan, Hon LEUNG Yiu-chung, Hon Cyd HO, Hon CHEUNG Kwok-che and Hon LEUNG Kwok-hung will move CSAs to require an employer to inform his employee of the hours worked and particulars of wages in the wage period concerned.

Commission, tips and service charges

Counting of commission

79. Clause 5(5) provides that for the purposes of the Bill, any commission paid in a wage period after the first seven days of that period, or within seven days after the end of a wage period, must be counted as part of the wages payable in respect of that period irrespective of when the work is done or the commission is otherwise payable. Members have noted that the definition of wages in the Bill is aligned closely with that under EO. Under section 2 of EO, wages is defined as all remuneration, earnings, allowances, tips and service charges, however designated or calculated, capable of being expressed in terms of money, payable to an employee in respect of work done or to be done under his contract of employment. Allowances including, among others, commission are within the definition of wages. However, wages do not include any

commission which is of a gratuitous nature or which is payable only at the discretion of the employer.

80. Some members are concerned whether clause 5(5) could cater for the different modes of commission payment currently found with different industries. The Administration has explained that in view of the great diversity of commission systems among various trades and different establishments, clause 5(5) ensures certainty and clarity to employers and employees in determining whether employers have remunerated their employees below the SMW level, and facilitates enforcement of the SMW legislation. The Administration has undertaken extensive consultation with various stakeholders. The Bill has already provided flexibility to cushion fluctuations in the commission income of some employees during different wage periods and ensured certainty in determining whether the employers have remunerated their employees not less than the SMW level.

81. A member is concerned about the consistency of clause 5(5) with section 23 of EO. The Administration has pointed out that according to section 23 of EO, where the commission is payable under the contract of employment in respect of a wage period, say, the wage period of January, it shall become due on the expiry of the last day of January and should be paid as soon as practicable, in no case more than seven days afterwards. Under the Bill, if the employer pays the commission, say, on the seventh day after January, it would be counted in respect of the wage period of January for the purpose of determining whether the remuneration to an employee meets SMW requirements. There is no contradiction with section 23 of EO in this respect.

82. Some members have asked whether a term in the contract of employment that enables commission to be apportioned and payable in different wage periods is consistent with clause 14 and clause 5(2), (3) and (4). The Administration has explained that the Bill confers on the employee a right to be paid no less than the SMW rate with reference to his total wages and total hours worked in a wage period. In making the commission apportioned and payable in different wage periods to meet the SMW level, such a contractual provision does not reduce the obligation of the employer to pay not less than SMW, and thus the Administration does not see it as contracting out under clause 14. Clause 5(2) is related to payment for hours not worked by the employee. Clause 5(3) and (4), which is related to advance or over-payment of wages and arrears of wages, is also not relevant because the commission is paid in accordance with the contract of employment.

83. Members have requested the Administration to explain with examples in its industry-based guidelines the meaning of clause 5, in particular clause 5(2) and (4), and how the amount of commission payable and paid according to a contract of employment is to be counted for the purpose of determining whether the remuneration to an employee meets SMW requirements.

Drafting of clause 5(5)

84. Some members have expressed concern whether the drafting of clause 5(5) would limit the flexibility for commission to be apportioned and payable in different wage periods to meet the SMW level.

85. The Administration has pointed out that how commission is determined and when it is payable over different wage periods is a matter for the contractual agreement between the employer and the employee. As a corollary, when commission is paid in accordance with the terms of the employment contract, it should not give rise to the issue of advancement or reduction of commission. Clause 5(5) only sets out how commission should be counted for determining whether the remuneration to an employee meets SMW requirements in respect of a wage period in order to provide clear guiding principles to determine whether the employee is remunerated at not less than the SMW rate.

86. Some members have suggested reviewing the drafting of clause 5(5) with a view to enhancing clarity and certainty to employers and employees in reckoning commission payment for the purpose of determining whether the remuneration to an employee meets SMW requirements.

87. The Administration has advised that clause 5(5) sets out how commission should be counted in respect of a wage period in order to provide clear guiding principles to determine whether the employee is remunerated at not less than the SMW rate. After considering the concerns of members, the Administration will move CSAs to refine clause 5(5) to clarify the counting of commission in a wage period when it is paid with prior agreement of the employee. The Administration has also stressed that under EO, the employer and the employee can agree between themselves that a particular commission is payable in respect of a certain wage period or a number of wage periods, and the Bill does not change this.

Tips and service charges

88. Members have noted that tips and service charges are included in the definition of wages under EO. Some members are concerned whether tips and service charges are to be counted as part of wages in cases where tips and service charges are paid directly by customers to the employees providing the service, such as in the catering industry or the hairdressing industry. The Administration has advised that tips and service charges within the meaning of "wages" under the EO will be counted towards wages in SMW calculation since the Bill is closely aligned with the EO in the definition of "wages".

89. Members have requested the Administration to explain with examples in its guidelines for different industries when tips and service charges would be counted as part of wages, especially in industries where tips are paid by the customer to the employee directly.

Wage period

90. A member has enquired how a wage period would be counted in the catering industry where wages are paid to an employee in two batches in a month. The Administration has advised that when the employer and the employee have a clear understanding that the wage period is one month, the wage period should be taken to be one month even if the employer pays wages in two batches in a wage period.

91. Members have requested the Administration to explain in its guidelines for different industries that the total wages paid within a wage period, irrespective of how such wages are broken down within that wage period, will be used as the basis for computing SMW.

92. Some members are concerned that there are industries where the basic salary of an employee is paid in a current wage period while the commission is calculated and paid in the following wage period. They are concerned whether the Bill allows the employer to apportion commission in some wage periods to meet the SMW level. The Administration has advised that there is a wide variety of commission systems in practice, depending on the terms in the contract of employment. Employers and employees are free to agree on when and how commission is payable under the contract of employment. Whether commission can be apportioned and payable in different wage periods is subject to the contract of employment and the Bill does not seek to regulate this. When the commission is so apportioned and payable under the contract of employment, the amount of commission paid would be counted in respect of the relevant wage period under the Bill when determining whether the remuneration to an employee meets SMW requirements.

93. Some members have asked whether any specific wording can be incorporated in a contract of employment to enable apportioning of commission payable among different wage periods. The Administration has advised that employers and employees are free to agree on the arrangement of commission depending on their respective circumstances. Different trades and establishments may also adopt varying commission systems to cater for their individual needs and characteristics. The Administration is not in a position to provide specific advice on commission payment arrangement to be written into a contract of employment as this may fail to account for possible specific features in individual sectors and occupational groups. Publicity materials of the Administration will include illustrative examples to show how the amount of commission payable and paid according to the contract of employment is counted under the Bill when determining the employee's entitlement to SMW.

Preventing the parties to a contract of employment from contracting out of the provisions in the Bill

94. Clause 14 provides that a provision of a contract of employment that purports to extinguish or reduce any right, benefit or protection conferred on the employee by the Bill is void. Some members are concerned about the effectiveness of the clause in safeguarding the interests of employees. Some other members have, however, requested the Administration to consider limiting clause 14 only to the employee's right to be paid not less than SMW.

95. The Administration has advised that according to clause 14, a provision of a contract of employment that purports to extinguish or reduce any right, benefit or protection conferred on the employee by the Bill is void. Clause 14 is modelled on section 70 of EO which renders void any term of a contract of employment which purports to extinguish or reduce any right, benefit or protection conferred on the employee by EO. Clause 14 is not limited to the amount of SMW. For example, if a provision in the contract of employment excludes the time during which the employee

has worked from hours worked for computing SMW, clause 14 would operate to render the provision void.

Provisional Minimum Wage Commission ("PMWC")

96. The Bills Committee has noted that PMWC was established on 27 February 2009 to advise CE on the initial SMW rate. PMWC comprises a chairperson and 12 members drawn from the labour sector, business community, academia and relevant government bureaux/departments. The chairperson and the non-official members are appointed on an ad personam basis. Their appointments will last until the establishment of MWC.

97. Some members have expressed concern about how PMWC takes forward its work in recommending the initial prescribed minimum hourly wage rate. PMWC has advised that its terms of reference is mainly to advise CE on the initial SMW rate on the basis of an evidence-based approach with a view to ensuring a sensible balance between forestalling excessively low wages and minimizing the loss of low-paid jobs, while sustaining Hong Kong's economic growth and competitiveness. PMWC has received written submissions and oral presentation of views from various stakeholders and interested parties. After discussions and having regard to the views of stakeholders, PMWC was of the preliminary view that a basket of indicators, factors relevant to SMW policy and the impact assessment of SMW should be taken into consideration in deliberating on the initial SMW rate.

98. PMWC has advised that since November 2009, it has met with some 90 stakeholders and interest groups to gauge their views and concerns on the mechanism in setting the initial SMW rate. Following the release of the 2009 Report on Annual Earnings and Hours Survey by the Census and Statistics Department in mid-March 2010, PMWC has posted statistical data, both overall and broken down by industry, on the webpage of PMWC and conducted further meetings with stakeholders to collate their analyses of the statistical data and comments on the preliminary views of PMWC on the basket of indicators and other considerations in deliberating on the initial SMW rate. PMWC was assessing the possible impact of different SMW levels on the labour market, firms' costs and profits, as well as prices of goods and services. In tandem, it was also gathering additional information on the characteristics and modus operandi of the sectors concerned to facilitate prudent, comprehensive and objective analyses and deliberations on the initial SMW rate.

99. At the request of members, PMWC has provided the Bills Committee with information on the stakeholder organizations with which it has met so far and a summary of the views collected, as well as its preliminary views on a basket of indicators, other relevant considerations and impact assessment in deliberating on the initial SMW rate. The preliminary views of PMWC are in **Appendix IV**.

Minimum Wage Commission

100. Under the Bill, a MWC is to be established to report to CE in Council its recommendations about the amount of the prescribed minimum hourly wage rate as well as the timing and frequency of rate reviews.

Composition of the Minimum Wage Commission

101. Some members are of the view that the non-official members of MWC should be elected from or nominated by the respective sectors concerned instead of appointed on an ad personam basis.

102. The Administration has advised that to facilitate independent, objective and unbiased analyses and deliberations, as well as a readiness to contribute their individual expertise and experience in the process to the overall interest of Hong Kong, it is necessary for the non-official members to be appointed on an ad personam basis rather than elected or nominated by the respective sectors. The non-official members of MWC will be appointed according to individual attributes including their connections with, knowledge of and experience in matters relating to the labour sector, business sector and relevant academic fields. This will better enable MWC members to deliberate on the rate collectively and in the overall interest of Hong Kong, after considering the perspectives of various sectors.

103. Hon LEE Cheuk-yan, Hon LEUNG Yiu-chung, Hon Cyd HO, Hon CHEUNG Kwok-che and Hon LEUNG Kwok-hung will move CSAs to broaden the scope of MWC members from relevant academic field to relevant field so as to include persons from research institutes and think tanks. They will also move CSAs to the effect that CE shall have regard to any nomination made by major labour organizations. The Administration has explained that relevant academic fields include academic institutions, research institutes and think tanks.

104. Some members are concerned whether the principle of gender mainstreaming is taken into account in appointing members to PMWC and MWC. Some of these members have suggested providing in the Bill the minimum ratio of female or male members in MWC.

105. The Administration has explained that in line with its established policy on advisory and statutory bodies, appointments to PMWC and the future MWC are primarily based on merits taking into account the candidate's ability, expertise, experience, integrity and commitment to public service, the functions and nature of business of the advisory and statutory body concerned, and with due regard to gender balance. The composition of PMWC is broadly in line with the target level of female participation in advisory and statutory bodies. In its future appointments to MWC, the Administration will continue to reach out and identify women who are willing and able to contribute to the work of MWC. When making appointments, the Administration will also consider the existing gender balance, the operational needs of MWC and the availability of suitable candidates.

106. The Administration has stressed that it is committed to promoting gender mainstreaming. Through gender-sensitive decision-making processes, gender mainstreaming seeks to ensure that women and men have equitable access to, and benefit from, society's resources and opportunities, with the aim of promoting women's advancement and fostering gender equality and harmony in the long run. Hence, there is no need to provide for such in the Bill.

107. Hon Emily LAU will move CSAs to require that in appointing members to MWC, CE must have regard to a participation target of at least 30% of each gender.

108. Some members have queried the need for appointing public officers to MWC. The Administration has stressed that to help ensure a holistic and balanced deliberation by MWC, it is appropriate to have an equal presence of members with labour, business, academia and government backgrounds. Such a balanced composition would help ensure holistic and balanced deliberations by MWC based on evidence. It is therefore crucial for MWC to include official members who will contribute their expertise, public administration experience and knowledge in areas relevant to SMW. They will serve to facilitate objective and comprehensive analyses and deliberations, and participate in MWC in the same way as the non-official members. There are other statutory boards with both official and unofficial members.

109. Hon LEE Cheuk-yan, Hon LEUNG Yiu-chung, Hon Cyd HO, Hon CHEUNG Kwok-che and Hon LEUNG Kwok-hung will move CSAs to the effect that public officers sitting on MWC have no voting rights.

110. Some members are concerned that the drafting of clause 10 may not reflect the policy intent of a balanced number of members from different sectors in MWC. The Administration has agreed to move CSAs to clause 10 to set out clearly that not more than three non-official members will be appointed each from the labour sector, the business sector and the relevant academic fields. In appointing the members, regard will be given to the need for maintaining a balanced number of members with labour, business, academia and government backgrounds.

111. A member has suggested providing in the Bill that members of MWC will not be appointed to more than six advisory and statutory bodies at the same time and will not sit on such a body for more than six years in the same capacity. The Administration has stressed that in line with established practice, it will follow the "Six-year Rule" and "Six-board Rule" in making such appointments and there is no need to provide for that in the Bill which would reduce flexibility.

112. Hon Emily LAU will move CSAs to provide that a member who is not a public officer may not be appointed as a member continuously for more than six years and may not serve on more than five other public sector advisory and statutory bodies at any one time.

113. Some members are of the view that the provision on the removal of non-official MWC members in section 2 of Schedule 4 provides the Administration with too much power. The Administration has explained that section 2 of Schedule 4 provides that CE may, by notice in writing, remove from office a member who is not a public officer if CE is satisfied that the member is unable or unfit to carry out the duties of the office due to permanent incapacity or other sufficient cause. Such provision is similar to those on the removal of non-official members in the legislation of other statutory bodies.

Functions of the Minimum Wage Commission

114. Some members have queried the purpose of clause 11(2) which requires MWC to perform other functions directed by CE. The Administration has advised that the additional advisory functions under clause 11(2) must be directly relevant to the object of the SMW legislation and MWC. There are also other statutory boards to which CE may direct other functions or give such directions as he thinks fit. SMW is a completely new policy for Hong Kong and its implications can only be more precisely gauged after implementation. It would therefore be prudent to allow flexibility for the Administration to take into account the actual needs, prevailing social and economic circumstances as well as the experience in implementing the SMW legislation and entrust other advisory functions to MWC where necessary and appropriate.

115. Some members are concerned that clause 11(1) provides for CE rather than MWC to invoke the mechanism for reviewing the SMW level and for recommending on the timing and frequency of the SMW rate reviews.

116. The Administration has explained that the main function of MWC is, when required by CE, to recommend the SMW level and the timing and frequency of the SMW rate reviews. In turn, the Administration will take into account the recommendations of MWC in deciding on the SMW level and the appropriate timing for conducting the next SMW rate review. This is consistent with the principle of adopting an evidence-based approach in setting and reviewing the SMW rate. It also preserves flexibility to cater for the needs and circumstances prevailing in Hong Kong at the time.

Transparency of the Minimum Wage Commission and its report to the Chief Executive in Council

117. Some members have expressed grave concern about a lack of transparency in the work of MWC. They are of the view that meetings of MWC should be open to the public, especially when major issues are discussed. They consider that the deliberations of MWC and the papers it considered should at least be made public after each meeting. Some members consider that MWC should consult the public before drawing up the recommendations in its report. They consider that MWC's report to CE in Council should be made public. The Administration should be required under the Bill to disclose the justifications it has taken into account in making its decision on the SMW rate.

118. The Administration has advised that in performing its functions, MWC will invite views from the public, consult stakeholders widely and draw on data collected through large-scale and representative surveys. All statistical information and data to be collected by the Census and Statistics Department and considered by MWC would be accessible to members of the public. In formulating its recommendations, MWC will have regard to the information obtained in the process of consultation with stakeholders, the evidence obtained as well as the analyses undertaken based on information and data collected from statistical surveys conducted by the Census and Statistics Department.

119. The Administration has stressed that it fully recognizes that the SMW rate would be a matter of wide public concern. After receiving and considering the

recommendation of MWC, the Government would consider the appropriate SMW rate in a prudent and objective manner. The rate, as prescribed in Schedule 3, would be subject to the scrutiny and approval of LegCo. To enhance transparency of the work of MWC, the Administration will move CSAs to provide that the Administration will make public the contents of MWC's report. The Administration will also provide members of the public and LegCo with the justifications it has taken into account in making its decision on whether to accept the recommendation of MWC.

120. Hon LEE Cheuk-yan, Hon LEUNG Yiu-chung, Hon Cyd HO, Hon CHEUNG Kwok-che and Hon LEUNG Kwok-hung will move CSAs to the effect that CE shall cause to be laid on the table of LegCo a copy of the report made by MWC.

Criteria and methodology for setting the statutory minimum wage rate

121. Under clause 11(3), MWC must have regard to the need to maintain an appropriate balance between the objectives of forestalling excessively low wages and minimizing the loss of low-paid jobs, and to sustain Hong Kong's economic growth and competitiveness when determining the SMW rate. Some members take the view that the criteria for setting the SMW rate should be set out in the Bill. Some members have suggested specifying in the Bill the basket of indicators adopted by PMWC in deliberating on the initial SMW rate. Some members consider that the Administration should provide in clause 11(3) that the setting of the SMW rate should be in conformity with Article 7 of ICESCR. Some members have expressed concern about the methodology to be adopted by MWC in deliberating the initial SMW rate. They consider that the methodology for setting the SMW rate should be set out in the Bill.

122. The Administration has advised that the Bill seeks to establish a SMW regime which would provide a wage floor to forestall excessively low wages but without unduly jeopardizing the labour market flexibility and economic competitiveness and without causing significant adverse impact on the employment opportunities for vulnerable employees. MWC will adopt an evidence-based approach to setting and reviewing the SMW rate through data research and analysis as well as extensive consultations with stakeholders. As SMW will affect many facets of society and the economy, a basket of social, economic and employment indicators that are relevant to, or affected by, the SMW level will be taken into account. MWC will formulate the basket of indicators suitable for Hong Kong's prevailing and changing circumstances. As to whether the indicators should be written into the Bill, the Administration notes that in the National Minimum Wage Act 1998 of UK, the Minimum Wage Act 1983 of New Zealand, and the Canada Labour Code (and SMW legislation in most of the provinces of Canada like Ontario and British Columbia), the legislative provisions do not specify the indicators to be adopted in determining the SMW rate.

123. Some members have suggested that the SMW rate should be set at a level higher than that of the CSSA Scheme. The Administration has advised that SMW is a wage floor to forestall excessively low wages and not a living wage. Wages are returns for individual employees' labour. Eligible families in need can separately obtain assistance from the CSSA Scheme. The CSSA Scheme provides assistance to needy persons on a household basis. The current CSSA Scheme already provides a safety net for those

households that cannot financially support themselves. It is designed to bring their income up to a level to meet their basic needs.

124. Hon LEE Cheuk-yan, Hon LEUNG Yiu-chung, Hon Cyd HO, Hon CHEUNG Kwok-che and Hon LEUNG Kwok-hung will move CSAs to clause 11(3) to provide that when performing its function to advise on the SMW rate, MWC must have regard to the needs of employees and their families, taking into account the general level of wages, the cost of living, social security benefits, the relative living standards of other social groups, and economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.

Income ceiling under the Transport Support Scheme ("TSS") and Pilot Employment Navigation Programme ("ENP")

125. A member considers that the income ceiling of $6,500 for TSS and ENP should be converted into an hourly rate and adopted as the basis for setting the SMW rate. The member has requested the Administration to explain how the monthly income ceiling of $6,500 under TSS and ENP is derived.

126. The Administration has explained that TSS was launched on 25 June 2007 on a one-year pilot basis as one of the poverty alleviation measures. The objective of TSS was to provide time-limited transport subsidy to needy job-seekers and low-income employees living in four designated remote districts, namely, Yuen Long, Tuen Mun, North and Islands, to find jobs and work across districts. Under the pilot TSS, one of the criteria for the Cross-District Transport Allowance was that the applicant had to be engaged in full-time employment and their monthly income levels should be less than or equal to $5,600. It was roughly the sum of half of the monthly median income ($5,000) then prevailing and part of the travelling expenses incurred by those living in remote areas and having to commute to work across districts ($600).

127. The Administration has pointed out that upon implementation of the pilot TSS, it was identified that most of the unsuccessful applications were ineligible because the applicants' monthly income exceeded the then income ceiling. With salary increasing and inflation picking up, there were views that the income ceiling of $5,600 per month was too low. There were demands for raising the income ceiling so that those earning slightly more than the amount might also benefit from TSS to help them develop and sustain a work habit. LD subsequently introduced a number of relaxation measures, including raising the monthly income ceiling for eligible persons from $5,600 to $6,500. It was estimated that 26% of salaried employees in the four designated districts would be covered under the revised income ceiling.

128. Regarding the proposed ENP, the Administration has advised that it seeks to address the problem of manpower mismatch, in order to fully utilize the labour productivity and encourage employment. Under the proposed ENP, an incentive of up to $5,000 will be offered to each eligible ENP participant. This is to encourage the participant to land on and stay in a job for at least three months. One of the eligibility criteria for the incentive is that the job-seeker has to be employed to fill a vacancy listed

under LD's employment service and the job concerned is a full-time post offering a salary of $6,500 or less per month.

129. The Administration has advised that in arriving at the threshold of $6,500 for ENP, reference has been made to the eligibility criteria under TSS. It has also matched this against the salary of vacancies posted by LD and found that a sizable number of job-seekers would benefit should a $6,500 threshold be adopted. For instance, in the first quarter of 2010, the median salary offered for job-seekers with no previous experience is around $6,500 per month for posts like sales representatives and shop sales/assistants where manpower mismatch is commonly found.

Criteria for setting the statutory minimum wage rate in other jurisdictions

130. Members have sought information on the criteria adopted for determining the SMW rate in other jurisdictions. The Administration has pointed out that various social, economic and employment factors are often taken into consideration in other jurisdictions. In UK, an evidence-based approach is adopted. The criteria include economic conditions, pay differentials, business costs, competitiveness of the economy, inflation rate and employment level. In US, the criteria include changes in the cost of living and productivity and the level of wages in manufacturing, and the ability of employers to absorb wage increases. In Guangdong and Shenzhen, the criteria include minimum living standards of employees and their dependants, average wage of workers, current economic situation, labour productivity, local employment situation, amount of social security benefits, and differences in the level of economic development within the region. The Administration has stressed that the circumstances of Hong Kong should be the prime consideration in determining the basket of indicators that Hong Kong should adopt in setting the SMW rate.

131. Some members have enquired whether the criteria for determining the SMW rate are set out in the SMW legislation of other jurisdictions. The Administration has advised that different practices are adopted in other jurisdictions. In UK, the National Minimum Wage Act 1998, in establishing the Low Pay Commission to advise the UK government on the SMW rate, does not specify the criteria to be adopted in determining the rate. The same is found in New Zealand where the Minimum Wage Act 1983 does not provide for the criteria which are to be taken into account in setting the SMW rate. As for Canada, there are no statutory provisions on these criteria in the Canada Labour Code and in the SMW legislation in most provinces like Ontario and British Columbia. However, there are also jurisdictions such as US, France, Guangdong and Shenzhen which set out in their legislative provisions the criteria to be considered in setting the SMW rate.

Legislative procedure for setting the statutory minimum wage rate

132. Under the Bill, the prescribed minimum hourly wage rate is set out in a schedule. Some members are concerned that while LegCo may either approve or revoke the notice to amend the schedule, it is not given the power to amend the schedule. These members take the view that as CE in Council has the power to amend the prescribed minimum hourly wage rate recommended by MWC, LegCo should also be given the power to amend the schedule so that if CE in Council decides against the

recommendation of MWC, LegCo as a gatekeeper can amend the schedule to adopt the recommendation of MWC.

133. The Administration has advised that the SMW rate, which is to be prescribed in Schedule 3 by way of subsidiary legislation, is subject to the scrutiny of LegCo. MWC will adopt an evidence-based approach in coming up with a recommendation on the SMW rate through data research and analysis as well as extensive consultations with stakeholders, having regard to the need to maintain an appropriate balance between the objectives of forestalling excessively low wages and minimizing the loss of low-paid jobs, and to sustain Hong Kong's economic growth and competitiveness. Given the diverse interests of different stakeholders as well as the significant economic and employment implications of the SMW rate, safeguarding the evidence-based approach is of cardinal importance. The Administration will consider the recommendation of MWC in a prudent and objective manner and prescribe the SMW rate in Schedule 3 by way of subsidiary legislation subject to the approval of LegCo. Its proposal that LegCo may approve or revoke, but not amend, the proposed SMW rate is intended solely to safeguard the evidence-based approach. The proposed SMW rate cannot take effect if LegCo decides to revoke it. Regarding the power of CE in Council in amending the SMW rate recommended by MWC, as the Administration is responsible for introducing subsidiary legislation and MWC is established to advise CE in Council on the amount of the SMW rate, there should not be any question on the power of CE in Council in determining the prescribed minimum hourly wage rate.

134. The Administration has pointed out that the National Minimum Wage Act 1998 of UK has not provided the Parliament with the power to amend the National Minimum Wage rates proposed by the UK government. Some members have, however, pointed out that neither House of the Parliament has the power to amend secondary or delegated legislation except in the small number of cases where the parent Act specifically provides for such amendment. The Administration has explained that if considered appropriate, the parent Act for SMW in UK could have provided for the Parliament to amend the SMW rate, yet it has not done so.

135. Hon LEE Cheuk-yan, Hon LEUNG Yiu-chung, Hon Cyd HO, Hon CHEUNG Kwok-che and Hon LEUNG Kwok-hung will move CSAs to provide that LegCo may amend the SMW rate made under clause 15(1).

Frequency of reviews of the statutory minimum wage rate

136. Members are generally of the view that the Bill should provide for an annual review of the SMW rate. The Administration has advised that given the high degree of external orientation of the economy of Hong Kong and with a linked exchange rate system, it must ensure that the SMW rate would not have significant adverse impact on the employment opportunities of vulnerable employees or unduly jeopardize the labour market flexibility and economic competitiveness. It is therefore important to maintain flexibility in the timing and frequency of reviews of the SMW rate so as to cater for the needs and prevailing circumstances of Hong Kong. In the SMW legislation of jurisdictions such as UK and US, there is no statutory regulation on the frequency of rate reviews.

137. The Administration has pointed out that while there will be flexibility in the timing and frequency of reviews of the SMW rate in order to cater for the changing needs and circumstances of the community, the Annual Earnings and Hours Survey will be conducted by the Census and Statistics Department every year to capture comprehensive data on the level and distribution of wages, employment details and demographic profile of employees in Hong Kong. The availability of these updated survey findings will facilitate MWC to conduct reviews on the SMW rate as and when necessary. The Administration undertakes to make such data available not only to MWC but also to the public.

138. Members remain of the view that the SMW rate should be reviewed once a year. The Bills Committee passed a motion at its meeting on 13 April 2010 calling for the Administration to provide in the Bill that MWC should review the SMW rate once a year. Some members have pointed out that MWC should review the SMW rate regularly, although the review may not necessarily result in any change to the rate in force.

139. Appreciating the suggestions by members that the Bill should provide for a regular review of the SMW rate although the review may result in an upward or downward adjustment or no change to the rate in force, the Administration has advised that it will move CSAs to specify that a regular review interval of not less than once every two years.

140. Hon LEE Cheuk-yan, Hon LEUNG Yiu-chung, Hon Cyd HO, Hon CHEUNG Kwok-che and Hon LEUNG Kwok-hung will move CSAs to require MWC to submit a report on the SMW rate to CE in Council once a year.

Whether the Bill should be applicable to the Government

141. Members have noted that the Bill is not applicable to the Government. Some members take the view that the Bill should also be applicable to the Government. Some other members are however of the view that the applicability of laws to the Government involves constitutional issues and has to be dealt with outside the context of the Bill. In this connection, they have noted that as the Government is not a natural person, it will be necessary to address issues such as whether and how imprisonment could be imposed in the event of a breach of its provisions with a penal consequence, should the Bill be made applicable to the Government.

142. The Administration has advised that the Bill is aligned closely with the provisions of EO so as to ensure consistency, facilitate enforcement and forestall confusion to employers and employees. It is modelled on EO in defining the meaning and coverage for employees. As EO does not bind the Government, the Bill should also not bind the Government. In response to questions from some members, the Administration clarified that the Bill is applicable to employees of Government contractors and statutory and advisory bodies.

143. The Administration has stressed that although EO does not bind the Government, it is the Administration's established policy that the employment terms of

government employees should, overall speaking, be no less favourable than the provisions under EO. As in the case of EO, the Administration's policy is to pay its employees no less favourably than the prevailing minimum wage rate stipulated under the SMW legislation.

Special arrangement for persons with disabilities

144. Under the Bill, a PWD is defined as a person who holds a valid Registration Card for People with Disabilities issued by the Central Registry for Rehabilitation. The Bill provides a special arrangement whereby PWDs 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 SMW level or at a rate commensurate with their productivity. Under the special arrangement, a trial period of employment not exceeding four weeks is provided for an assessment to be made of the productivity of a PWD in performing his work in the actual workplace to help determine whether SMW should be discounted.

145. Some members have queried the need for the proposed special arrangement for assessing the degree of productivity of PWDs. They are concerned that such a special arrangement may have the effect of exempting PWDs from the Bill. Another member is of the view that persons with severe disabilities should be exempted from the Bill. The Administration has explained that the Bill is applicable to able-bodied employees and PWD employees alike. Nevertheless, recognizing the possible employment difficulties encountered by some PWDs upon the implementation of SMW, the Bill also provides a special arrangement for those whose productivity is impaired by their disabilities so as to minimise any possible adverse impact of SMW on their employment opportunities. To forestall abuse, the right to invoke such an assessment is vested in the PWD but not his employer.

146. Some members are concerned whether stakeholders and the Equal Opportunities Commission ("EOC") are supportive of the special arrangement for PWDs. The Administration has explained that the special arrangement has been formulated after elaborate discussions involving PWDs, parent groups, rehabilitation organizations and EOC. LD has met with more than 50 rehabilitation organizations, including non-government organizations providing vocational rehabilitation services with subvention from the Social Welfare Department, self-help groups and parent groups, with the participation of EOC. LD has also met with over 30 employer representatives who have ample experience in employing PWDs. The majority view gauged is that in order to strike a reasonable balance between providing wage protection for PWDs and safeguarding their employment opportunities, the Bill should provide a special arrangement so that PWDs whose productivity may be impaired by their disabilities will have the right to choose to have their productivity assessed to help determine whether they should be remunerated at least at the SMW level or at a rate commensurate with their productivity.

147. Members are concerned whether the special arrangement for PWDs is in conformity with the Disability Discrimination Ordinance (Cap. 487) ("DDO") and BL39. The Administration has stressed that all the proposals in the Bill, including the special arrangement for PWD employees, are in conformity with the provisions of BL,

including those concerning human rights. The special arrangement is not incompatible with DDO, which has no constitutional or overriding status over the Bill. It does not oblige the employer to employ a person who is unable to carry out the inherent requirements of the particular employment due to his disabilities. A person who is able to carry out the inherent requirements of a particular employment should be protected by SMW, irrespective of whether he is a PWD or not. The special arrangement provided in the Bill seeks to ensure that, while safeguarding like treatment of PWDs and able-bodied, the employment opportunities of PWD employees would not be affected by the introduction of SMW.

Trial period of employment

148. Some members are concerned about the purpose of the trial period of employment and the protection provided to PWDs during such a trial period. The Administration has explained that if a PWD invokes the special arrangement, he may, in accordance with Schedule 2, choose to agree with the employer to undergo a trial period of employment. The terms of the trial period of employment, such as its duration, seek to protect the interests of PWD employees by enabling them to invoke the assessment only when they consider themselves accustomed to the working environment, while avoiding unnecessary prolongation of the trial period. A PWD is engaged by the employer under an employment contract in the trial period. The purpose of the trial period of employment is to provide an opportunity for an assessment to be conducted on the degree of productivity impairment, if any, arising from the disability of a PWD. The Administration has stressed that the choice of an assessor from among the approved list is vested in the PWD. During the trial period of employment, the wages of a PWD must not be less than 50% of the SMW. The length of the trial period is four weeks or until the end of the day on which the assessment of the PWD's productivity is completed, whichever is the shorter. Therefore, when a PWD has the assessment of his productivity completed on a certain day during the trial period of employment, the trial period will end on that day and the minimum wage level determined according to his degree of productivity will be effective from the following day. If a PWD has not been assessed during the trial period of employment, the employer has to pay him not less than SMW with effect from the first day after the expiry of the trial period. Where the PWD is subsequently assessed, the minimum wage level determined according to his degree of productivity would take retrospective effect from the first day after the expiry of the trial period of employment.

Wage floor during the trial period of employment

149. Some members are concerned that the wage floor of a PWD during a trial period of employment will be 50% of SMW. They consider that the wage floor during such a period should be more than 50% of SMW. The Administration has advised that the rehabilitation organizations consulted generally feel that 50% of SMW is an appropriate wage floor during the trial period of employment which would encourage employers to open up employment opportunities to PWDs, including those with more severe disabilities. Individual PWDs may negotiate for higher wages with employers in accordance with their work abilities. In addition, this arrangement can increase the possibility of the PWD employees getting a pay rise after the assessment which should prove more palatable to them. As PWDs who need to invoke the special arrangement

are usually those with more severe disabilities, it is very likely that their employment opportunities would be jeopardized should the percentage of 50% of SMW for the trial period of employment be raised.

Whether a person with disability should be reimbursed the wage difference between the assessed percentage and 50% of SMW during the trial period of employment

150. Some members are of the view that if the degree of productivity of a PWD is assessed to be more than 50% of SMW, the PWD should be paid retrospectively the wage difference during the trial period of employment. The Administration has advised that where a PWD has completed the assessment within the trial period of employment, the SMW level determined according to his degree of productivity will take effect on the following day. Both the employer and the PWD cannot claim from one another the wage difference reckoned from the first day of the trial period of employment. The mechanism is intended to be simple so that PWDs would not be required to pay back retrospectively the wage difference during the trial period of employment, and the employers' willingness to employ PWDs with productivity impaired by their disabilities would not be dampened due to the introduction of SMW. Therefore, after balancing all the considerations, the Administration is of the view that there should be no retrospective claims on the wage difference with regard to the percentage of the degree of productivity assessed during the trial period of employment.

151. The Administration has stressed that the percentage of SMW during the trial period of employment, the length of the trial period and whether there are retrospective claims on the wage difference after assessment are all inter-related. After consultation with the rehabilitation organizations and relevant stakeholders, the Administration considers that the arrangement in setting the wages to be no less than 50% of SMW during the trial period of employment which lasts for not more than four weeks (save for cases in exceptional circumstances) with no retrospective claims would strike an appropriate balance.

Outcome of assessment of the degree of productivity

152. Some members have suggested that a wage floor, say 50% of SMW, should be established such that PWD employees whose degree of productivity has been assessed must be remunerated no less than 50% of SMW irrespective of the outcome of productivity assessment. The Administration has advised that such an across-the-board mandatory requirement will affect the employment opportunities and in turn the social integration of PWDs, especially those with severe disabilities.

153. Some members are of the view that the Administration should subsidize the difference between the proposed wage floor and the assessed percentage, if the latter is found to be less than 50%. The Administration has advised that it has no plan to provide wage subsidy which is also not the policy intent of the Bill.

Review of the assessment of degree of productivity

154. Some members are of the view that an opportunity should be provided for a review of an assessment in the event of dispute about the assessment results,

deteriorated health of a PWD, or improved productivity of a PWD as he has become familiarized with his work.

155. The Administration has advised that stakeholders have divergent views on whether PWD employees who have their degree of productivity assessed should have a review in the form of a second assessment. There are views that if a PWD employee has a second assessment, the SMW rate to which he is entitled can be adjusted upwards or downwards on the basis of the second assessment outcome, since his degree of productivity may improve or deteriorate over time. Even those supporting a review favour a lapse of time between the original assessment and the review rather than a review to be conducted shortly after the assessment. On the other hand, there are also views suggesting that the assessment mechanism must be simple and easy to implement. The Administration takes the view that if there is a review arrangement, it could discourage some employers from employing PWDs and put a strain on the labour relations between the employer and the PWD employee, leading to, say, disputes on whether the PWD is forced by the employer to undertake a review assessment to facilitate a pay cut. Some rehabilitation organizations have pointed out that the productivity of some PWD employees may deteriorate owing to the changing state of their disabilities and a review may not necessarily be to their advantage. Many rehabilitation organizations consider that employers are obliged to treat their disabled and able-bodied employees alike, including the application of the same mechanism to appraise the performance of their employees and conduct salary reviews, and this is a more preferred way to address the issue of PWDs' salary adjustment as a result of their productivity enhancement.

156. The Administration has pointed out that the Bill allows a PWD to request a fresh assessment of his productivity if his work required under the contract of employment is no longer the same even though he is working for the same employer. The right to invoke the assessment mechanism is vested in a PWD rather than the employer. Besides, a PWD is free to choose an approved assessor to conduct his assessment. The Administration will review the special arrangement, including the need for a second assessment, in the light of operational experience within two years of the implementation of the SMW and report the results to the Panel on Manpower.

157. The Bills Committee has sought the views of rehabilitation organizations on whether there is a need for providing an opportunity for the review of an assessment or re-assessment in the event of dispute about the assessment results. Members have noted that rehabilitation organizations are generally of the view that an opportunity for reassessment should be provided to PWDs a certain period of time after the first assessment. Some other rehabilitation organizations have, however, expressed the view that they do not support re-assessment.

Assessment prior to employment

158. Hon Mrs Regina IP will move CSAs to provide that an assessment report prior to employment conducted by a non-government organization approved by the Social Welfare Department shall be accepted as the basis for determining an appropriate minimum wage for a PWD. The Administration has explained that pre-employment assessment for vocational rehabilitation training conducted by non-government

organizations is different from the productivity assessment proposed in the Bill and thus not suitable to be adopted for determining the appropriate SMW rate of the PWD in taking up a particular job.

Requirement for the certificate of assessment to be signed by the person with disability, the employer and the approved assessor

159. Under the Bill, a certificate of assessment must state the degree of productivity that can be achieved by a PWD in performing his work, and be signed by the PWD, the employer and the approved assessor. Some members have queried the need for the certificate to be signed by a PWD and his employer. The Administration has advised that a PWD and his employer should be well aware of the outcome of assessment to avoid unnecessary misunderstanding and disputes over computation of the minimum wage to which the PWD employee is entitled. Thus, the Bill provides that the certificate of assessment must be signed by the three parties including the PWD, the employer and the approved assessor.

160. Members are concerned about the status and effect of the certificate of assessment in the event that an employer or a PWD refuses to sign the certificate as required in section 5(2)(c) of Schedule 2.

161. The Administration has advised that under the Bill, an approved assessor must provide a certificate of assessment after conducting an assessment of a PWD's productivity in performing the work, and the certificate must be signed by the PWD, the employer and the approved assessor. As a matter of fact, in the event that the certificate of assessment is not signed by the employer and/or the employee owing to disagreement over the outcome of the assessment, it is unlikely that the parties would continue their employment relationship. Nonetheless, if their employment relationship continues for various reasons, the PWD employee should be paid wages at or above the SMW rate with effect from the following day after the assessment is conducted, given that the assessed rate cannot take effect when the certificate of assessment is not signed by the employer and/or the employee.

162. On the question of whether a provision should be added to the Bill to sanction the employer for failure to sign the certificate of assessment, the Administration has advised that such a provision is not appropriate. The special arrangement aims to reduce any possible adverse impact of SMW on PWDs' employment opportunities. The assessment seeks to determine the productivity of the PWDs in performing the work. Therefore, neither the employers nor the PWDs should be sanctioned or held criminally liable for failing to sign the certificate of assessment, otherwise both would hesitate to go through the special arrangement which would in turn defeat the purpose of minimizing possible adverse impact of SMW on PWDs' job opportunities. As a matter of fact, after a PWD employee has his productivity assessed under Schedule 2, the SMW level applicable to him would be determined according to the degree of productivity as stated in the certificate of assessment. Failure on the part of the employer to sign the certificate would render it invalid, in which case the PWD employee would be entitled to receive the SMW rate or more.

163. Hon LEE Cheuk-yan, Hon LEUNG Yiu-chung, Hon Cyd HO, Hon CHEUNG

Kwok-che and Hon LEUNG Kwok-hung will move CSAs to remove the requirement for the certificate of assessment to be signed by the employer.

Termination of a person with disability's contract of employment

164. Under clause 23, an employer dismissing a person with a disability on account of the outcome of an assessment will be exempted from DDO. Some members have expressed concern that the proposed exemption in clause 23 would weaken PWDs' rights under DDO. The Administration has explained that such an exemption from DDO is necessary to enable the PWD employees and the employers to understand clearly that acts done in connection with the special arrangement for PWDs, including the termination of the employment contract on account of the outcome of an assessment made under Schedule 2, would not be in breach of DDO so that employers would not be discouraged from employing PWDs under the SMW regime. The Bill seeks to provide for a wage floor and does not affect other rights and obligations in the employment relationship. When seeking to terminate a contract of employment, the employer must comply with EO, other relevant legislation in force and the relevant terms of the employment contract, and act in accordance with the contractual terms and the provisions of EO.

165. The Bills Committee has sought the views of EOC on whether the dismissal of a PWD on account of the outcome of an assessment made under Schedule 2 to the Bill is consistent with DDO and whether DDO would have the effect of exempting an employer dismissing a PWD on account of the outcome of the assessment, even if the exemption is not provided in clause 23.

166. EOC has advised that whether the possible dismissal of a PWD on account of the outcome of an assessment made under Schedule 2 to the Bill is inconsistent with DDO has to take into account, in any specific case, the inherent requirements of the particular employment. In general terms, if an employee is dismissed because he is found, after assessment, to be no longer able to meet the inherent requirements of the particular employment, even with reasonable accommodation, the act of dismissal in itself may not be inconsistent with DDO.

167. EOC takes the view that the issue of whether there is discrimination has to be decided by comparing an employer's treatment of the PWD worker with a non-PWD worker. If the intended effect of clause 23 is that any dismissal of a PWD worker, on account of the outcome of an assessment, would be exempted from DDO, regardless of any comparison with a non-PWD worker, this may limit recourse to DDO which may otherwise be open to the PWD worker. In any specific case, the actual analysis and conclusion must be subject to the facts and evidence.

168. EOC has also advised that if clause 23 is interpreted as exempting from DDO any dismissal of a PWD worker on account of the assessment outcome without regard to the treatment of a non-PWD worker, this may limit the PWD worker's recourse to DDO. Besides, if the assessment mechanism is meant to reduce "the possible adverse impact of SMW on the employment opportunities of some PWDs whose productivity is impaired by their disabilities" by enabling a lower than SMW to be paid, it is difficult to see how exempting a dismissal on account of assessment outcome from the DDO could

help to achieve this objective, and the necessity and reasonableness of this exemption may be called into question.

169. The Administration takes the view that an assessment made under the Bill serves to determine whether the disability affects the degree of productivity of a PWD in performing his work for the purpose of deciding whether he should be remunerated at no less than the SMW level or at a rate commensurate with his productivity, and clause 23 pertains to termination of employment on account of the assessment outcome. If an individual is dismissed because he is found to be unable to meet the inherent requirements of the particular employment, even with reasonable accommodation, the act of dismissal in itself may not be inconsistent with DDO, irrespective of whether there is exemption under clause 23.

170. The Administration has advised that if the reason for dismissal is the individual's failure to satisfy inherent requirements of the particular employment, the individual may not have a claim under the existing DDO even without the clause 23 exemption. If an employee is dismissed on ground of disability rather than owing to his failure to satisfy the inherent requirements of the particular employment, the Bill does not operate to affect his claim under DDO. The exemption to DDO relating to dismissal provided by the Bill is limited to the situation where the reason for dismissal is the outcome of the assessment.

171. The Administration has pointed out that if an employee is concerned that the reason for his dismissal is not the outcome of the assessment or his failure to satisfy inherent requirements, the employee may lodge a complaint with EOC and, if necessary, the case may be referred to the court for determination of whether a particular dismissal constitutes an infringement of DDO on the basis of the evidence to be presented by the litigating parties.

172. Hon LEE Cheuk-yan, Hon LEUNG Yiu-chung, Hon Cyd HO, Hon CHEUNG Kwok-che and Hon LEUNG Kwok-hung will move CSAs to the effect that an employer dismissing a PWD on account of the outcome of the productivity assessment is not exempted from DDO.

Qualifications required of an approved assessor

173. Some members are concerned about the qualifications required of an approved assessor. The Administration has explained that under Schedule 2, an approved assessor should hold the profession or occupation or qualification as specified by the Commissioner for Labour and possess the experience in providing vocational rehabilitation or other services in relation to the employment of PWDs. It is the Administration's intent that the approved assessors should be eligible persons, such as registered social workers, registered occupational therapists and registered physiotherapists, with experience in providing vocational rehabilitation or other services in the employment of PWDs. Information on the assessors approved by the Commissioner for Labour would be included in a list of approved assessors. A PWD who decides to invoke the assessment mechanism is entitled to select any of the approved assessors from the list to conduct his productivity assessment.

174. The Administration has pointed out that while some of the assessors may currently work in the Government or the Hospital Authority, they would not be acting as a servant or an agent of the Government when they conduct a productivity assessment under the special arrangement, unless they are conducting the assessment in the capacity as a public officer. Approved assessors would act as independent persons in the course of conducting the productivity assessments. They should conduct the assessment impartially in accordance with section 4 of Schedule 2 in order to determine the productivity of a PWD in performing his work. In the event of misconduct on the part of an approved assessor, the Commissioner for Labour may consider withdrawing the approval, and the PWD employee or employer may also lodge a complaint with the professional authority concerned.

Cost of assessment

175. Some members are of the view that the cost of assessment of the degree of productivity of a PWD should be borne by the Administration. The Administration has advised that there are views from some stakeholders that PWDs whose productivity is affected by their disabilities and thus need to invoke the special arrangement are a vulnerable group and should not be asked to bear the assessment cost. Neither should the employers shoulder the cost, as this may dampen their incentive to employ PWDs. There are thus calls for the Government to take up this responsibility and pay for the assessment cost. While the Administration will consider this suggestion, it will have to ensure that the assessment cost, if paid from the public coffers, should be reasonable in quantum and would not inadvertently provide a financial incentive for possible abuse of the special arrangement. Discussions with the rehabilitation organizations on the details of the assessment mechanism are underway to map out the arrangement for the payment of the assessment fee. The Administration has undertaken to finalize the arrangement for the assessment cost and advise the Panel on Manpower of the party responsible for bearing the costs for assessment of the degree of PWDs' productivity before the enacted Ordinance comes into operation.

Transitional arrangement for persons with disabilities already in employment

176. Some members are concerned whether there will be transitional arrangements for PWDs who are already in employment. A member has also expressed worry about the possible adverse impact of SMW on the existing employment of serving PWDs with severe disabilities. The Administration has advised that it will propose CSAs to provide for a transitional arrangement to minimize the impact of the SMW legislation on PWDs who are already in employment and earning below the SMW rate, particularly those with more severe disabilities. The discretion to avail oneself of the transitional arrangement can only be exercised by the PWD. The proposal has been worked out in collaboration with the rehabilitation organizations, and EOC has been engaged throughout the discussions. The Administration has since then taken into account the views expressed by members and improved the proposal in collaboration with the rehabilitation organizations and with the participation of EOC. Specifically, a serving PWD with a wage rate below SMW may make the following choice prior to the implementation of SMW -

(a) to opt for SMW; or

(b) to opt for a productivity assessment, which can be conducted whenever the serving PWD chooses to do so without a prescribed time limit.

177. The Administration has explained that for the option in paragraph 176(b) above, the serving PWD may invoke the assessment after SMW has taken effect. There is no time limit for the serving PWD to initiate the assessment. Before the assessment, he is entitled to no less than his current contractual wage rate below SMW (pitched at the same percentage of the prevailing SMW rate in case there is a change in the latter) when he remains in the same employment for the same work. Both the employer and the serving PWD must jointly sign an option form to signify clearly the decision made by the PWD in opting for a productivity assessment. Otherwise, the PWD should be paid not less than SMW. The right to make a choice is vested in the serving PWD employee and not his employer. The proposal is in compliance with DDO and relevant human rights provisions of BL.

178. Some members have queried the need for proposing a transitional arrangement for PWDs already in employment. They have sought information on the feedbacks of stakeholders on the proposed transitional arrangement.

179. The Administration has advised that since 2008, LD has held over 10 meetings with PWDs, parent groups and non-government organizations providing vocational rehabilitation services to discuss the appropriate arrangement for PWDs under the SMW regime. EOC has all along been engaged in the course of these discussions. Previous deliberations were focused on formulating the cardinal principles under the Bill and incorporated the proposals arrived at these discussions into the Bill. After introduction of the Bill into LegCo, the Administration continued in-depth discussions with these stakeholders on the specific operational details of the assessment mechanism, including the transitional arrangement to provide serving PWD employees with a right to make a choice.

180. The Administration has pointed out that the transitional arrangement seeks to allow the serving PWD employees who are paid lower than the SMW rate, in particular those with more severe disabilities, to have a choice according to their own circumstances upon implementation of SMW and thus avoid the possible impact of SMW on their existing employment.

Consequential amendments to the Trade Boards Ordinance

181. Under clause 18, "TBO" will be repealed. Members have noted that TBO, which was enacted in 1940, provides, among other things, that CE in Council may, if it thinks fit, form trade boards and fix minimum wages for trades in which the wage standards are unreasonably low.

182. A member takes the view that the provisions in TBO regarding the normal number of hours of work and overtime payment should not be repealed. The Administration has advised that TBO has been dormant on Hong Kong's statute books for 70 years and the Government has never invoked the powers under TBO. As affirmed by the Court of Appeal in 2009, the Government has discretion as to whether

to invoke such power. As the provisions of TBO are largely obsolete and legally problematic, and are thus incapable of meeting the needs of the prevailing socio-economic situations, the Administration considers it opportune to repeal TBO. The Administration has no intention to deal with the issue of working hours in the Bill. Instead, the Bill is to, inter alia, provide for a minimum wage rate on an hourly basis applying across-the-board.

183. Hon LEE Cheuk-yan, Hon LEUNG Yiu-chung, Hon Cyd HO, Hon CHEUNG Kwok-che and Hon LEUNG Kwok-hung will move CSAs to the effect that the parts in TBO relating to normal number of hours of work and overtime payment would not be repealed.

Manpower arrangements for enforcement of the enacted Ordinance

184. A member has expressed concern about the adequacy of manpower in LD, including Labour Inspectors, for enforcement of the enacted Ordinance. The Administration has advised that it attaches great importance to the implementation of the enacted Ordinance and will adopt appropriate measures and strategies to ensure its effective enforcement. Resource requirements for implementing the enacted Ordinance and relevant law enforcement work will be handled according to the established resource allocation mechanism.

185. The Administration has stressed that the enforcement work of Labour Inspectors has been suitably adjusted and refined in line with prevailing social developments and economic restructuring over the years. LD reviews from time to time the manpower resources and workload of various grades in the department, and meets work demands through effective redeployment of resources and adjustment of enforcement strategies. Where necessary, additional resources and manpower will be sought to cope with operational needs. LD also keeps its work procedures under review for the purpose of continuous improvement and better manpower utilization.

Publicity and promotion

186. Some members are concerned whether there will be sufficient publicity and promotion on the requirements in the enacted Ordinance before commencement. The Administration has advised that prior to the implementation of SMW, LD will vigorously launch a wide range of publicity and promotional activities to enhance public awareness of the SMW requirements and facilitate the understanding of employers and employees regarding their respective obligations and entitlements under the SMW regime. It will include in the publicity materials illustrative examples drawn from different trades and industries to elucidate the application of the provisions on hours worked and wages, including commission, for determining employees' entitlement to SMW. Its engagement process with stakeholder groups will also continue in respect of the preparatory work for implementation, such as the drawing up of guidelines for the concerned sectors.

Timing for commencement of the enacted Ordinance

187. Some members are concerned about the timing for commencement of the enacted Ordinance. Some members are strongly of the view that there should be sufficient time for employers to prepare for the implementation of the enacted Ordinance. Some of these members are concerned that the implementation of the enacted Ordinance may necessitate changes in the terms of employment contracts and hence may lead to massive dismissals. The Administration has advised that besides the enactment of the Bill, it will have to prescribe the SMW rate, having regard to the recommendation of PMWC, by way of subsidiary legislation which will be subject to negative vetting by LegCo. The Administration hopes to commence the enacted Ordinance in the first half of 2011. At the request of members, the Administration has undertaken to brief the Panel on Manpower on its guidelines on SMW for employers and employees before the commencement of the enacted Ordinance. Hon Emily LAU has requested the Administration to state in the speech of the Secretary for Labour and Welfare during the resumption of Second Reading on the Bill that sufficient resources will be provided for publicity on the enacted Ordinance and the preparation of guidelines for different industries.

188. A member has suggested providing a grace period to exempt employers from criminal liability after commencement of the enacted Ordinance. The Administration has advised that prior to the commencement of the SMW system, time will be provided for the community and the business sector to gear up for implementation. This will obviate the need for a further grace period after the commencement of the enacted Ordinance to exempt employers from criminal liability for failing to pay SMW. Moreover, non-compliance with SMW is no different in nature from underpayment of wages. Since an employer who underpays wages wilfully and without reasonable excuse is currently liable to prosecution under EO, a grace period to exempt employers for defaulting SMW is not justifiable. Nevertheless, the Administration will spell out in its guidelines the provisions regarding constructive dismissals in EO.

Possible impact of the Bill on the problem of false self-employment

189. Some members are concerned that the problem of false self-employment may become more serious after the implementation of SMW. They have requested the Administration to step up enforcement against false self-employment.

190. The Administration has advised that LD is adopting a three pronged approach to tackle false self-employment by -

(a) strengthening education and promotional efforts both for employers and employees, targeting small and medium enterprises and in particular sectors where false self-employment is a more common practice, so as to drive home the message that a person falsely labelled as a self-employed person or a contractor is still entitled to employment rights and benefits if in essence there exists an employer-employee relationship;

(b) providing a more user-friendly consultation and conciliation service to employees in false self-employment in case of disputes; and

(c) stepping up enforcement action to safeguard employees' statutory rights and benefits.

191. The Administration has stressed that it encourages those who are aggrieved by suspected false self-employment to report to LD. A complaint hotline has been established to facilitate the reporting of such cases. It will keep relevant statistics on cases related to claims of false self-employment to facilitate better understanding of the problem, and will report back to the Panel on Manpower.

Committee Stage amendments

192. Apart from the CSAs to be moved respectively by the Administration, Hon LEE Cheuk-yan, Hon LEUNG Yiu-chung, Hon Emily LAU, Hon Cyd HO, Hon CHEUNG Kwok-che, Dr Hon LEUNG Ka-lau, Hon Mrs Regina IP and Hon LEUNG Kwok-hung as referred to in the above paragraphs, the Administration will move other minor or technical amendments to the Bill.

Resumption of Second Reading debate on the Bill

193. The Bills Committee raises no objection to the resumption of the Second Reading debate on the Bill at the Council meeting on 14 July 2010.

Follow-up actions by the Administration

194. The Administration has undertaken -

(a) to review the special arrangement for PWDs, including whether there is a need for a second assessment, in the light of operational experience within two years of the implementation of the SMW and report the results to the Panel on Manpower (paragraph 156 above refers);

(b) to advise the Panel on Manpower of the party responsible for bearing the costs for assessment of the degree of PWD's productivity before the commencement of the enacted Ordinance (paragraph 175 above refers); and

(c) to brief the Panel on Manpower on its guidelines on SMW for employers and employees before the commencement of the enacted Ordinance (paragraph 187 above refers).

Consultation with the House Committee

195. The Bills Committee reported its deliberations to the House Committee on 2 July 2010.

Council Business Division 2
Legislative Council Secretariat
9 July 2010

Bills Committee on Minimum Wage Bill

Membership list

Chairman	Hon TAM Yiu-chung, GBS, JP
Deputy Chairman	Hon Paul CHAN Mo-po, MH, JP
Members	Hon Albert HO Chun-yan Hon LEE Cheuk-yan Hon LEUNG Yiu-chung Hon Miriam LAU Kin-yee, GBS, JP Hon Emily LAU Wai-hing, JP Hon Abraham SHEK Lai-him, SBS, JP Hon LI Fung-ying, SBS, JP Hon Tommy CHEUNG Yu-yan, SBS, JP Hon Frederick FUNG Kin-kee, SBS, JP Hon Audrey EU Yuet-mee, SC, JP Hon Vincent FANG Kang, SBS, JP Hon WONG Kwok-hing, MH Hon Jeffrey LAM Kin-fung, SBS, JP Hon Andrew LEUNG Kwan-yuen, GBS, JP Hon WONG Ting-kwong, BBS, JP Hon Ronny TONG Ka-wah, SC Hon CHIM Pui-chung Hon Cyd HO Sau-lan Dr Hon LAM Tai-fai, BBS, JP Hon CHAN Kin-por, JP Hon Tanya CHAN (up to 28 January 2010) Dr Hon Priscilla LEUNG Mei-fun Dr Hon LEUNG Ka-lau Hon CHEUNG Kwok-che Hon WONG Sing-chi Hon WONG Kwok-kin, BBS Hon IP Wai-ming, MH Hon IP Kwok-him, GBS, JP Hon Mrs Regina IP LAU Suk-yee, GBS, JP Dr Hon PAN Pey-chyou Hon Paul TSE Wai-chun Dr Hon Samson TAM Wai-ho, JP Hon Alan LEONG Kah-kit, SC (up to 28 January 2010) (rejoined on 19 May 2010) Hon LEUNG Kwok-hung (up to 28 January 2010) (rejoined on 19 May 2010)

Hon WONG Yuk-man (from 28 September 2009 to 28 January 2010)
(rejoined on 26 May 2010)

(Total : 36 Members)

Clerk Mr Raymond LAM

Legal Adviser Mr Arthur CHEUNG

Date 2 July 2010

Bills Committee on Minimum Wage Bill

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

1. Asian Migrant Centre
2. Asian Migrants Coordinating Body
3. Association of Restaurant Managers
4. Caritas Community Centres - Working Group on Services Relating Legislating Minimum Wage
5. Catering and Hotels Industries Employees General Union
6. Chao and Hak
7. Chinese Cuisine Management Association
8. Civil Human Rights Front
9. Cleaning Workers Union
10. Coalition for Migrants Rights
11. Coalition of Service Providers for Ethnic Minorities in Hong Kong
12. Commodities Promotion and Retailing Employee General Union
13. Concerning CSSA Review Alliance
14. Democratic Alliance for the Betterment and Progress of Hong Kong
15. Employers' Federation of Hong Kong
16. Environmental Services Contractors Alliance (Hong Kong)
17. Families for Domestic Workers
18. Federation of Asian Domestic Workers' Unions in Hong Kong Organizing Committee
19. Federation of Hong Kong Industries

20. Filipino Community Services and Information Network

21. Filipino Domestic Workers' Union

22. Hong Kong Action

23. Hong Kong Association for Democracy and People's Livelihood

24. Hong Kong Blind Union

25. Hong Kong Buildings Management and Security Workers General Union

26. Hong Kong Catering Industry Association

27. Hong Kong Catholic Commission for Labour Affairs

28. Hong Kong Chamber of Professional Property Consultants Limited

29. Hong Kong Confederation of Trade Unions

30. Hong Kong Domestic Workers General Union

31. Hong Kong Employers of Domestic Helpers Association

32. Hong Kong Federation of Restaurants & Related Trades

33. Hong Kong General Chamber of Commerce

34. Hong Kong Housing Management Employees Union

35. Hong Kong Human Rights Monitor

36. Hong Kong Institute of Human Resource Management

37. Hong Kong Joint Council for People with Disabilities

38. Hong Kong Real Estate Agencies General Association

39. Hong Kong Retail Management Association

40. Hong Kong Women Workers' Association

41. Indonesian Migrant Workers Union

42. IUF - International Domestic Workers Network

43. Justice and Peace Commission of the Hong Kong Catholic Diocese

44. Minimum Wage Concern Group

45. Mr Albert WONG Shun-yee, Islands District Council member

46. Mr Andrew SHUEN Pak-man

47. Mr Hans Mahncke

48. Mr Joseph YEUNG

49. Mr LEE Kam-wing

50. Mr LUK Chung-hung, Yuen Long District Council member

51. Mr Raymond HO Man-kit, Sai Kung District Council member

52. Neighbourhood and Worker's Service Centre

53. Oxfam Hong Kong

54. Rehabilitation Alliance Hong Kong

55. Thai Regional Alliance

56. The British Chamber of Commerce in Hong Kong

57. The Federation of Hong Kong and Kowloon Labour Unions

58. The Forthright Caucus

59. The Hong Kong Association of Property Management Companies

60. The Hong Kong Council of Social Service

61. The Hong Kong Federation of Trade Unions - Rights & Benefits Committee

62. The Hong Kong Society for the Blind

63. The Law Society of Hong Kong

64. The Lion Rock Institute

65. The Parents' Association of Pre-School Handicapped Children

66. Unitarian Universalists Hong Kong

67. United Filipinos in Hong Kong

68. Women Cooperatives

69. 「互助情生活易」小組

70. 天主教爭取家庭工資聯盟

71. 天主教家庭工資關注組

72. 外傭僱主義工隊

B. Organizations/individuals who have provided written submissions only

1. A group of entrepreneurs

2. A group of Tung Wah Group of Hospitals Jockey Club rehabilitation centres

3. AHK Air Hong Kong Limited

4. Association for the Advancement of Feminism

5. Cathay Pacific Airways Limited

6. Community Development Initiative

7. Dr Fernando CHEUNG Chiu-hung

8. Environmental Services Contractors Alliance (Hong Kong)

9. Equal Opportunities Commission

10. Freshfields Bruckhaus Deringer

11. HK Environmental Services and Logistics Employees Association

12. Hong Chi Association

13. Hong Kong & Kowloon Trades Union Council

14. Hong Kong Christian Service

15. Hong Kong Diecasting and Foundry Association

16. Hong Kong Down Syndrome Association

17. Hong Kong Dragon Airlines Limited

18. Hong Kong Federation of Catholic Students

19. Hong Kong Institute of Real Estate Administrators

20. Hong Kong Securities Association

21. Hong Kong Women Professional & Entrepreneurs Association Limited

22. John Swire & Sons

23. Kowloon City District Council members Mr CHAN Wing-lim, Ms WONG Wai-ching and Mr CHAN King-wong

24. Manley TAI

25. Miss IP Ka-ching

26. Miss Jessie LEE

27. Ms Elizabeth LAM

28. Ms Sandy AW

29. Ms WONG Mo-tai, Sha Tin District Council member

30. New Life Psychiatric Rehabilitation Association

31. Rehabilitation Advisory Committee

32. Submissions from a group of 97 persons

33. Supermarkets & Chain Stores Employees General Union

34. Terry CHING

35. The Chinese General Chamber of Commerce

36. The Hong Kong General Union of Security & Property Management Industry Employees

37. The Mental Health Association of Hong Kong

38. Travel Industry Council of Hong Kong

39. Tung Wah Group of Hospitals Community Services Division

40. 一群基層待業市民

41. 亞洲民生關注n Friends

42. 劉爾蔓

43. 受《最低工資條例草案》困擾並關心香港民生的市民 (梁女士)

44. 受《最低工資條例草案》引致精神困擾的「打工仔」

45. 吳嘉欣

46. 小飛俠親子義工小組

47. 小麥

48. 幾位牛頭角的婦女

49. 新人類(青年組)

50. 新來港之友互助組

51. 東華三院莫羅瑞華綜合職業復康中心家屬

52. 深受最低工資草案困擾的職場人士

53. 絲一族婦女組

54. 羅嘉穗

55. 翱翔社

56. 荃灣三無(日間街坊茶聚)

57. 荃灣三無(晚間街坊茶聚)

58. 觀塘一些基層街坊

59. 許慧珊

60. 鍾貞霞

61. 關懷愛心互助組

Examples relating to the interpretation of "in attendance at a place of employment" in clause 3(1)(a)

Example 1:

A shop assistant works in the shop from 9:00 am to 1:00 pm and from 2:00 pm to 6:00 pm in accordance with the contract of employment. He also works overtime from 6:00 pm to 7:00 pm with the agreement or at the direction of the employer. According to clause 3(1)(a), the time from 9:00 am to 1:00 pm and from 2:00 pm to 7:00 pm is hours worked for the purpose of computing his minimum wage. Owing to personal reasons (e.g. to avoid busy traffic), the shop assistant returns to the shop at 8:00 am However, if he is not, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance in the shop for the purpose of doing work or receiving training, then, for the purpose of computing his minimum wage, the shop from 8:00 am to 9:00 am is not his place of employment as defined in clause 2, and hours worked under clause 3(1)(a) do not include such time from 8:00 am to 9:00 am.

Example 2:

It is the existing practice of some catering establishments to arrange their employees to be off duty say for a few hours in the afternoon during the interval between the service hours of lunch and dinner. It is commonly known as the time of "落場" (literally meaning "leaving the field"). If an employee during this period is not in attendance at a place of employment for the purpose of doing work or receiving training in accordance with the contract of employment, or with the agreement or at the direction of the employer, such time of "落場" is not hours worked under clause 3(1)(a) for the purpose of computing his minimum wage.

Example 3:

In the airline industry, an employer may arrange the cockpit and cabin crew to have a layover in a destination outside Hong Kong after they perform work during the course of a flight. The employer may also provide free accommodation and/or meals for the crew during the layover. If an employee in his personal time (such as sleeping time) during the layover is not in attendance at a place of employment for the purpose of doing work or receiving training in accordance with the contract of employment, or with the agreement or at the direction of the employer, such time is not hours worked under clause 3(1)(a) for the purpose of computing his minimum wage.

Example 4:

An operative works in the factory in Hong Kong on Mondays, and in the factory in Dongguan from Tuesdays to Fridays. The employer may also provide free accommodation and/or meals for the operative when he is in Dongguan. If the operative in his personal time (such as sleeping time) in Dongguan is not in attendance at a place of

employment for the purpose of doing work or receiving training in accordance with the contract of employment, or with the agreement or at the direction of the employer, such time is not hours worked under clause 3(1)(a) for the purpose of computing his minimum wage.

Example 5:

In the tourism industry, when an escort guide accompanying a tour group outside Hong Kong is in his personal time (such as sleeping time) and is not in attendance at a place of employment for the purpose of doing work or receiving training in accordance with the contract of employment, or with the agreement or at the direction of the employer, such time is not hours worked under clause 3(1)(a) for the purpose of computing his minimum wage. However, when the escort guide works because, for instance, a client in the tour group falls sick at midnight and seeks his assistance, the time spent in attending to and assisting the client is hours worked under clause 3(1)(a) for the purpose of computing his minimum wage.

Example 6:

When a real estate agent is, in accordance with the contract of employment, or with the agreement or at the direction of the employer, in attendance at a property sales office or another place for the purpose of doing work such as awaiting customers, according to clause 3(1)(a) such time is hours worked for the purpose of computing his minimum wage.

Examples relating to the interpretation of "meal break" in clause 3(2)(a)

Example 7:

A clerk is allowed his meal time from 1:00 pm to 2:00 pm and he is not doing work in accordance with the contract of employment, or with the agreement or at the direction of the employer, during the period. Therefore, according to clause 3(2)(a), the hours worked by the clerk for the purpose of computing his minimum wage do not include the period from 1:00 pm to 2:00 pm. In another situation, the clerk takes his meal in the office from 1:00 pm to 2:00 pm. Although he is in the office during the period from 1:00 pm to 2:00 pm, he is not, in accordance with the contract of employment, or with the agreement or at the direction of the employer, in attendance in the office for the purpose of doing work or receiving training. Under such circumstances, for the purpose of computing his minimum wage, the office from 1:00 pm to 2:00 pm is not his place of employment as defined in clause 2, and hours worked under clause 3(1)(a) do not include such period from 1:00 pm to 2:00 pm.

Example 8:

A tour guide, when accompanying a tour group, has to make arrangements for meals en route. When the tourists take their meal, the tour guide is in attendance in the restaurant in accordance with the contract of employment, or with the agreement or at the direction of the employer, for the purpose of doing work, such as for overseeing the meal arrangements,

acting as interpreter for the tourists or helping them in ordering refreshments as necessary. Although the tour guide is also taking his meal, he is at the same time doing work in accordance with the contract of employment, or with the agreement or at the direction of the employer, during the period. Therefore, clause 3(2)(a) does not operate to exclude the period from the hours worked by the tour guide for the purpose of computing his minimum wage. Rather, since the tour guide is in attendance in the restaurant in accordance with the contract of employment, or with the agreement or at the direction of the employer, for the purpose of doing work, such time is hours worked under clause 3(1)(a) for the purpose of computing his minimum wage.

Example 9:

A watchman has his meal time from 1:00 pm to 2:00 pm. At the same time, he remains in attendance at his watchman post for the purpose of doing work in accordance with the contract of employment, or with the agreement or at the direction of the employer. As he is doing work in accordance with the contract of employment, or with the agreement or at the direction of the employer, clause 3(2)(a) does not operate to exclude the period from the hours worked for the purpose of computing his minimum wage. Since the watchman is in attendance at the place of employment in accordance with the contract of employment, or with the agreement or at the direction of the employer, for the purpose of doing work, such time is hours worked under clause 3(1)(a) for the purpose of computing his minimum wage.

Examples relating to the interpretation of "travelling" in clause 3(1)(b) and 3(2)(b)

Example 10:

A messenger resides at Sheung Shui and works in a company at Kowloon Bay. According to clause 3(2)(b), the time during which he is travelling between his place of residence and his company is not hours worked for the purpose of computing his minimum wage. On a day, the messenger delivers some documents from his company at Kowloon Bay to a client's office at Tsuen Wan, and then returns to the company. For the travelling time between his company at Kowloon Bay and the client's office at Tsuen Wan during which he is, in accordance with the contract of employment, or with the agreement or at the direction of the employer, travelling in connection with his employment, the time is hours worked under clause 3(1)(b) for the purpose of computing his minimum wage.

Example 11:

An operative works in the factory at Chai Wan on Mondays, and in the factory in Dongguan from Tuesdays to Fridays. He resides at Sheung Shui. For the travelling time between his place of residence at Sheung Shui and the factory at Chai Wan, clause 3(2)(b) provides that it is not hours worked for the purpose of computing his minimum wage. Since the factory in Dongguan is also his usual place of employment, according to clause 3(2)(b) the time during which he is travelling between his place of residence at Sheung Shui and the factory in Dongguan is not hours worked for the purpose of computing his minimum wage.

Example 12:

An escort guide meets the tour group at the airport and takes care of the tourists and various co-ordinations for their trip out of Hong Kong. He accompanies the tour group travelling by air. For the travelling time between Hong Kong and the destination during which the escort guide is, in accordance with the contract of employment, or with the agreement or at the direction of the employer, travelling in connection with his employment, the time is hours worked under clause 3(1)(b) for the purpose of computing his minimum wage.

Provisional Minimum Wage Commission: Preliminary Views on a Basket of Indicators, Other Relevant Considerations and Impact Assessment

Introduction

The terms of reference of the Provisional Minimum Wage Commission (PMWC) is mainly to advise the Chief Executive on the initial statutory minimum wage (SMW) rate on the basis of an evidence-based approach with a view to ensuring a sensible balance between forestalling excessively low wages and minimising the loss of low-paid jobs, while sustaining Hong Kong's economic growth and competitiveness.

The PMWC has received written submissions and oral presentation of views from various stakeholders and interested parties.

The preliminary view of the PMWC is that in discharging its duties under the terms of reference and in conformity with the spirit and intent of the SMW policy, the Commission should –

(1) make references to:
   a) a number (basket) of indicators that reflect the areas of concerns raised; and
   b) other considerations or factors that are relevant to the SMW policy.

(2) assess the potential impact of different rates of SMW based on data available so as to enable the PMWC to conduct its analysis and deliberation in an informed and evidence-based manner.

Elaboration of the above preliminary views of the Commission is set out below. It cannot be over-emphasised that the views are neither conclusive nor exhaustive. They are set out to enhance transparency on the progress of work of the PMWC and to facilitate community discourse on the optimal initial SMW rate. In this connection, the PMWC looks forward to receiving further comments or submissions from interested organisations and individuals.

Basket of Indicators

PMWC's preliminary view is that the following indicators may be taken into account:

(1) General Economic Conditions

- Including the nominal and real Gross Domestic Product (GDP) growth rates, as well as short-term (2010) and medium-term (2011 to 2014) GDP and inflation forecasts.

(2) Labour Market Conditions

- Labour demand and supply — including employment and vacancies, labour force, labour force participation rate, unemployment and underemployment.
- Wage level and distribution — covering major sectors, particularly the low paying sectors, and making analyses on socio-economic characteristics of the employees.
- Wage differentials — ratios between the lower and higher levels of the hourly wage distribution.
- Employment characteristics — including employment status (employees and self-employed), employment nature (full-time and part-time employment) and contractual status (permanent, fixed-term contract and casual basis).

(3) Competitiveness

- Productivity growth — real labour productivity growth in Hong Kong relative to selected economies, and labour productivity growth in Hong Kong's major sectors.
- Labour costs — nominal unit labour costs of Hong Kong and selected economies.
- Operating characteristics of enterprises — including the numbers of enterprises and employees in various sectors, the ratios of remuneration of employees to total operating costs and business receipts respectively, and earnings before tax and depreciation ratios (abbreviated as profit ratios)[(1)], etc.

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(1) Earnings before tax and depreciation ratios here refer to ratio of profit before deducting tax, depreciation, gain/loss on disposal of property, machinery and equipment, bad debts/write-off, amortization and provisions, to business receipts. This profit is similar to Earnings Before Interest, Tax, Depreciation and Amortisation (EBITDA) in business accounting.

- Entrepreneurship, business sentiment and solvency — including the numbers of creation and deletion of business registration as well as the numbers of bankruptcies and compulsory winding-up of individuals or partners.
- Relative economic freedom and competitiveness of Hong Kong — Hong Kong's rankings under the indices of economic freedom and competitiveness compiled by various international organizations, as well as sub-indices on the regulation and flexibility of labour market.

(4) Standard of Living

- Employment earnings — the nominal and real rates of change in average monthly employment earnings from main employment for full-time workers.
- Consumer price inflation — rate of change in Consumer Price Index (A).

<u>Other Relevant Considerations</u>

The other relevant considerations listed below are neither exhaustive nor final. The value- and interest-laden nature of SMW and as a corollary, the inevitable divergence of views would naturally make any discussion on the SMW rate very animated and interactive. Therefore, the considerations that need to be factored into account may need to be refined in tandem.

The considerations set out below, nonetheless, broadly reflect the views so far expressed by the stakeholders and interested parties that have written to or met with the PMWC.

(1) Social harmony

(2) Encouraging employment

(3) Enhancing quality of life

(4) Raising purchasing power

(5) Other possible chain effects

- Downsizing and organisational changes — streamlining the operation structure, dismissing employees with lower productivity, reducing working hours, introducing automation to substitute for labour, reducing the number of hierarchical levels in the firm, etc.

- Changes in employment terms and relocation — hiring fewer full-time and permanent workers but more part-time and casual staff, relocating operations to areas with lower costs, etc.
- Changes in pay strategy — reducing the amount and number of non-wage benefits (year-end payment, discretionary bonuses, free meals, free accommodation and medical benefits, etc.) in order to raise basic wages to the SMW level, raising wages at the middle to upper segments in order to preserve reasonable wage differentials in the hierarchy, etc.
- Changes in training strategy — reducing training for staff in order to reduce costs.
- Changes in the provision and demand of goods and services — passing part or all of the wage increases to consumers through higher prices or downward adjustment in output or quality, switching to goods or services of lower prices or quality by consumers, etc.
- Wage-price spiral — depending on the level of SMW, the cycle of inflation inducing the rise of labour costs, which in turn further pushes up inflation, may occur.

Impact Assessment

From the above basket of indicators, the PMWC will simulate the possible impact of different SMW levels on the labour market, firms' profits, and prices of goods and services.

Links to reference information related to the data of the Basket of Indicators

(1) General Economic Conditions

- Including the nominal and real Gross Domestic Product (GDP) growth rates

  http://www.censtatd.gov.hk/hong_kong_statistics/statistics_by_subject/index.jsp?subjectID=3&charsetID=2&displayMode=T

- Short-term (2010) and medium-term (2011 to 2014) GDP and inflation forecasts.

  http://www.budget.gov.hk/2010/eng/pdf/supple_appen/appendix_a.pdf
  (please refer to page 6 for relevant information)

(2) Labour Market Conditions

- Labour demand and supply — including employment and vacancies, labour force, labour force participation rate, unemployment and underemployment.

  http://www.censtatd.gov.hk/hong_kong_statistics/statistics_by_subject/index.jsp?subjectID=2&charsetID=2&displayMode=T

- Wage level and distribution — covering major sectors, particularly the low paying sectors, and making analyses on socio-economic characteristics of the employees.

  http://www.censtatd.gov.hk/products_and_services/products/publications/index.jsp

- Wage differentials — ratios between the lower and higher levels of the hourly wage distribution.

  http://www.censtatd.gov.hk/products_and_services/products/publications/index.jsp

- Employment characteristics — including employment status (employees and self-employed), employment nature (full-time and part-time employment) and contractual status (permanent, fixed-term contract and casual basis).

  http://www.censtatd.gov.hk/products_and_services/products/publications/statistical_report/labour/index_cd_B1050001_dt_latest.jsp

  http://www.censtatd.gov.hk/products_and_services/products/publications/index.jsp

(3) Competitiveness

- Productivity growth — real labour productivity growth in Hong Kong relative to selected economies, and labour productivity growth in Hong Kong's major sectors.

  http://www.statistics.gov.hk/publication/feature_article/B70911FB2009XXXXB0100.pdf

- Labour costs — nominal unit labour costs of Hong Kong and selected economies.

- Operating characteristics of enterprises — including the numbers of enterprises and employees in various sectors, the ratios of remuneration of employees to total operating costs and business receipts respectively and earnings before tax and

depreciation ratios (abbreviated as profit ratios)[(1)], etc.

http://www.censtatd.gov.hk/products_and_services/products/publications/statistical_report/commerce_and_industry/index.jsp
(please refer to the reports of annual survey of various industries)

- Entrepreneurship, business sentiment and solvency — including the numbers of creation and deletion of business registration, as well as the numbers of bankruptcies and compulsory winding-up of individuals or partners.

  http://www.ird.gov.hk/dar/2008-09/table/eng/schedules.pdf
  (please refer to Schedule 8 for relevant information)

  http://www.oro.gov.hk/cgi-bin/oro/stat.cgi

- Relative economic freedom and competitiveness of Hong Kong — Hong Kong's rankings under the indices of economic freedom and competitiveness compiled by various international organizations, as well as sub-indices on the regulation and flexibility of labour market.

  http://www.heritage.org/index/

  http://www.freetheworld.com/release.html

  http://www.weforum.org/en/initiatives/gcp/Global%20Competitiveness%20Report/index.htm

  http://www.imd.ch/research/publications/wcy/wcy_online.cfm

  http://www.doingbusiness.org/features/Highlights2010.aspx

(4) Standard of Living

- Employment earnings — the nominal and real rates of change in average monthly employment earnings from main employment for full-time workers.

  http://www.censtatd.gov.hk/products_and_services/products/publications/statistical_report/labour/index_cd_B1050001_dt_latest.jsp

- Consumer price inflation — rate of change in Consumer Price Index (A).

  http://www.censtatd.gov.hk/hong_kong_statistics/statistics_by_subject/index.jsp?subjectID=12&charsetID=1&displayMode=T

(1) Earnings before tax and depreciation ratios here refer to ratio of profit before deducting tax, depreciation, gain/loss on disposal of property, machinery and equipment, bad debts/write-off, amortization and provisions, to business receipts. This profit is similar to Earnings Before Interest, Tax, Depreciation and Amortisation (EBITDA) in business accounting.