吳靄儀議員辦事處
LegCo Office of the Hon. Margaret Ng

公民黨
Civic Party

中環昃臣道 8 號
立法會
立法會主席
曾鈺成議員

主席先生：

關於《2008 年僱員再培訓條例（修訂附表 3）公告》，有議員欲就《僱員再培訓條例》（第 423 章）徵收的徵款提出永久豁免的修正案。根據附件的文件，政府當局曾經在人力事務委員會回應本人的提問時，指出該項徵款的目的並非作爲政府一般收入。

本人敬悉　閣下將就有關修正案作出裁決，因此提出以上意見，及有關文件，以資參考。

立法會議員
吳靄儀

2008 年 11 月 7 日

附件：

1．立法會人力事務委員會 2003 年 3 月 12 日特別會議紀要（CB(2)1785/02-03 號文件）
2．立法會人力事務委員會 2003 年 4 月 24 日會議紀要（CB(2)2281/02-03 號文件）
3．立法會法律事務部題爲「人口政策及輸入外籍家庭傭工」文件（LS83/02-03 號文件）

副本送：全體立法會議員

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立法會
Legislative Council

LC Paper No. CB(2)1785/02-03
(These minutes have been
seen by the Administration)

Ref : CB2/PL/MP/1

Panel on Manpower

Minutes of special meeting
held on Wednesday, 12 March 2003 at 10:45 am
in the Chamber of the Legislative Council Building

Members present	:	Hon LAU Chin-shek, JP (Chairman) Hon CHAN Kwok-keung (Deputy Chairman) Hon Kenneth TING Woo-shou, JP Hon Cyd HO Sau-lan Hon LEE Cheuk-yan Dr Hon LUI Ming-wah, JP Hon CHEUNG Man-kwong Hon CHAN Yuen-han, JP Hon LEUNG Yiu-chung Hon YEUNG Yiu-chung, BBS Hon Andrew CHENG Kar-foo Hon LI Fung-ying, JP Hon Tommy CHEUNG Yu-yan, JP Hon Michael MAK Kwok-fung Hon LEUNG Fu-wah, MH, JP
Members attending	:	Hon Margaret NG Hon Mrs Selina CHOW LIANG Shuk-yee, GBS, JP Hon Audrey EU Yuet-mee, SC, JP
Members absent	:	Hon Ambrose LAU Hon-chuen, GBS, JP Hon SZETO Wah Hon Frederick FUNG Kin-kee

Public Officers attending	:	Mr Stephen IP, GBS, JP Secretary for Economic Development and Labour
		Mr Matthew CHEUNG Kin-chung, JP Permanent Secretary for Economic Development and Labour (Labour)
		Mrs DO PANG Wai-yee Principal Assistant Secretary for Economic Development and Labour (Labour)
		Mr Philip K F CHOK, JP Deputy Secretary for Education and Manpower
		Mr Ian WINGFIELD Law Officer (International Law) Department of Justice
		Ms Roxana CHENG Senior Assistant Solicitor General Department of Justice
		Mrs Jenny CHAN, JP Assistant Commissioner for Labour (Employees' Rights and Benefits)
		Mr Simon PEH Assistant Director of Immigration (Visa and Policies)
		Mr H Y CHEUNG Principal Economist Financial Services and the Treasury Bureau
Attendance by invitation	:	Hong Kong Employers of Overseas Domestic Helpers Association
		Mr Joseph LAW
		Asian Migrants Coordinating Body
		Connie Bragas-Regalado (United Filipinos in Hong Kong)
		Demi Kasi Darum (Association of Indonesian Migrant Workers)
		Association of Indonesian Migrant Workers
		Jamilatun

United Filipinos in Hong Kong

Emmanuel C Villanueva

Mission for Filipino Migrant Workers (Hong Kong) Society

Cynthia Ca Abdon-Tellez

Corazon A Canete

Coalition for Migrants Rights

Lori G Brunio

Indonesian Migrant Workers Union

Eko Indriyanti

Wahyu

Asia Pacific Mission for Migrants

Aurelio Estrada

Esther Bangcawayan

Clerk in attendance	:	Mrs Sharon TONG Chief Assistant Secretary (2) 1
Staff in attendance	:	Miss Kitty CHENG
	:	Assistant Legal Adviser 5
		Mr Stanley MA Senior Assistant Secretary (2) 6

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I. Review of the policy on foreign domestic helpers
(LC Paper Nos. CB(2)1438/02-03(01) and (02) and EDLB/LB/C/36/02)

At the invitation of the Chairman, Secretary for Economic Development and Labour (SEDL) briefed members on the key issues on review of the policy on foreign domestic helpers (FDHs). He highlighted that the proposed reduction of the Minimum Allowable Wage (MAW) of FDHs by $400 with effect from 1 April 2003 and the proposed Employees Retraining Levy (the levy) of $400 per month for each FDH with effect from 1 October 2003 were independent policy decisions. He also stressed that the review of MAW was conducted in line with existing practice and was not intended to reduce the income of FDHs. He added that the levy was in conformity with the Basic Law, including those provisions concerning human rights.

Meeting with representative of the Hong Kong Employers of Overseas Domestic Helpers Associations
(LC Paper No.CB(2)1438/02-03(03))

2. Mr Joseph LAW presented the views of the Hong Kong Employers of Overseas Domestic Helpers Associations (the Association). He concluded that the Association supported the proposed reduction of MAW by $400, but considered the inclusion of importation of FDHs under the Employee Retraining Ordinance (ERO) not justified. However, having regard to the prevailing economic downturn and the large fiscal deficit, the Association reluctantly accepted the levy of $400 for employment of each FDH on a temporary basis.

Meeting with representatives of the Asian Migrants Coordinating Body, Association of Indonesian Migrqnt Workers, United Filipinos in Hong Kong and Mission for Filipino Migrant Workers (Hong Kong) Society
(LC Paper No.CB(2)1438/02-03(04))

3. Ms Connie BRAGAS-REGALADO presented the views of the four organisations as detailed in their joint submission. She concluded that the four organisations opposed the proposed reduction of MAW by $400 and the levy of $400 on employers for employment of each FDH.

Meeting with representatives of the Coalition for Migrants Rights and Indonesian Migrant Workers Union
(LC Paper Nos. CB(2)1438/02-03(05) and CB(2)1474/02-03(01))..

4. Ms Lori BRUNIO and Ms Eko INDRIYANTI presented the views of the Coalition for Migrants Right (CMR) and the Indonesian Migrant Workers Union (IMWU) as detailed in their joint submission and the statement of the IMWU which was tabled at the meeting. They stressed that CMR and IMWU considered the two proposals discriminative against FDHs and were in violation with the International Labour Convention (ILC). They concluded that CMR and IMWU

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opposed the proposed reduction of MAW by $400 and the levy of $400 on employers for employment of each FDH.

Meeting with representatives of the Asia Pacific Mission for Migrants
(LC Paper No.CB(2)1438/02-03(06))

5. Mr Aurelio ESTRADA said that Asia Pacific Mission for Migrants supported the views of the Asian Migrants Coordinating Body and opposed the proposed reduction of MAW by $400.

Issues raised by Members

6. Miss Margaret NG asked why the imposition of a levy on some 200 000 employers to pay $400 per month for each FDH was not regarded as a new taxation, and why there was no need to legislate for the proposal.

7. Law Officer (International Law) (LO(IL)) responded that ERO was enacted by LegCo in 1992 to establish a statutory fund which was to be financed by the levy imposed on employers of imported employees under a labour importation scheme (LIS) for the purpose of providing retraining course designed to assist those workers who were displaced as a result of the economic restructuring process to find alternative employment. Section 14 of ERO empowered the Chief Executive (CE) in Council to approve a LIS from time to time to impose a levy payable by the employers to the Director of Immigration (D of ImmD) in respect of each imported worker to be employed under the scheme. In approving the inclusion of FDHs in ERO, CE in Council was exercising the statutory authority and applying the mechanism already approved by LegCo to set a levy of $400 per month for each FDH in accordance with Schedule 3 of ERO which applied to all imported employees.

8. LO(IL) further explained that since the statutory levy should be paid into the Employees Retraining Fund under ERO and be used for the purposes of the Fund, it was not imposed for the purpose of general revenue and should not be regarded as a new taxation. He also pointed out that when enacting ERO, LegCo had in effect endorsed the mechanism by which the Administration was to decide whether the employment of a certain category of imported foreign workers should be designated under a LIS.

9. Miss Margaret NG considered that the legislative intent of ERO did not cover FDHs as imported foreign workers under a LIS. She pointed out that section 14(4) of ERO specified that an employer should apply to D of ImmD for permission to employ an imported foreign worker under a LIS in accordance with a quota allocated by or with the authority of Secretary for Education and Manpower (SEM). She asked why the Administration considered that section 14 of ERO gave such a power to the Administration to impose a levy on some 200 000 households who were formerly not covered by ERO as employers of imported foreign workers.

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10. LO(IL) said that he believed that consideration had been given to designating the importation of FDHs as a LIS under the ERO when it was enacted in 1992. However, it was not included as a designated LIS. He said that the decision should not prevent the inclusion of importation of FDH under ERO in the light of changing social and economic circumstances, i.e. when there was public support to do so. Furthermore, the proposal to include the importation of FDHs under ERO would not have any retrospective effect. As regards the application of a quota system, LO(IL) said that an employer had to apply to the D of ImmD for the grant of separate visas for employment of two or more FDHs.

(*Post-meeting note :* The Administration found no record of deliberation on whether importation of FDHs should be designated as a LIS when the ERO was enacted in 1992.)

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11. Miss Margaret NG requested the Administration to provide the Department of Justice (D of J)'s advice on the legal justifications for the imposition of a levy on employers of FDHs without the need to legislate in writing. She also requested the Administration to provide the background for excluding importation of FDHs from a LIS when ERO was enacted in 1992 and whether a quota system would apply to the importation of FDHs. In response to Miss NG, Assistant Legal Adviser 5 undertook that the Legal Service Division would provide as soon as possible the written opinion on whether it was legally in order for the levy to be imposed under ERO as requested at previous House Committee meeting and a response to D of J's advice.

12. Mrs Selina CHOW said that MAW of FDHs after the current adjustment from $3,670 to $3,270 was still competitive as $3,270 was double or treble of the wages earned by FDHs in Singapore, Indonesia, Malaysia and some Middle East countries. She stressed that the Liberal Party was sympathetic to the situation of FDHs in that many of them were actually receiving a salary less than MAW. She suggested that the Panel should focus discussion on how the widespread underpayment of wages in employment of FDHs could be effectively curbed. She urged the Administration to work out effective measures to combat such underpayment and other illegal practices of the employment agencies on overcharging of commission on FDHs. She also encouraged FDHs who were exploited by their employers or employment agencies to come forward as witnesses.

13. SEDL responded that MAW was subject to regular review which took account of the general economic and employment situation as reflected by a host of economic indicators. As a result of his recent visit to Indonesia, the relevant authorities in Indonesia had agreed to provide Indonesia domestic helpers (IDHs) with relevant information on the terms and conditions of employment in Hong Kong. IDHs under training would be briefed on MAW and the complaint channels available in case they were unfairly treated by their employers or the employment agencies. Locally, the Administration had set up an inter-

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departmental task force comprising the Labour Department, Immigration Department and the Police to combat underpayment of wages and illegal practices of employment agencies and local employers. Booklets and leaflets in the FDHs' languages had been published to promote the awareness of FDHs on their rights and benefits in employment, and the criminal nature of underpayment of wages and illegal employment of FDHs under the Hong Kong law.

14. Ms Connie BRAGAS-REGALADO said that FDHs were reluctant to testify against the illegal practices of their employers and employment agencies for fear that they would lose their jobs. Ms Lori BRUNIO supplemented that the long judicial proceedings involved in prosecution would deter FDHs from lodging complaints against their employers and the employment agencies. She stressed that FDHs simply could not take the risk of losing their jobs.

15. Mr LEE Cheuk-yan stated that the Hong Kong Confederation of Trade Unions (HKCTU) was opposed to the proposed imposition of a levy on employers of FDHs and the reduction of MAW of FDHs. Referring to the submission of HKCTU entitled "manipulation of statistics for political reasons", he highlighted the more appropriate economic indicators for assessing the adjustment of MAW. He asked why the Administration had applied different sets of economic indicators for assessing the adjustments of MAW in the last review in 1999 and the current review in 2003 and queried the mechanism adopted. He pointed out that local employees normally received a thirteenth month payment or Chinese New Year bonus in the first quarter of a year. Referring to Annex I of the Administration's paper [LC Paper No.CB(2)1438/02-03(01)], he considered that comparing the fourth quarter of 2002 with the first quarter of 1999 in respect of the decrease in median monthly household income of local households with FDHs was inappropriate and misleading. Mr LEUNG Yiu-chung expressed a similar concern on the adoption of the median values for such comparison.

(*Post-meeting note* : HKCTU's submission was circulated to members under LC Paper No.CB(2)1474/02-03(02) on 13 March 2003.)

16. SEDL stressed that the downward adjustment of $400 (10.9%) was reasonable as it was set on the basis of a well-tried and established mechanism. He explained that in adjusting the MAW, the Administration had taken into account of the general economic and employment situation of Hong Kong and made reference to a host of economic indicators including the relevant pay trends, price indices, unemployment rate and labour market situation. Specifically, a basket of economic indicators were included, i.e., the Consumer Price Index (A), the median monthly employment earnings of service workers and workers in elementary occupations, nominal wage index for service workers for all industries, median monthly household income, Gross Domestic Product and unemployment rate. SEDL added that the median employment earnings should be given due reference in considering the adjustment of MAW because

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compared with the median, the average wage was more subject to possible distortions by extreme values.

17. Mr Kenneth TING held the view that MAW of FDHs should follow the mainstream wage adjustments of local households, particularly in a period of economic downturn. He pointed out the changes in currency exchange rates between Hong Kong dollars and those of the FDH exporting countries in November 1997 and in March 2003 to illustrate that the proposed adjustment of MAW was reasonable. He concurred with Mrs Selina CHOW that enforcement against underpayment of wages of FDHs and illegal practices of the employment agencies should be stepped up.

18. Mr LEUNG Fu-wah expressed doubt about the serious accusations such as the violation of ILC and human rights treaties as stated in the joint submission of the deputations and said that Hong Kong was a democratic society with a well-established judiciary system to protect the rights of individuals including FDHs. He stressed that FDHs enjoyed the same employment protection and benefits as their local counterparts. Referring to the alleged high commissions charged by overseas employment agencies, he urged FDHs to report such overcharging of commission to the Labour Department for follow-up and come forward as witnesses.

19. Ms Corazon CANETE said that some FDHs had lodged complaints against their employers and unscrupulous employment agencies. However, the judicial process was so long that FDHs simply could not afford the time to attend the court hearings and suffer the loss of income as a result.

20. Mr LEUNG Fu-wah urged the Administration to review the FDH policy and its implications on the employment of local domestic helpers (LDHs). Given a prevailing 7.4% unemployment rate of the local workforce, he also suggested that the Government should consider suspending further importation of FDHs whilst the review was in progress. In view of the serious accusations in a deputation's submissions, he said that the Administration should also review the existing arrangements and procedures for importation of FDHs with a view to eliminating underpayment of wages and illegal practices of the employment agencies.

21. SEDL responded that the Administration was of the view that there was a genuine need for Hong Kong to continue to import FDHs, given the inadequate supply of full-time live-in local domestic helpers. He pointed out that given the "satisfied customer syndrome", it was difficult to secure sufficient evidence to bring criminal proceedings against employers and employment agencies. He urged the FDHs concerned to report their cases to the relevant authorities and come forward as witnesses. He said that the Labour Department had recently re-deployed resources to set up the Employment Claims Investigation Unit to investigate offences under the Employment Ordinance including wage offences, and had already prosecuted employers for underpayment of wages. Furthermore,

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the relevant authorities in Indonesia would send their labour officers to Hong Kong to advise IDHs of the employment protection and benefits available to them.

22. Permanent Secretary for Economic Development and Labour (Labour) supplemented that the Labour Department had been in contact with FDH representatives and the relevant non-government organisations to establish a reporting system whereby information concerning underpayment of wages could be referred to a designated officer so that investigation and prosecution could be conducted swiftly.

23. Mr LEUNG Fu-wah pointed out that underpayment of wages of FDHs was already a widespread phenomena in employment of FDHs, in particular the Indonesian FDHs, which could hardly be eradicated by a few isolated prosecutions. He suggested that the Administration should set up an effective mechanism for detection and prosecution of underpayment of wages on a continuous basis. He considered that successful elimination of such illegal practice would enhance the image of Hong Kong as a major importing place of FDHs and maintain its reputation as an international city.

24. The Chairman concurred with Mr LEUNG Fu-wah on the need to set up an effective detection and prosecution mechanism to combat underpayment of wages and other illegal practices in employment of FDHs. He considered that the Administration should work out arrangements to facilitate FDHs to lodge complaints and testify in courts. Mr Tommy CHEUNG also suggested that the Administration should collaborate with the Judiciary to simplify the court proceedings so that more FDHs would be willing to come forward to assist in prosecution against underpayment of wages.

25. SEDL responded that the Administration was liaising with the Judiciary on possible arrangements and measures to speed up the proceedings for prosecutions against illegal practices such as underpayment of wage of FDHs by employers and employment agencies. He undertook to follow up on the matter.

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26. Ms LI Fung-ying said that she and Messers CHAN Kwok-keung and LEUNG Fu-wah shared a similar concern about the implications of the existing FDH policy on the employment of local workers. She pointed out that the patience of local workers, particularly LDHs, to tolerate the FDH policy had been pushed to the extreme. She said that according to their questionnaire survey conducted in collaboration with the employee representatives of the Labour Advisory Board in August 2002, more than 90% of the local labour unions had expressed strong dissatisfaction that the FDH policy had not been reviewed after some thirty years of implementation. These labour unions held a strong view that importation of FDHs should be freezed with immediate effect. These labour unions had suggested that a levy be imposed on employers of FDHs and that measures be in place to protect the employment opportunities of local workers. They also pointed out that the FDH policy had been widely abused and the

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Administration should only allow those families who could demonstrate a genuine need, such as for taking care of a new born baby or an elderly suffering from a chronic disease, to employ FDHs.

27. SEDL responded that the Government would have to take into account the interests and concerns of FDH employers and the labour unions on importation of FDHs. Given the current shortage in the supply of full-time live-in LDHs, there was a genuine need for importation of FDHs to continue. He pointed out that freezing the importation of FDHs or establishing a set of "fair criteria" for further admission of FDHs would be fraught with problems. In fact, the Task Force on Population Policy had included a review of the FDH policy in view of its share of the bulk of the transient population in Hong Kong. The review sought to ensure that the FDH policy matched the aspirations of the community and met the needs of Hong Kong's development, and concluded that employers of FDHs should be subject to a new scheme for importation of labour similar to employers under the Supplementary Labour Scheme (SLS).

28. Ms LI Fung-ying stressed that local labour unions had requested the Administration to review its policy on importation of FDH with a view to improving the employment of local workers. She asked how the Administration would assist some 200 000 unemployed local workers in finding employment. She added that her labour union supported the policy of imposing a levy on employers of imported employees including employers under the "Admission of Talents Scheme" and the "Admission of Mainland Professionals Scheme". Mr LEUNG Yiu-chung also asked why the Administration did not impose a levy on employers under the two Schemes.

29. SEDL explained that the levy collected under ERO would be channeled into the Employees Retraining Fund for the retraining of local workers to take up new employment. Unlike a LIS which allowed employers to engage imported workers at the technician level or below, the Scheme for admission of talents and the Scheme for admission of Mainland professionals targeted at candidates normally holding a degree or above. These talents or professionals were allowed to work in Hong Kong on different grounds, including the expectation that they would contribute to economic development which would in turn create more employment opportunities for the local workforce.

30. The Chairman and Mr LEUNG Yiu-chung considered that the Administration should conduct a wide consultation before changing its policy to include the importation of FDHs in ERO. Mr LEUNG also queried the purpose of the proposals to reduce MAW and to impose a levy on employers of FDHs.

31. SEDL explained that Government policies were subject to review in the light of changing circumstances. He pointed out that the report of the Task Force on Population Policy had forecast a surplus of 138 000 semi-skilled and low-skilled workers by 2005. He also pointed out that the Task Force had included a review of the FDH policy in its development of a population policy for Hong

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Kong. It had recommended to impose a levy payable by employers for the employment of FDHs under ERO.

32. Ms Audrey EU pointed out that at the LegCo Sitting on 28 June 1995, the then SEM had, in response to a question on whether the Administration would consider levying retraining charges on employers of FDHs, said that FDHs came under a separate scheme which was different from LIS and that FDHs were imported on the basis of the local demand with no special charges levied or quota set for such employment. She asked why the FDH policy had changed without consultation. She also queried the justifications for including the importation of FDHs under ERO and imposing a levy on employers of FDHs.

33. SEDL explained that although FDHs and LDHs were serving different markets, some families might now consider employing LDHs who had attended the appropriate training and were able to meet their requirements. Given that employers of FDHs were enjoying services offered by foreign workers, and having regard to the current economic situation and high unemployment rate, the Administration considered it reasonable to bring the admission of FDHs on par with the SLS and require employers of FDHs to contribute towards the training and retraining of the local workforce and promotion of job opportunities for local employees.

34. Dr LUI Ming-wah asked why the reduction of MAW could not be more than $400 a month. He also asked why the levy for each FDH employee could not be more than $400 a month. SEDL explained that the adjustment of MAW was set on the basis of the existing well-tried and established mechanism, and the levy was set in accordance with Schedule 3 of ERO.

35. Mr MAK Kwok-fung asked why the Association would support the downward adjustment of MAW and the imposition of the levy. He considered that employers would suffer as the adjustment might affect the morale of FDHs and their quality of work.

36. Mr Joseph LAW responded that the Association considered it reasonable to adjust MAW in the light of the prevailing circumstances but had only reluctantly accepted the inclusion of importation of FDHs as a new LIS under ERO in view of the prevailing economic circumstances. He stressed that the Association considered that there was a distinction between imported employees employed by businesses and by domestic households, and reserved the right to urge the Administration to review the justification for the levy when the economic conditions had changed. He also stressed that there was a genuine need for some 200 000 families comprising a population of 900 000 to use the service of FDHs.

37. Mr MAK Kwok-fung asked whether the Administration had assessed whether employers of FDHs would adjust the salaries of their FDHs in accordance with the revised MAW. SEDL responded that it was not possible for

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the Administration to conduct a survey in this regard, but pointed out that so far he had not heard of any employer who would adjust his FDH's salary.

38. Mr YEUNG Yiu-chung said that the Democratic Alliance for Betterment of Hong Kong supported the proposed adjustment of MAW and the imposition of a levy on employers of FDHs. He considered that the Administration should clarify whether the proposals were in compliance with the various anti-discrimination requirements and international treaties on human rights.

39. SEDL responded that the imposition of a levy on employers of FDHs complied with the right to equality and equal protection. There was no inequality of treatment and the levy did not raise any issue of discrimination or non-compliance with the various international treaties on human rights such as ILC and the Migration for Employment Convention (Revised) 1949 (ILC 97) of the International Labour Organisation.

40. Mr Andrew CHENG opined that as FDHs were vulnerable groups, the Government should protect the interests of FDHs who received $3,670 a month for working some ten-odd hours a day. He queried whether a downward adjustment of MAW by $400 should be made merely because local workers were having a similar level of reduction in monthly income. He urged the Administration to re-consider the need to set a statutory minimum wage for low income workers in the community as well as to review the FDH policy having regard to the existing supply of LDHs.

41. SEDL reiterated that the Task Force on Population Policy had conducted a thorough review of the FDH policy and recommended the adjustment of MAW and the inclusion of importation of FDHs under ERO. He stressed that the Administration would keep in view the latest developments in the demand and supply of both LDHs and FDHs in the community.

Way forward

42. Mr LEE Cheuk-yan said that he would not move his motion on adjustment of MAW circulated to members before the meeting. He suggested that the Panel should hold follow-up discussion on the subject when the Administration had provided detailed information on the mechanism for adjustment of MAW and a written response to issues raised by Members concerning the imposition of levy. The Chairman added that Members should inform the Clerk of further information to be provided by the Administration. Members raised no objection.

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II. Any other business

43. There being no other business, the meeting ended at 1: 05 pm.

Council Business Division 2
Legislative Council Secretariat
22 April 2003

立法會
Legislative Council

LC Paper No. CB(2)2281/02-03
(These minutes have been seen by the Administration)

Ref : CB2/PL/MP/1

Panel on Manpower

Minutes of meeting
held on Thursday, 24 April 2003 at 2:30 pm
in the Chamber of the Legislative Council Building

Members present	:	Hon CHAN Kwok-keung (Deputy Chairman) Hon Kenneth TING Woo-shou, JP Hon Cyd HO Sau-lan Hon LEE Cheuk-yan Dr Hon LUI Ming-wah, JP Hon CHEUNG Man-kwong Hon LEUNG Yiu-chung Hon YEUNG Yiu-chung, BBS Hon Ambrose LAU Hon-chuen, GBS, JP Hon Andrew CHENG Kar-foo Hon SZETO Wah Hon LI Fung-ying, JP Hon Michael MAK Kwok-fung Hon LEUNG Fu-wah, MH, JP Hon Frederick FUNG Kin-kee
Members attending	:	Hon NG Leung-sing, JP Hon Margaret NG
Members absent	:	Hon LAU Chin-shek, JP (Chairman) Hon CHAN Yuen-han, JP Hon Tommy CHEUNG Yu-yan, JP
Public Officers attending	:	Item III Mr Stephen IP, GBS, JP Secretary for Economic Development and Labour

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Mr Matthew CHEUNG Kin-chung, JP
Permanent Secretary for Economic Development and Labour (Labour)

Mrs DO PANG Wai-yee
Principal Assistant Secretary for Economic Development and Labour (Labour)

Mr Philip CHOK, JP
Deputy Secretary for Education and Manpower

Mr Ian WINGFIELD, GBS, JP
Law Officer (International Law)
Department of Justice

Ms Roxana CHENG
Senior Assistant Solicitor General
Department of Justice

Mr Simon PEH
Assistant Director of Immigration (Visa and Policies)

Mrs Jenny CHAN, JP
Assistant Commissioner for Labour (Employees' Rights and Benefits)

Item IV

Mr Matthew CHEUNG Kin-chung, JP
Permanent Secretary for Economic Development and Labour (Labour)

Mr TSANG Kin-woo, JP
Assistant Commissioner for Labour (Employment Services)

Mrs Jennie CHOR, JP
Assistant Commissioner for Labour (Labour Relations)

Item V

Mr Matthew CHEUNG Kin-chung, JP
Permanent Secretary for Economic Development and Labour (Labour)

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Mr TSANG Kin-woo, JP
Assistant Commissioner for Labour (Employment Services)

Item VI

Mr Byron LAM
Principal Assistant Secretary for Education and Manpower
(Manpower Planning and Training)

Mr Gary AU
Assistant Secretary for Education and Manpower
(Manpower Planning and Training)

Mr M K WONG
Chief Industrial Training Officer
Vocational Training Council

Clerk in attendance : Mrs Sharon TONG
Chief Assistant Secretary (2) 1

Staff in attendance : Miss Kitty CHENG
: Assistant Legal Adviser 5
(for item III only)

Ms Dora WAI
Senior Assistant Secretary (2) 4

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I. Confirmation of minutes of previous meetings and matters arising
(LC Paper Nos. CB(2)1785/02-03 and CB(2)1787/02-03)

The minutes of the meetings held on 12 and 28 March 2003 were confirmed.

II. Date of next meeting and items for discussion
(LC Paper Nos. CB(2)1783/02-03(01) and (02))

2. Members agreed that the next regular meeting originally scheduled for 15 May 2003 be re-scheduled to 6 May 2003 at 10:45 am to discuss the following items -

(a) Severe Acute Respiratory Syndrome : Proposed relief measures on employment side; and

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(b) Proposed withholding of the Factories and Industrial Undertakings (Medical Examinations) Regulation.

III. Review of the policy on foreign domestic helpers - proposal to impose a levy on employers of foreign domestic helpers
(LC Paper Nos. CB(2)1730/02-03(01), LS83/02-03, CB(2)1438/02-03(02), CB(2)1783/02-03(03) and (04), and the Legislative Council Brief (Ref: EDLB/LB/C/36/02))

3. Secretary for Economic Development and Labour (SEDL) briefed Members on the Administration's response to issues previously raised by Members and Assistant Legal Adviser 5 (ALA5) concerning the proposal to impose a levy on employers of foreign domestic helpers (FDHs) as set out in its paper (LC Paper No. CB(2)1730/02-03(01)). SEDL informed Members that judicial review was being sought by a group of members of the public on the legality of the levy proposal.

4. Miss Margaret NG said that the 1992 General Labour Importation Scheme (the General Scheme) had been in place before the introduction of the Employees Retraining Bill. According to the Administration, employers who imported workers under the General Scheme had been charged a levy as a contractual fee by the Government in consideration of the grant of a quota to employers for importing workers. The Administration's intention in making the levy statutory was to ensure that the levy collected could be channelled directly to the statutory fund specified for retraining of local workers.

5. Miss Margaret NG pointed out that paragraph 6 of the Legislative Council (LegCo) Brief on "Importation of Labour: The Way Forward" issued in 1996 provided in Annex A to the Administration's paper (LC Paper No. CB(2)1730/02-03(01)), which read "Applications from employers from any sector of industry will be processed on …….", had revealed that labour importation schemes had been designed for importing industrial workers rather than domestic helpers. In her view, the legislative intent of the Employees Retraining Ordinance (Cap. 423) (ERO) did not cover FDHs as imported foreign workers under a labour importation scheme. Apparently, it was a change to the original policy of not charging a levy from employers of FDHs. She questioned whether there had been adequate public consultation on such a fundamental change, and whether the Labour Advisory Board (LAB) had been consulted on the proposal, in particular the conditions for importation of FDHs set out in Annex B to the Administration's paper (LC Paper No. CB(2)1730/02-03(01)), before it was announced to the public.

6. SEDL said that section 14(3) of the ERO empowered the Chief Executive (CE) (CE) in Council to approve, from time to time, a labour importation scheme under the terms of which an employees retraining levy was payable by employers who imported workers under the scheme. Although importation of FDHs had not been designated as a labour importation scheme when the ERO was enacted, it should not prevent the

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inclusion of such importation under the ERO in the light of changing social and economic circumstances.

7. SEDL pointed out that the meaning of "industry" was very broad, which covered various trades and industries. Therefore, the Supplementary Labour Scheme (SLS) under the ERO was applicable to a great number of trades and industries. He also pointed out that there was not a standing requirement to consult LAB on each proposed labour importation scheme. For example, LAB had not been consulted on the Special Importation of Labour Scheme for the New Airport and Related Projects as the ground rules were similar to those of the General Scheme. As for SLS, LAB had been consulted because it would be involved in monitoring the Scheme and vetting applications.

8. Miss Margaret NG opined that the scope of application of section 14 of the ERO should be determined by its legislative intent rather than the apparent meaning of the provision. If in doubt, proper consultation should be conducted before the formulation and implementation of a proposal. In her view, LAB should be consulted on each proposal, including labour importation schemes, where there might be implications on local employment.

9. ALA5 said that section 14 of the ERO did not expressly provide for the scope of application in respect of a labour importation scheme approved by CE in Council for the purposes of this section. Therefore, it was not clear as to whether a labour importation scheme under the ERO should only be applicable to business and industrial sectors, or whether it should cover domestic purposes as well. Despite this, as a matter of principle of law, the powers conferred by an ordinance should be exercised reasonably and in good faith and upon lawful and relevant grounds of public interest in case of absence of an express provision. In determining how to exercise such powers, the policy intent of the legislation should be taken into due consideration.

10. Law Officer (International Law) of the Department of Justice (LO(IL), D of J) said that the definitions of "employer" and "employee" under the ERO imposed no requirement on the scope of application of a labour importation scheme approved by CE in Council for the purposes of the Ordinance. It might cater for commercial or domestic purposes.

11. Mr LEUNG Fu-wah said that he was a member of LAB between 1991 and 2000. According to his knowledge, LAB had not always been consulted on proposals relating to importation of labour. He recalled that the establishment of a fund financed by a levy imposed on employers of foreign workers for the purpose of providing training and retraining to local workers had been a political decision of the Administration in view of the pressure from the labour sector against the importation of labour. He did not consider that the Administration had the intention to impose a levy on employers of FDHs when the ERO was enacted in 1992. He questioned why the Administration had not imposed such a levy on FDH employers as soon as the Employees Retraining Board (ERB) had started offering retraining programmes for local domestic helpers (LDHs).

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12. Deputy Secretary for Education and Manpower said that he was unable to provide the answer as he had not yet assumed responsibility for labour and manpower matters when ERB first launched retraining programmes for LDHs. Nevertheless, he considered it an opportune time to introduce the levy proposal given the existing changing circumstances.

13. Mr LEUNG Fu-wah considered that LAB should be consulted on all proposals relating to labour matters. SEDL agreed to consider Mr LEUNG's views.

14. Dr LUI Ming-wah considered the proposal to impose a levy on employers of FDHs acceptable, given that it should be able to help reduce the increasing number of FDHs in Hong Kong and promote employment opportunities for LDHs. In his view, the more effective way to achieve the purposes was to reduce the level of minimum allowable wage (MAW) for FDHs.

15. In response to Mr Kenneth TING's enquiry, SEDL said that the MAW of FDHs was subject to annual review under a well-tried mechanism. There was no need to consult LAB on such reviews. Over the past three decades, there were altogether 18 revisions. Of these, only one had shown downward adjustment.

16. Mr Kenneth TING and Mr YEUNG Yiu-chung expressed support for the proposals to reduce the MAW of FDHs and to impose a levy on FDH employers. Mr YEUNG considered the proposed reduction in the MAW reasonable having regard to the level of prevailing monthly salary of university graduates which only stood at around $6,000 to $7,000. Mr YEUNG welcomed the proposed imposition of levy on employers of FDHs as he believed that the levy collected could enhance the training and retraining of LDHs.

17. Mr LEE Cheuk-yan opined that the designation of the importation of FDHs as a labour importation scheme under the ERO was in essence a policy change. It could be evidenced by the response given by the then Secretary for Education and Manpower to a question asked by Dr Hon Samuel WONG at the LegCo sitting on 28 June 1995. The then Secretary had pointed out that FDHs came under a separate scheme which was different from the labour importation scheme. Mr LEE considered that the Administration had consciously bypassed LegCo in the formulation of the levy proposal. In his view, LAB and LegCo should be consulted during the formulation process of the proposal.

18. SEDL pointed out that according to a manpower projection commissioned by the Administration, there would be some 136 000 low-skilled workers with low education attainment who were in need of training or retraining to help them enhance their employability. After a review of the policy on FDHs conducted in the context of the formulation of population policy, the Administration considered it reasonable that employers who enjoyed services offered by FDHs should shoulder the obligation of contributing towards the training and retraining of LDHs. Against this background, the Administration considered it appropriate to impose a levy payable by employers for the importation of FDHs under the ERO. He pointed out that a major consideration in

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formulating the levy proposal was the compliance with statutory requirements.

19. Noting that FDHs were imported on the basis of local demand with no quota set for such importation, Mr LEE Cheuk-yan did not agree with the Administration's argument that individual employers had to be given a quota under the ERO. He considered that such "quota" was in fact the approval given by the Administration on the number of FDHs an employer could import. In practice, there should be no upper ceiling for the total number of FDHs to be imported by an employer.

20. Ms Cyd HO expressed similar views of Mr LEE Cheuk-yan. She asked whether the Administration had ever announced to the public the quota for the importation of FDHs. She also asked whether there was a maximum number of FDHs that an employer would be allowed to import.

21. LO(IL), D of J said that there was a limit on the number of FDHs that an employer could import. Such limit was operated on the basis of the household income of individual employers who imported FDHs.

22. Assistant Director of Immigration (Visa and Policies) said that with effect from 1 April 2003, an employer must have a household income of no less than $15,000 per month or assets of comparable amount for each FDH he employed. If an employer intended to employ two FDHs, he must have at least $30,000 monthly household income or comparable assets and so on.

23. Ms Cyd HO opined that the household income requirement should be regarded as a condition for importation of FDHs rather than a quota for such importation. Mr LEUNG Yiu-chung shared the view of Ms HO, and asked whether the so-called "quota" was applicable to individual employers or the whole scheme.

24. Permanent Secretary for Economic Development and Labour (Labour) (PSL) said that before the enactment of the ERO, the levy had been introduced as a contractual fee charged by the Government in consideration of the grant of a quota to an employer for importing workers. Employers applying for FDHs would therefore be subject to a quota. When the Administration introduced the Employees Retraining Bill in 1992, the policy intention was to give a quota to each individual employer, i.e. the number of workers he could import. Thus, under the ERO, quota meant the number of FDHs an employer would be permitted to employ after satisfying the eligibility criteria set out in Annex B to the Administration's paper (LC Paper No. CB(2)1730/02-03(01)). He pointed out that there was no ceiling for the number of workers to be imported under SLS, and no such ceiling would be set for the importation of FDHs.

25. In response to Ms Cyd HO's enquiry on the definition of "quota", ALA5 said that from the legal perspective, the meaning of "quota" should be interpreted in the context of all relevant provisions in a piece of legislation. In the context of the ERO, the word "quota" was used in a relatively loose manner. The Ordinance did not specify whether a labour importation scheme was subject to a ceiling in respect of the number of workers to be imported, or whether the quota should apply to individual employers or

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the whole scheme.

26. Given that the policy of FDHs had been in place for nearly 30 years, Ms LI Fung-ying agreed that the time had come for a review of the policy. However, she criticised that the review had not been conducted in a comprehensive manner. She said that over 80% of the members of The Federation of Hong Kong and Kowloon Labour Unions were in support of the proposal to impose a levy on employers of FDHs. She suggested that the levy for the provision of training and retraining for local workers should be imposed on all employers who imported workers from outside Hong Kong, including employers who imported talents and professionals from the Mainland. SEDL agreed to consider Ms LI's views.

27. Miss Margaret NG said that in exercising its powers, the Administration should ensure that proper procedures were followed and the spirit of law was upheld. Where there was a change to the original legislative intent, comprehensive consultation should be carried out and the new policy should be put forward by way of legislative proposal.

28. Miss Margaret NG considered it a totally inappropriate approach for the Administration to announce the levy proposal to the public prior to discussing it with the Panel. Although there might be public support to implement the proposal, adequate consultation with stakeholders should not be omitted in particular where there was a major policy change. She asked whether the Administration was prepared to carry out a consultation exercise for the levy proposal, and, if the answer was in the positive, what would be the scope and basis of the consultation.

29. SEDL pointed out that the Administration had followed established procedures and upheld the spirit of law in the formulation of policies, including the levy proposal. He said that extensive consultation on the levy proposal had been carried out when conducting the review of the policy on FDHs. Views from relevant parties, such as associations of employers of FDHs, associations of migrant workers and local labour unions, had been carefully considered during the process. He added that whether the levy proposal was legally in order would be a matter for the court as judicial review proceedings for a case concerning the proposal were underway.

30. Ms Cyd HO gathered that according to the administrative regulations of the Census and Statistics Department (C&SD), a government bureau/department intending to implement a proposal that might affect over 1 000 persons should inform C&SD which should conduct a survey to collect the views of the affected parties on the proposal. She asked whether this procedure had been followed in the formulation of the levy proposal. The Deputy Chairman asked the Administration to provide a written response on this.

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IV. Financial assistance to workers affected by atypical pneumonia
(LC Paper No. CB(2)1843/02-03(01))

31. Mr LEE Cheuk-yan considered that the package of relief measures to help the

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community tide over the difficulties arising from the outbreak of atypical pneumonia (AP) could not address the problem faced by workers who had been requested by their employers to take no pay leave or whose earnings had been reduced by reason of the disease. In his view, those who would benefit from the salaries tax rebate measure were not the ones who most needed the Government's assistance. He urged the Administration to consider his following proposal and provide financial assistance to unemployed and semi-unemployed workers, e.g. those who were on no pay leave by reason of AP, with a view to helping them tide over their financial difficulties during this critical period -

	Amount of financial assistance to be provided to each affected worker	**Estimated cost of implementing this measure**
Unemployed	$5,000 per month (for a maximum of three months)	$0.1 billion
Semi-unemployed	80% of the amount of reduced earnings (estimated to be around $2,000 per month)	$0.3 billion

32. PSL pointed out that the package of relief measures had been drawn up in a multi-pronged manner. In fact, those workers who were on no pay leave by reason of lower turnover of their companies due to the outbreak of AP were the target group to be assisted by the Government through the loan guarantee scheme (the Loan Scheme) announced under the package of relief measures. The arrangement was that a Government-guaranteed loan scheme with a commitment of 3.5 billion would be introduced to provide bridging finance to business establishments against the likelihood of closure or lay-offs. Under the Loan Scheme, each business establishment could borrow a maximum of $1 million provided it could meet the relevant eligibility criteria.

33. PSL said that based on past records, catering establishments with 30 to 50 employees were facing more serious financial difficulties during the outbreak of AP. A loan of $1 million would be able to help the employers of these establishments to make wage payments to their employees for three months. He believed that the Loan Scheme, together with other relief measures, such as waiver of rates payments, reduction of water and sewage charges as well as trade effluent surcharges, could effectively reduce the operating costs of these establishments and would in turn lower the chance of closures or lay-offs. With the various assistance provided to employers, the problem of no pay leave, non-payment or under-payment of wages on grounds of financial difficulties, should be greatly improved if the employers concerned were determined to carry on the business and retain their employees wholeheartedly.

34. PSL further pointed out that employers who had secured a loan under the Loan Scheme would be given a grace period of six months for repayment of the loan and the repayment period could be as long as 24 months. He also highlighted a special feature of the Loan Scheme that the amount of loan secured should only be used for making

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wage payments. Such payments should be made direct to the employees' bank accounts with to view to preventing possible abuse by employers. This had demonstrated that the Loan Scheme sought to provide the best possible protection to workers. He added that the hard times arising from the outbreak of AP had indeed provided a good opportunity for employers and employees to show their concern and care to each other.

35. Mr LEE Cheuk-yan considered that in view of the prevailing critical situation, time factor was important in the provision of skills enhancement training, with payment of $4,000 training allowance for unemployed workers. He suggested that such training programmes should be launched immediately after funding approval had been sought from the Finance Committee on 16 May 2003. He also suggested that training programmes of a two-week module should be designed to allow greater flexibility for workers.

36. PSL said that the special two-month tailor-made skills enhancement training to be run by ERB would be provided to unemployed workers previously engaged in the catering, retail and tourism sectors. This would provide a good opportunity to these workers to upgrade their job skills in preparation for new challenges. The skills enhancement training would be provided in a mobile and flexible manner, and would be different from the traditional programmes offered by ERB. There would be 2 000 places for tourist guides, with key training components on languages and soft skills. Trainees of the skills enhancement training would be subject to an end-of-term assessment and 90% attendance requirement. The skills enhancement training programmes would be launched as soon as their curricula had been finalised and funding approval obtained.

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37. Mr LEE Cheuk-yan requested the Administration to include its response to the following issues in the paper to be provided for the item "Severe Acute Respiratory Syndrome : Proposed relief measures on employment side" scheduled for discussion at the regular meeting in May 2003 -

(a) the free cleaning service to the homes of needy elderly as proposed under the package of relief measures should be provided on a long term rather than an ad hoc basis;

(b) the 3 000 temporary street cleaning posts proposed to be created in the Food and Environmental Hygiene Department should be under direct employment by the Department; and

(c) the measures to help the unemployed and semi-unemployed, such as the provision of skills enhancement training, should be implemented immediately after funding approval had been sought from the Finance Committee.

38. Ms LI Fung-ying and Mr Andrew CHENG shared similar view of Mr LEE Cheuk-yan that the Government should provide more financial assistance to the unemployed. Ms LI urged the Administration to re-consider the proposal of The

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Federation of Hong Kong and Kowloon Labour Unions to establish a loan fund to cater for the needs of unemployed workers with a view to helping them tide over their financial predicament.

39. PSL responded that the Administration had given careful consideration to the proposed establishment of a loan fund for the unemployed. However, it was unable to pursue the proposal due to resource constraints. Indeed, the resources earmarked for addressing unemployment and under-employment of workers under circumstances related to AP, i.e. $3.5 billion for the Loan Scheme and $432 million for creation of new jobs and training places, accounted for nearly one-third of the package of relief measures which amounted to a total of $11.8 billion.

40. Ms LI Fung-ying considered that to better protect the rights and benefits of workers and to reduce the chance of labour disputes, the Administration should provide clear guidelines for the reference of employers and employees on arrangements for taking no pay leave, reduction of wages as well as termination of employment under circumstances related to AP.

41. PSL pointed out that labour laws clearly provided that the taking of no pay leave and reduction of wage required mutual agreement between employers and employees. The guidelines on retrenchment and wage reduction issued by the Government in 1998 when there had also been high unemployment had been updated from time to time. The guidelines had been posted on the Labour Department (LD)'s webpage and had also been widely distributed to labour unions, district offices of LD and the Home Affairs Department, etc. In view of the latest development of the outbreak of AP, the relevant guidelines would be further updated and posted on LD's webpage in the following week. Information illustrating how to handle different cases would be presented in the format of frequently asked questions to facilitate public understanding. He suggested that employees who were unfairly treated by their employers might approach LD for assistance.

42. Mr Andrew CHENG learned that many pregnant employees, especially employees of the Hospital Authority (HA), were afraid of reporting to work for fear of contracting AP. He hoped that the Government and HA would take the lead to allow pregnant employees to take paid leave until the disease was under control.

43. PSL said that the Government had issued guidelines in this regard some two weeks ago. The Government would adopt a flexible and pragmatic approach in dealing with pregnant employees who expressed worry about AP infection at work. Depending on the wish of these employees, they might be arranged to stay away from frontline work or might even be allowed to discharge their duties at home if operationally feasible. If these employees preferred to take leave during the period, they would be allowed to first exhaust their annual leave balance, and upon exhaustion, advance leave would be granted to them. Any employees who encountered difficulties on this front might contact LD for advice and assistance.

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44. PSL learned that HA had worked out its own leave arrangements for its employees under circumstances related to AP. He understood that due to the tremendous workload arising from the fight against AP, employees of HA might not be able to take leave during this period for operational reasons. He agreed to further liaise with HA on the matter.

V. Employment training scheme for university graduates
(LC Paper No. CB(2)1783/02-03(06))

45. PSL briefed members on the Graduate Employment Training Scheme for university graduates (the GET Scheme) as set out in the Administration's paper. He said that the Administration intended to seek funding approval from the Finance Committee on 16 May 2003 for launching the GET Scheme in 2003-04.

46. Mr LEE Cheuk-yan enquired about the response of employers to the "One Company One Job" Campaign (the Campaign) launched in 2002. He also asked whether the Administration had conducted any assessment of the acceptability of employers towards the GET Scheme in the light of the response of the Campaign.

47. PSL said that the Administration did not have the overall number of employers who had participated in the Campaign since LD had not been responsible for following up job placements under the Campaign. Despite this, the Administration learned from the Hong Kong General Chamber of Commerce that its members had given a positive feedback about the Campaign.

48. PSL added that he had discussed the GET Scheme with the Small and Medium Enterprises Committee as well as some entrepreneurs who had business operations in the Pearl River Delta. Initial feedback from these parties about the Scheme was encouraging. They had indicated that they would be willing to employ university graduates if a monthly training allowance of $2,000 for six months would be provided to them for each trainee they engaged. They would also consider offering long-term employment to the graduate trainees if the performance of the latter was satisfactory. He pointed out that the actual response to the GET Scheme would depend heavily on the economic climate in August 2003 when the Scheme would be launched.

49. Noting that there would be a monitoring mechanism to prevent abuses of the GET Scheme by employers, Ms LI Fung-ying asked whether additional measures would be put in place to better guard against exploitation of university graduates by employers.

50. PSL said that LD had acquired abundant experience in implementing employment programmes like the GET Scheme. On the other hand, the seven participating universities also possessed ample experience in arranging job placements for their graduates. In fact, these universities had well-established networks to canvass suitable vacancies based on the needs of their graduates. He, therefore, believed that the

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possibility of employers exploiting graduate trainees under the GET Scheme should be remote.

51. Mr Kenneth TING said that the Federation of Hong Kong Industries was in full support of the GET Scheme as members of the Federation considered that on-the-job training was the most effective way to enhance job-related skills and to broaden the horizons of trainees.

VI. Proposed amendments to the Apprenticeship Ordinance
(LC Paper No. CB(2)1783/02-03(07))

52. Principal Assistant Secretary for Education and Manpower (Manpower Planning and Training) (PAS (MP&T)) briefed members on the proposed amendments to the Apprenticeship Ordinance and the Apprenticeship Regulations as set out in the Administration's paper.

53. Ms LI Fung-ying noted that the minimum period required to be served by an apprentice in a designated trade would be reduced from three years to one year. She asked whether the Administration had assessed whether the proposed change would affect the training of an apprentice, and whether the Administration would make arrangements to align the duration of the complementary courses to that of the revised apprenticeship periods. In addition, she enquired whether the Administration would review the 43 designated trades having regard to the present day needs.

54. PAS (MP&T) pointed out that the required period of apprenticeship varied from trade to trade. The purpose of relaxing the minimum period of apprenticeship was to give flexibility to the Apprenticeship Scheme so as to facilitate more trades to participate in the Scheme. As the Vocational Training Council (VTC) would consult employers of different designated trades on the suitable duration of apprenticeship period for their trades, the quality of apprenticeship training would not be affected due to the relaxation.

55. PAS (MP&T) added that the list of 43 designated trades would be reviewed and updated from time to time by the Office of the Director of Apprenticeship. In fact, the Administration would add some new designated trades shortly after having regard to the latest market information.

56. Chief Industrial Training Officer of VTC said that VTC would design complementary courses for each of the designated trades of a duration not more than the apprenticeship periods required to be served by apprentices. Under normal circumstances, the situation where an apprentice was unable to complete the complementary courses before the completion of the respective apprenticeship training should not arise.

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VII. Any other business

57. There being no other business, the meeting ended at 4:35 pm.

Council Business Division 2
Legislative Council Secretariat
30 May 2003

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Legislative Council

LC Paper No. LS83/02-03

Paper for the Manpower Panel

Population Policy and Importation of Foreign Domestic Helpers

At the House Committee Meeting held on 7 March 2003, Hon Margaret NG requested Legal Adviser to provide a written opinion on whether it was in order, as proposed by the Administration, for a monthly levy of $400 to be imposed under the Employees Retraining Ordinance (Cap. 423) (ERO) for the employment of foreign domestic helpers (FDHs).

Is the Employees Retraining Levy a tax?

2. The question of whether the Employees Retraining Levy (ER Levy) is a tax or not calls for an examination of the policy intent of ERO, the functions of the Employees Retraining Board (ER Board), the composition and purpose of the Employees Retraining Fund (ER Fund) and the Government's role in the operation of the ER Board and management of the ER Fund. If it may be concluded from the examination that the ER Board is a public body operating under ERO for a public purpose, and that the payment of ER Levy required by ERO is for the benefit of the public or a section of the public, it should provide sufficient grounds to justify an affirmative answer to the question.[1]

3. The ERO was passed in 1992 to establish the ER Board and to establish the ER Fund. The long title of ERO provides for, inter alia, the imposition of a levy (the ER Levy) payable by employers who employ imported employees, the collection of the levy by the Director of Immigration (Director) from those employers in respect of those employees and the remittance of the levy to the ER Board for the purposes of the ER Fund.

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[1] *A-G of New South Wales v. Collector of Customs of New South Wales* (1908) 5 CLR 818 at 848; *Transport Authority v. Adelaide* (1980) 24 SASR 481; Paul Lordon, Q.C., *Crown Law*, pp. 496-498 (1991); *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Limited* [1933] AC 168 and *Mootoo v. A-G of Trinidad and Tobago* [1979] 1WLR 1334

4. In moving the Employees Retraining Bill on 24 June 1992, the then Secretary for Education and Manpower made reference to the need to provide retraining courses designed to assist those workers who were displaced as a result of the economic restructuring process to find alternative employment. (Paper provided to the Panel on Manpower for its meeting on 12 March 2003 vide LC Paper No. CB(2) 1438/02-02(02) refers.)

5. According to the LegCo Brief issued on the Employees Retraining Bill, there was already in place the 1992 General Labour Importation Scheme before the introduction of the Bill. The Administration explained that under that scheme, employers of imported workers were charged a levy as a contractual fee by Government in consideration of the grant of a quota to an employer for importing workers. The Government's intention in making the levy statutory was to ensure that the levy collected could be channelled directly to the statutory fund specified for retraining rather than to the general revenue.

6. Under section 14(3) of ERO, the Chief Executive in Council (CE in Council) may, from time to time, approve a labour importation scheme under the terms of which a levy shall be payable by employers in accordance with Part IV of the ERO. Section 14 (1) requires an employer to pay the ER Levy to the Director in respect of imported employees to be employed by him. The amount of the ER Levy is specified in Schedule 3 to ERO which may be amended by the CE in Council pursuant to section 31 of ERO. That amount is currently specified as $400, the same amount when ERO was enacted in 1992. Although not expressed as a condition precedent for the Director's granting of visa to a person intending to enter Hong Kong to take up employment with an employer who has made application for the employment of such person, the payment of the ER Levy is a statutory requirement if an employer intended to employ a person from outside Hong Kong under an approved labour importation scheme.

7. The ER levy, once collected, has to be remitted to the ER Board in accordance with section 16 of ERO after deducting from it fees charged by the Financial Secretary for any service provided to the ER Board by the Government. The ER Board will then pay the ER Levy received into the ER Fund established under section 6(1) of ERO and from which the ER Board is empowered under section 7 of ERO to pay from the ER Fund expenditure for providing training or retraining courses and retraining allowance to trainees eligible for the allowance.

8. Apart from the ER Levy collected under ERO, the ER Fund also receives money provided by the Government for the purposes of the ER Fund under section 6(3)(e) of ERO. According to Head 177 of the Draft 2003-04 Estimates of Expenditure, the ER Board

receives recurrent funding from the Government to allow it to have a stable source of funding to provide retraining to eligible persons, enabling them to acquire new or enhanced vocational skills and adjust to changes in the employment market. This funding arrangement is subject to a Memorandum of Administrative Arrangements signed with the ER Board. For the years 2001–02 and 2002-03, the funding was $400 million and $396 million respectively. The proposed funding for 2003-2004 is $378 million. Under section 27 of ERO, the CE has the authority to give directions to the ER Board which may include a direction to transfer assets of the ER Fund which the ER Board no longer requires for the purposes of the ER Fund to the general revenue.

9. Under section 4 of ERO, the functions of the ER Board are, among other things, to consider the provision, administration and availability of retraining courses intended or designed for the benefit of eligible employees in adjusting to changes in the employment market by acquiring new or enhanced vocational skills; to identify particular occupations or classes of occupation that have high vacancy rates and in respect of which eligible employees may secure employment or re-employment by attending retraining courses as trainees to acquire new or enhanced vocational skills; to liaise with training bodies, other related organizations and Government departments with respect to the design, administration and availability of retraining courses; to pay retraining allowances to trainees; to engage the services of training bodies for the purpose of providing or conducting retraining courses; and to appoint, by notice in the Gazette, a training provider to provide training or retraining.

10. The above may be grounds for arguing that the ER Levy is a tax because the ER Board is a public body operating under ERO for a public purpose, and that the payment of the ER Levy as required by ERO is for the benefit of a class of person in the society generally. However, it may, on the other hand, be argued that the nature of the ER Levy is fundamentally a contractual fee charged in consideration of the quota allocated by the Secretary for Education and Manpower. The making of the ER Levy statutory was not intended to change that fundamental nature but to achieve the policy objective of designating the ER Levy for funding retraining programme for eligible employees.

11. At the meeting of the LegCo Panel on Manpower held on 12 March 2003, the Administration advised that, from the legal point of view, the ER Levy income brought by importation labour scheme under ERO was not for the purpose of general revenue but for the purposes specified under ERO, and therefore did not fall within the head of taxation in its normal sense for the purposes of Legislative Council procedures. That advice appeared to address the question from the perspective of Legislative Council procedures only. Members may wish to ask the Administration to provide its views from other legal perspectives as well.

Is the ER Levy a tax which requires the approval of the Legislative Council?

12. Assuming that it is correct to regard the ER Levy as a tax, the next question is whether the approval of a new importation of labour scheme with the consequence that an employer intending to employ a worker from outside Hong Kong has to pay the ER Levy in accordance with ERO requires the approval of the Legislative Council in accordance with Article 73 of the Basic Law.[2] If the ER Levy is not a tax, the question does not arise.

13. As a matter of general principle, it is permissible for a legislature to delegate by way of legislation its powers and functions to a subordinate agency. However if such delegation amounts to the legislature effacing itself or results in the legislature losing effective control over the subordinate agency, doubts may be raised on the constitutionality of such delegation.[3]

14. If section 14(3) of ERO and other provisions of ERO read as a whole are considered a delegation of the power to approve taxation, the issue is whether Legislative Council has deprived itself of the opportunity to exercise that power to approve an imposition of the ER Levy in relation to an importation of labour scheme approved under section 14(3).

15. According to section 31 of ERO, the level of the ER Levy specified in Schedule 3 of ERO may be amended by the CE in Council by notice in the Gazette. The notice is subsidiary legislation and is subject to the power of the Legislative Council to amend in accordance with section 34 of the Interpretation of General Clauses Ordinance (Cap. 1). In so far as the CE in Council's power to adjust the level of the ER Level is concerned, the Legislative Council retains an effective control over it.

16. As with the exercise of power under section 14(3) by the CE in Council, there is no legislative means provided by ERO to set that aside. The only means the Legislative Council may invalidate that is by way of primary legislation. To the extent that the Legislative Council is empowered to enact laws in accordance with the provisions of the Basic Law and legal procedures, it may be said that Legislative Council retains the ultimate control over the CE in Council. However, in the light of the conditions and restrictions imposed by Article 74 of the Basic Law on Members' right to introduce bills into the Legislative Council, whether that right could be considered as an effective means of control in the current context has not been considered by the court.

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[2] Article 73 of the Basic Law provides that the Legislative Council of the HKSAR shall exercise the powers and functions of, inter alia, approving taxation and public expenditure.

[3] *The Sze Yap S.S. Co. Ltd. v. The King* [1924] 14 HKCU 1; *Mootoo v. A-G of Trinidad and Tobago* [1979] 1WLR 1334; *Cobb & Co. Ltd. v. Kropp* [1967] A.C. 141

Powers Under Section 14 of ERO

17. Another question is whether the imposition of ER Levy on importation of FDH and the purported designation of the importation of the employment of FDHs as a labour importation scheme under ERO are within the powers conferred on the CE in Council by section 14(3) of ERO.

18. Section 14(3) empowers CE in Council to approve, from time to time, a labour importation scheme, for the purpose of section 14. The power conferred appears to be a broad discretionary power without restrictions. However, it is well established that such broad discretionary power should only be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest.[4] In order to determine whether the CE in Council has satisfied these requirements requires a detailed examination of the facts and policy reasons considered by the CE in Council.

19. According to the LegCo Brief entitled "Review of the Policy on Foreign Domestic Helpers" (Ref: EDLB/LB/C/36/02) dated 26 February 2003, the main policy justification for the CE in Council's decision to designate the importation of FDHs as a labour importation scheme is to bring employers of FDHs on par with employers of other imported workers under the Supplementary Labour Scheme (SLS) (para. 2 of the LegCo Brief). This justification is further elaborated in paragraph 5 of the LegCo Brief along the following lines. First, because there is an insufficient supply of local people willing to work as full-time live-in domestic helpers, it justifies the continued importation of FDHs. Secondly, because the SLS and the importation of FDHs operate on the same principle, i.e. employers should be allowed to import employees to fill vacancies where there are insufficient suitable and available local candidates, there is a case to bring the admission of FDHs on par with the SLS. Thirdly, given that employers of FDHs are enjoying services offered by foreign workers, it is reasonable that they contribute towards the training and retraining of the local workforce and promotion of job opportunities for local employees.

20. At the meeting of the LegCo Panel on Manpower held on 12 March 2003, the Secretary for Economic Development and Labour remarked that FDHs and Local Domestic Helpers (LDHs) had different labour markets. He made reference to his personal experience that people had indicated to him that they might be willing to change to hiring LDHs if the latter had been trained to cook properly and do a good job in household chores. He also said that according to the manpower forecast that the Administration had done, the reasons for the need to provide training and retraining were because many low-skilled or semi-skilled middle-aged people had the need to find a job.

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[4] Sir William Wade, QC in Administrative Law (8th Edition, 2000) at page 357

21. It has been noted by Members that when ERO was enacted in 1992, the policy of allowing the admission of foreigners into Hong Kong to take up employment as domestic helper had been in place for some years without charging the employer the ER Levy and it was considered not appropriate to change that policy at that time. In 1995, it was stated by the then Secretary for Education and Manpower, when answering a question asked in the Legislative Council, that "[f]oreign domestic helpers come under a separate scheme which is different from the labour importation scheme. For this reason, our present approach is based on the policy that has been adopted for the past 20 years and that is, foreign domestic helpers are imported on the basis of the local demand, with no special charges levied or quota set for such employment. Therefore, we consider it inappropriate to levy charges on the employers. Of course, if we deem it is necessary to readjust the demand and supply, it is possible that we will use other methods to readjust the demand and supply of foreign domestic helpers. However, we will certainly give this matter individual consideration because this is a matter different from the labour importation scheme."

22. It is clear from the above background information that there has been a change of government policy in relation to the policy of not charging the ER Levy from employers who employ FDHs. Whether Members should support this change of policy is, of course, a matter for them. However, in considering whether the exercise of power under section 14(3) of ERO could stand up to challenge in judicial review proceedings, it would be relevant to consider whether the stated justifications could stand up to scrutiny. The following three paragraphs provide an analysis of the issues for Members' reference.

23. First, the fact that there is an insufficient supply of local people willing to work as full-time live-in domestic helpers is considered by the Administration as a justification to continue the importation of FDHs. This does not appear to provide justification for imposing the ER Levy on the employers of FDHs bearing in mind that the insufficient supply of pool of local people for employment as domestic helpers is not because of their lack of vocational skills required of domestic helpers but their unwillingness to work as full-time live-in domestic helpers. Members may note that the Administration,when reporting to the Panel on Manpower the findings of that survey at the meeting of the Panel held on 2 November 2001, had described the domestic helper employment market as a "mismatch of demand and supply" on the basis of a fact-finding survey on the supply and demand of domestic helpers in Hong Kong conducted in 2000, which suggested that FDHs and LDHs were addressing the needs of different types of households. The Administration's proposed measures to address the problem were to attract potential employers to hire LDHs by improving the quality of service of LDHs, enhancing employment services for employers seeking LDHs, enhancing publicity of LDH service, and preserving the part-time market of LDHs. To impose the ER Levy on employers was not considered. (LC Paper No. CB(2)189/01-02(04) refers.)

24. Secondly, it is doubtful whether it is reasonable to regard the SLS and the importation of FDHs as operating on the same principle in that both types of employers are allowed to import employees to fill vacancies for the same reason that there are insufficient suitable and available local candidates for them to employ. Members may wish to ask the Administration to explain the grounds for this justification.

25. Thirdly, in relation to the justification that given that employers of FDHs are enjoying services offered by foreign workers, it is reasonable that they contribute towards the training and retraining of the local workforce and promotion of job opportunities for local employees, it should be noted that this ground has been available to the Administration since the inception of the policy to allow employers to employ domestic helpers from outside Hong Kong.

Conclusion

26. The above analysis is based on information at hand. Our preliminary view is that on the question of whether the ER Levy is taxation, it would depend on whether the requirement to pay the levy is fundamentally contractual. If it is not, it is likely that the ER Levy will be considered a tax. If the ER Levy is a tax, it should require the approval of the Legislative Council for its imposition and collection. However, since the ER Levy is being collected by authority of ERO, it may be argued that the necessary approval has been given. Nevertheless, because the triggering off of the imposition of the ER Levy is by means of the CE in Council's approval of a labour importation scheme given under section 14(3) of ERO, it would be a matter for judicial determination in an appropriate case as to whether conditions and restrictions imposed by Article 74 of the Basic Law on Members' right to introduce bills could be considered as having the effect of reducing the effectiveness of Legislative Council's control over the CE in Council by enacting legislation. If it could, there may be doubts on the constitutionality of ERO if the ER Levy is considered a tax. As regards whether the exercise of power to "designate" the employment of FDHs as a labour importation scheme was exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest, an analysis of the issues is given in paragraphs 22 to 25 above for Members' consideration. Subject to examination of further information the Administration has been asked to provide, Members may find that because of the uniqueness of the employment market of domestic helpers it is doubtful whether it was within the contemplation of ERO to have the employment of FDHs covered by it.

27. The Administration has been asked at the Panel on Manpower meeting held on 12 March 2003 to provide further information including the Department of Justice's advice on whether section 14 of ERO gives the power to the Administration to impose a levy on employers of FDHs without the need to legislate and other questions. Members will be assisted in their consideration of that advice and the above analysis will be reviewed in the light of that advice and information.

Prepared by

Legal Service Division
Legislative Council Secretariat
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