立法會
Legislative Council

LC Paper No. CB(2)2042/10-11
(These minutes have been seen by the Administration)

Ref : CB2/PL/MP

Panel on Manpower

Minutes of meeting
held on Monday, 11 April 2011, at 2:00 pm
in the Chamber of the Legislative Council Building

Members present	:	Hon LEE Cheuk-yan (Chairman) Hon LI Fung-ying, SBS, JP (Deputy Chairman) Hon CHEUNG Man-kwong Hon LEUNG Yiu-chung Hon Andrew CHENG Kar-foo Hon Tommy CHEUNG Yu-yan, SBS, JP Hon WONG Kwok-hing, MH Hon Andrew LEUNG Kwan-yuen, GBS, JP Dr Hon LAM Tai-fai, BBS, JP Hon CHAN Kin-por, JP Hon CHEUNG Kwok-che Hon WONG Sing-chi Hon WONG Kwok-kin, BBS Hon IP Wai-ming, MH Dr Hon PAN Pey-chyou Hon Alan LEONG Kah-kit, SC Hon LEUNG Kwok-hung
Members attending	:	Hon Miriam LAU Kin-yee, GBS, JP Hon Vincent FANG Kang, SBS, JP Hon Jeffrey LAM Kin-fung, SBS, JP Hon Ronny TONG Ka-wah, SC Hon Paul TSE Wai-chun
Members absent	:	Hon Frederick FUNG Kin-kee, SBS, JP Hon IP Kwok-him, GBS, JP

Public Officers attending : Item III

Mrs Erika HUI LAM Yin-ming, JP
Deputy Commissioner for Labour
(Occupational Safety and Health)

Mr LEUNG Chun-ho
Chief Occupational Safety Officer
(Support Services)
Labour Department

Mr WU Wai-hung
Deputy Chief Occupational Safety Officer
(Occupational Safety & Health Training Centre)
Labour Department

Item IV

Mr Matthew CHEUNG Kin-chung, GBS, JP
Secretary for Labour and Welfare

Mr CHEUK Wing-hing, JP
Commissioner for Labour

Mr FONG Ngai
Assistant Commissioner for Labour
(Policy Support)

Miss Mabel LI Po-yi
Assistant Commissioner for Labour
(Development)

Mr Raymond HO Kam-biu
Senior Labour Officer (Labour Inspection)
Labour Department

Item V

Mr Matthew CHEUNG Kin-chung, GBS, JP
Secretary for Labour and Welfare

Mr CHEUK Wing-hing, JP
Commissioner for Labour

Miss Mabel LI Po-yi
Assistant Commissioner for Labour
(Development)

Mr Charles HUI Pak-kwan
Chief Labour Officer
(Statutory Minimum Wage)

Clerk in attendance	:	Mr Raymond LAM Chief Council Secretary (2) 1
Staff in attendance	:	Ms Clara TAM Assistant Legal Adviser 9
		Miss Josephine SO Senior Council Secretary (2) 7
		Miss Lulu YEUNG Clerical Assistant (2) 1

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I. Confirmation of minutes of previous meeting
(LC Paper No. CB(2)1374/10-11)

The minutes of the meeting held on 17 February 2011 were confirmed.

II. Date of next meeting and items for discussion
(LC Paper Nos. CB(2)1461/10-11(01) and (02))

2. Members agreed to discuss the item "A review of occupational diseases in Hong Kong in 2010" proposed by the Administration at the next regular meeting scheduled for Tuesday, 17 May 2011, at 2:30 pm.

3. Referring to item 14 in the list of outstanding items for discussion, the Chairman said that the Deputy Chairman proposed discussing the subject "Performance of driving duties by foreign domestic helpers". Members agreed that the subject would be discussed at the next regular meeting.

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(*Post-meeting note:* On the instruction of the Chairman, the item "Progress of implementation of statutory minimum wage" was included in the agenda for the meeting on 17 May 2011 and the item "A review of occupational diseases in Hong Kong in 2010" was deferred to a future meeting. The notice of the meeting was issued vide LC Paper No. CB(2)1544/10-11 on 15 April 2011.)

III. Review of the system for recognition and monitoring of Mandatory Safety Training Courses

(LC Paper Nos. CB(2)1461/10-11(03) and (04))

4. Deputy Commissioner for Labour (Occupational Safety and Health) ("DC for L(OSH)") briefed Members on the results of the review conducted by the Administration on the system for recognition and monitoring of mandatory safety training ("MST") courses and the proposed improvement measures to the system for phased implementation from 2011, details of which were set out in the Administration's paper.

5. Mr WONG Kwok-hing expressed concern about the fees of MST courses provided by different training course providers ("TCPs") and the financial burden on workers engaging in specific high-risk trades/ activities/work processes or operating hazardous machineries as they were required to complete MST and obtain relevant certificates before undertaking the work. He asked whether the Administration's recent review of the regulatory system for MST courses covered the fee-charging policy of TCPs, with a view to alleviating the financial burden on the workers. In his view, the Administration should monitor the fees of MST courses charged by different TCPs to ensure that they were set at a reasonable and affordable level.

6. DC for L(OSH) responded that -

(a) the recent review focused mainly on how the quality of MST courses could be assured and further enhanced. The fee-charging policy of TCPs did not fall within the scope of the review; and

(b) as individual TCPs had their own business considerations and decision, the course fees for the same MST charged by different TCPs might vary. As at the end of December 2010, the Labour Department ("LD") had recognized 664 MST

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courses run by 157 TCPs. There was, therefore, a sufficient range of choices for workers. Taking the Mandatory Basic Safety Training for Construction Work and Container Handling (commonly known as "green card" training) as an example, the fees of courses currently available in the market were in the range of $80 to $400.

7. Mr WONG Kwok-hing said that he had received complaints from some workers that they had to carry with them while at work the relevant certificates to work at construction sites or for operating different types of machines so that they could produce the certificates for inspection on request by occupational safety officers of LD. These workers had pointed out that given the tough working conditions on construction/industrial sites, bringing certificates or green cards to work would, apart from causing inconvenience to the workers, cause damage to the certificates. Mr WONG urged the Administration to seriously consider introducing a smart card to replace the various certificates relating to industrial safety training.

8. In response, DC for L(OSH) advised that the Administration had, in response to members' request, commissioned a consultancy study a few years ago on the feasibility of introducing a smart card to replace the various certificates relating to MST. The Administration had provided the Panel with the findings of the study in November 2007. In gist, the study revealed that the costs likely to be incurred for introducing a smart card system was prohibitive and would far outweigh the perceived benefits. Added to this would be the institutional and legal complexity concerning the establishment of a central agency, data privacy, the necessity of timely updating and verification, as well as enforcement measures to guard against fraudulent practices and to cope with loss of card and data. A decision had therefore been taken against the development of a smart card system to record all MST training completed by individual workers. To address the inconvenience of some workers having to carry a number of training certificates at work, the Administration had produced multi-compartment card holders for distribution to workers free of charge to enable them to carry all their certificates in one card holder.

9. DC for L(OSH) further advised that the Administration was also exploring with the Construction Workers Registration Authority the possibility of incorporating information relating to MST courses completed by workers into the registration cards issued to construction workers.

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10. Notwithstanding the explanation provided by the Administration, Mr WONG Kwok-hing remained of the view that the Administration should introduce a smart card to replace the various certificates relating to industrial safety training. He requested the Administration to provide a written response on whether it would commence a further study, with a view to reducing the number of industrial safety training certificates to be carried by workers at work.

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11. The Chairman said that the Panel would keep in view and follow up the matter with the Administration, where appropriate. He advised that the issue would be included in the Panel's list of outstanding items for discussion.

12. Mr WONG Sing-chi expressed deep concern about various problems identified in post-course examinations, in particular cheating and leaks of examination contents, and their adverse impact on the quality of MST courses as well as the effectiveness of these courses in enhancing the safety awareness and knowledge of workers. He sought detailed information about the improvement measures proposed by the Administration to address these problems.

13. In response, DC for L(OSH) made the following points -

(a) issues such as leaks of examination questions and laxity of invigilation in post-course examinations were part of the problems identified during the Administration's review of the existing MST system. Since staff of TCPs and trainees would inevitably behave with more discipline in the presence of LD officers conducting inspections, it was difficult to uncover irregularities in instruction and the post-course examinations even with surprise inspections by LD officers;

(b) the performance of trainees in post-course examinations could reflect the effectiveness of course instruction by TCPs. Improvements in the administration of such examinations, therefore, would be a useful quality assurance of the training provided. At present, TCPs developed and used their own examination papers approved by LD during the stage of course recognition; and

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(c) taking into account the problems identified and views gathered in the review, LD considered that monitoring inspections alone could not effectively tackle the problems. Therefore, apart from stepping up monitoring of the courses, including arranging undercover operations and surprise inspections of post-course examinations, there was a need to tighten regulatory control on TCPs and MST courses. Among other enhancement measures, LD would provide TCPs with centrally-prepared examination papers and issue them to individual TCPs shortly before the examinations, so as to minimize the chance of leaks of examination contents.

14. Responding to Mr CHAN Kin-por's suggestion that the Administration should consider holding central examinations or bringing in independent invigilators, DC for L(OSH) advised that there were practical difficulties in implementing the proposals in view of the need to cater for the flexibility required by the large number of candidates who had to complete the MST training and examinations in order to work. DC for L(OSH) pointed out that the current arrangements in which TCPs would run the examinations after the MST courses and issue certificates immediately upon satisfactory completion of the examinations would cater for the specific needs of workers. Compared with other options, such as introducing a system of central examination or bringing in independent invigilators, the provision of examination papers centrally by LD to TCPs for the post-course examinations would be more practicable and suit the needs of the workers.

15. The Deputy Chairman noted that the Administration planned to consolidate the different Guidance Notes issued for the six types of MST courses. She asked about the underlying reasons for the proposal. Regarding the improvement measures proposed for implementation in the second phase, she expressed concern about their impact on TCPs and asked whether the views of stakeholders would be taken into account before the measures were put into operation.

16. In response, DC for L(OSH) explained that there had been changes to the Guidance Notes for the MST courses over time and there might be discrepancies in the contents of even the same type of MST course submitted by different TCPs to LD for vetting and approval in accordance with the Guidance Notes. The Administration believed that standardizing course contents as well as consolidating the approval conditions under the Guidance Notes would facilitate reference and compliance by TCPs and, in turn, be conducive to ensuring the quality of MST courses.

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17. As regards the measures proposed for implementation in Phase 2, DC for L(OSH) said that at present, LD officers monitored the recognized courses delivered by TCPs primarily through surprise inspections. When breaches of approval conditions were found, LD would issue warning letters to the TCPs concerned. In the case of serious breaches, it would consider withdrawing recognition of the courses. In the past three years, LD had issued around 100 warnings and withdrawn recognition for seven courses run by three TCPs. Since disciplinary actions were limited to the issue of warnings or withdrawal of recognition, deterrent against poor performers was inadequate. The Administration thus proposed to introduce measures, such as developing a demerit point system, to enhance deterrence against irregularities. In view of the complexity of these proposed measures and their possible impact on interested parties including TCPs, LD considered a two-phased approach necessary such that the less complicated measures could be implemented first. If the proposal to improve the existing MST system was supported by the Panel, LD would conduct more in-depth studies and consult interested parties before finalizing the measures for implementation in Phase 2.

18. Mr CHAN Kin-por noted that in the course of the review, LD had invited the Independent Commission Against Corruption ("ICAC") to provide advice on various options for improvement. He asked about the reasons for involving ICAC in the review process.

19. DC for L(OSH) responded that ICAC had all along been providing assistance and advice to government departments and public bodies for improving their systems and procedures. ICAC had in the past provided useful advice and suggestions to LD on the system of surprise inspections of the MST courses and monitoring post-course examinations. For this reason, LD had again invited ICAC to assist in the recent review.

20. Concluding the discussion, the Chairman said that Members in general supported the implementation in Phase 1 of the improvement measures set out in paragraphs 15 and 16 of the Administration's paper, and considered that the Administration should continue to examine other measures with a view to enabling their early implementation in Phase 2.

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IV. Wage arrangement for non-skilled workers engaged in government service contracts
(LC Paper Nos. CB(2)1461/10-11(05) and (06))

21. Secretary for Labour and Welfare ("SLW") briefed Members on the new wage arrangement for non-skilled workers engaged under government service contracts upon the implementation of the statutory minimum wage ("SMW") on 1 May 2011, details of which were set out in the Administration's paper tabled at the meeting.

(*Post-meeting note*: The Administration's paper was issued to Members vide LC Paper No. CB(2)1496/10-11 on 12 April 2011.)

Provision of paid rest days and meal breaks

22. Mr WONG Kwok-hing and Mr IP Wai-ming welcomed the Administration's initiative to pay some 40 000 non-skilled workers engaged under government service contracts one paid rest day in every period of seven days. They, however, expressed disappointment that the Administration had not indicated clearly whether the workers would be provided with paid meal breaks under the new arrangement. Referring to a case involving employees of service contractors currently providing outsourced cleansing services in Tin Hang Estate, Tin Shui Wai who were required to work odd hours or different hours in a day, Mr WONG expressed deep concern about the possibility that some unscrupulous employers might change the employment terms or lay off some of their workers, in order to reduce the additional SMW-induced staff costs. He was of the view that the Administration should revise the standard employment contract ("SEC") for use by contractors of government service contracts in their employment of non-skilled workers to carry out the service contracts, so as to enhance the protection for those employed under such contracts.

23. The Deputy Chairman queried why the Administration had not taken the opportunity and benefit of reviewing and revising SEC to mandate service contractors to provide their employees with paid meal breaks.

24. In response, SLW made the following points -

(a) in May 2004, the Government introduced a mandatory wage requirement ("MWR") for non-skilled workers engaged in

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government service contracts. Under MWR, bureaux and departments should ensure, when procuring services, that government service contractors offered their non-skilled workers wage rates not lower than the average monthly wages for the relevant industry/occupation in the market. This wage protection measure served to prevent non-skilled workers engaged under government service contracts from receiving excessively low wages. While MWR de facto set, to a certain extent, non-statutory minimum wages for certain occupations, there was no express provision in SEC requiring the provision of paid meal breaks;

(b) neither the Minimum Wage Ordinance (Cap. 608) ("MWO") nor the Employment Ordinance (Cap. 57) ("EO") prescribed that meal breaks or rest days should be with pay or otherwise. These matters had all along been subject to the agreement between employers and employees having regard to the circumstances of individual enterprises and operational needs;

(c) while the questions of whether meal breaks constituted hours worked and whether meal breaks not constituting hours worked should be remunerated were matters to be agreed between employers and employees, MWO stipulated the circumstances under which meal breaks should constitute hours worked for the purpose of computing SMW: if an employee was, during his meal break, in attendance at a place of employment in accordance with the contract of employment or with the agreement or at the direction of the employer, such time should be included in the hours worked by the employee for computing SMW, irrespective of whether he was provided with work or not. Furthermore, if meal breaks were regarded as working hours of the employee according to his employment contract or agreement with his employer, such hours should also be taken into account in computing SMW;

(d) EO provided protection against unreasonable and unlawful dismissal as well as unilateral variation of employment terms and conditions by employers. Employees who suspected their employment rights infringed might make enquiries with or seek assistance from LD. LD would step up the publicity of its complaint hotline (2815 2200) to encourage employees

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to report breaches of labour laws. All complaints received would be promptly and thoroughly investigated. LD would make every effort to take out prosecution against wilful offenders and where there was sufficient evidence; and

(e) under the new wage arrangement, the Government would mandate service contractors to pay their non-skilled workers at not less than the SMW rate plus one paid rest day in every period of seven days. To ensure that the monthly wage level of non-skilled employees could meet the SMW rate of $28 per hour irrespective of the number of calendar days in a month, the monthly rate to be entered into in SEC would have to be set on the basis of 31 days, i.e. 27 working days plus 4 rest days, per month for those working six days a week.

25. Regarding allegations of exploitation of staff by contractors in Tin Hang Estate, SLW said that LD had looked into the case jointly with the Housing Department. According to the findings of the Administration, the split of workers' eight-hour conditioned hours of work into three two- or three-hour slots a day was proposed by the contractor to allow greater flexibility for the workers, and the latter opted on their own volition to follow such duty pattern. Mr WONG Kwok-hing remained unconvinced that the case had been satisfactorily resolved. He urged SLW to follow up the issue with the contractor and workers direct.

26. Mr Ronny TONG said that under section 5 of EO, every contract of employment, which was a continuous contract, should, in the absence of any express agreement to the contrary, be deemed to be a contract for one month renewable from month to month. In his view, this provided an adequate legal basis for the Administration to mandate service contractors to provide their non-skilled workers with paid rest days and meal breaks. He could not understand why the Administration adopted different approaches in handling these two issues in concluding the new wage arrangement for non-skilled workers engaged under government service contracts. He asked whether there was a loophole in existing legislation which prevented the provision of paid rest days and meal breaks.

27. Sharing Mr Ronny TONG's concern, Mr LEUNG Kwok-hung called on the Administration to introduce legislative amendments to EO and MWO to regulate the provision of meal breaks and rest days with pay, so as to better protect employees' entitlements. Mr LEUNG Yiu-chung echoed Mr LEUNG Kwok-hung's view, adding that low-paid workers

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with weak bargaining power were very often in a less advantaged position to fight for their rights. For this reason, he considered that there was a need to amend the legislation to make it a statutory requirement for employers to provide employees with paid meal breaks and rest days.

28. In response, SLW made the following points -

(a) under EO, employers must provide their employees engaged under a continuous contract with at least one rest day in every period of seven days. However, EO was silent on payment for rest days;

(b) neither MWO nor EO prescribed that meal breaks or rest days should be with pay or not. These matters had to be agreed between employers and employees;

(c) at present, SEC set out clearly the monthly wages, working hours, payment of wages and other employment terms of non-skilled workers engaged under government service contracts. As SMW would be computed on an hourly basis, to ensure that wages received by the outsourced workers complied with the SMW requirement, the Administration had reviewed the wage arrangement for non-skilled workers engaged under government service contracts;

(d) SEC used by government service contractors was silent on whether meal breaks should be paid. As a matter of fact, like enterprises in the private sector, at the time of signing SEC, contractors and their workers could negotiate and agree on the terms of employment such as working hours, including arrangements and any payment for meal breaks having regard to the nature of work, characteristics of the industries and operational needs of the company. If and after a contractor and his employees had entered into employment terms specifying that meal breaks were part of the working hours, the employer should not unilaterally vary or remove such employment terms without the consent of employees; and

(e) there was no loophole in the existing legislation. The Administration did not consider it necessary to introduce legislative amendments to regulate the provision of paid rest days and meal breaks.

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29. Mr Andrew LEUNG and Mr Tommy CHEUNG sought clarification on whether employers who did not provide their employees with paid meal breaks and rest days were in breach of the law.

30. In response, Commissioner for Labour ("C for L") reiterated that neither MWO nor EO prescribed that meal breaks and rest days should be paid. Whether meal breaks and rest days should be paid or otherwise were matters to be agreed between employers and employees.

31. Mr Tommy CHEUNG said that the Administration's decision to mandate government service contractors to provide their non-skilled employees with paid rest days would probably convey a confusing message that employers in the private sector who did not follow suit were in breach of the law, although it was actually a better-than-expected initiative pursued by the Government. Mr CHEUNG held the view that in order to avoid dispute when computing SMW, employers should clarify with employees as soon as practicable all components of wages as defined under the employment contracts. If there were unclear terms in the existing contracts, employers should enter into a new agreement with their employees upon obtaining their consent.

32. Ms Miriam LAU expressed concern whether the Administration's decision to mandate government service contractors to provide their non-skilled employees with paid rest days was taken out of the intention to set a good example for employers in the private sector. She asked about the legal basis for this new arrangement.

33. SLW responded that the Administration had taken into account a basket of factors, including the terms and conditions in the existing SEC, the impact of SMW on different sectors, legal advice obtained from the Department of Justice, the needs of protecting employees' rights and benefits as well as ensuring the prudent use of public funds, before finalizing the new wage arrangement to mandate service contractors to pay their non-skilled workers at not less than the SMW rate plus one paid rest day in every period of seven days.

34. Mr WONG Kwok-kin considered the Administration's explanation on the reasons for including only paid rest days in SEC not convincing.

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35. Ms Miriam LAU requested the Administration to explain in writing the factors which the Administration had considered in deciding to mandate government service contractors to provide their non-skilled employees with paid rest days, with specific emphasis on the legal basis for the proposed arrangement. She also requested the Administration to advise whether there was any precedent judgment by the court that the practice adopted by LD and the Labour Tribunal when calculating employees' entitlements under EO in an attempt to settle labour disputes and claims against employers, such as calculating untaken annual leave/holiday pay on the basis of 30 days per month, would constitute an implied obligation on employers.

Top-up Arrangement

36. Mr WONG Sing-chi noted that the Government had decided to authorize in principle bureaux and departments to provide top-up payments to service contractors to cover their wage cost increase, including corresponding increase in contribution to the Mandatory Provident Fund ("MPF"), arising from the implementation of SMW. He enquired whether consideration would be given to expanding the scope of the top-up arrangement to cover also severance or long service payment awarded to an employee in the case of retrenchment or termination of employment.

37. The Deputy Chairman said that she had reservations about the proposal of providing top-up payment. She pointed out that the issue of implementing SMW had been discussed for a long time and MWO was passed by the Legislative Council on 17 July 2010. Service contractors should have taken into account their obligation to pay non-skilled workers SMW and predicted whether this would contribute to higher tender costs, in offering bids for government services.

38. SLW responded that the Administration appreciated that the implementation of the initial SMW rate was unique in that many service contractors were unable to capture the impact of SMW on their contract prices when offering bids at the tendering stage. The top-up arrangement was intended as a one-off measure to help service contractors cover increase in wage costs arising solely and directly from the implementation of SMW. This measure was made out of the Administration's deep concerns over the employment and the rights and benefits of non-skilled workers, and the need to avoid disruption to public service delivery. SLW stressed that the top-up arrangement was exceptional. As the SMW level would be reviewed at least once in every

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two years, contractors had to take into account the possible impact of the reviews of SMW on wage costs in future. The Government would not provide top-up payment upon subsequent reviews of the SMW level. He further advised that since severance and long service payments were "contingent liabilities" which would only arise in case of retrenchment, termination of employment, or cessation and winding up of business, the Administration did not consider it appropriate to include them in the top-up payments.

39. The Deputy Chairman and Mr WONG Kwok-hing enquired about the amount of expenditure to be incurred by the Administration in the provision of top-up payments.

40. SLW said that the new wage arrangement and top-up arrangement would incur additional costs to the Administration. Whilst the former was recurrent in nature, the latter was one-off. The exact amounts of the additional costs would be assessed by the procuring departments, taking into account the individual circumstances of the service contracts. If departments were unable to meet or absorb the additional costs from their existing resources, the Administration would apply for the necessary funding from the Finance Committee according to the established procedures.

41. The Deputy Chairman, Mr IP Wai-ming and Mr WONG Kwok-kin were deeply concerned about the measures adopted by the Administration to ensure that the top-up payments would go to the workers who were the target beneficiaries.

42. SLW and C for L responded that the Labour and Welfare Bureau had briefed relevant bureaux and departments on the arrangement. The latter would proceed to discuss the details with the contractors concerned as soon as possible. They would also, in accordance with their existing contract management system, spare no efforts to ensure that the top-up payments would go straight to the pocket of workers who were the target beneficiaries. In case of any wilful non-compliance with the statutory requirement, LD would take out prosecution when there was sufficient evidence to establish an offence.

43. Mr Andrew LEUNG declared that he was the Chairman of the Vocational Training Council ("VTC"). Expressing support for the proposed top-up arrangement, he said that it was his understanding that many public bodies, including VTC, and non-government organizations ("NGOs") had also outsourced their cleansing and guarding services.

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He considered that the top-up arrangement should be extended to cover service contractors of public bodies and NGOs which had difficulty in absorbing the increase in wage costs upon the implementation of SMW. He further suggested that since the SMW rate would be reviewed at least once in every two years, the Administration should consider making it a standing practice to provide top-up payments to service contractors to cover their wage cost increase arising from subsequent reviews of the SMW level.

44. In response, SLW advised that -

(a) in principle, the Administration had agreed to provide top-up to subvented bodies for their service contracts that relied heavily on the deployment of non-skilled workers, having regard to the particular circumstances of each case. The relevant bureaux and departments, notably the Education Bureau as in the case of VTC, would proceed to discuss the details with their subvented bodies concerned;

(b) basically, it was the obligation of service contractors to pay their workers additional remuneration to meet the shortfall as from 1 May 2011. However, the Administration appreciated that many service contractors might not be able to capture the impact of the initial SMW rate on their contract prices when offering bids at the tendering stage. The Administration thus decided to make a special arrangement to authorize bureaux and departments to provide top-up payments to service contractors to cover their wage cost increase arising solely and directly from the implementation of SMW, including the corresponding increase in MPF contributions, in order to protect the employment of existing employees and to ensure the continued provision of public services; and

(c) it should be noted that the top-up arrangement was exceptional. As the level of SMW would be reviewed at least once in every two years, contractors should estimate and take into account the possible impact of the reviews on the level of wage costs in future and reflect this suitably in the tender prices. The Government would not provide any more top-up payments upon subsequent reviews of the level of SMW.

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45. The Chairman said that it had come to his notice that some service contractors were considering terminating the government service contracts, irrespective of the top-up arrangement presently proposed by the Administration to help them cover the increase in wage costs. He asked whether the Administration had any contingency plans to cope with such situation whereby a large number of service contractors might withdraw from the business. He was worried that workers might face the risk of dismissal despite they would be re-employed after termination. The Chairman further said that he did not support the idea of extending the scope of the top-up arrangement to cover severance or long service payment, lest it would encourage collective dismissal of workers. He suggested that the Administration should stipulate clearly in SEC that service contractors should not lay off their existing staff but engage new staff in order to reduce their liabilities towards employees in respect of severance or long service payment. He pointed out that according to EO, those employees under a continuous contract with an employer for not less than two years prior to retrenchment were eligible for severance payment, while those employees serving an employer for not less than five years prior to termination of employment were eligible for long service payment. As an employee's entitlement for severance or long service payment was calculated by reference to the number of fully reckonable years of service and a pay rate at two-thirds of the last full month's wage, the break in service would unduly have negative impact on the employee's entitlement.

46. In response, SLW advised that the relevant bureaux and departments which had outsourced their services would proceed to discuss with their service contractors the details of the top-up arrangement. While the two sides would endeavour to resolve the matter in a satisfactory manner, the Administration did not wish to see government service contractors laying off their staff due to the implementation of SMW. The procuring departments in general would take into account a contractor's past performance as a good employer and compliance with contractual obligations in the re-tendering exercise.

47. Mr WONG Kwok-hing suggested that the Administration should blacklist those service contractors who had exploited their staff and implemented massive layoffs.

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Revision of the Standard Employment Contract

48. Mr IP Wai-ming noted that LD had revised SEC setting out, among others, the specified monthly wages for hours worked and one paid rest day in every period of seven days, according to the SMW level or the frozen MWR level, i.e. the level published in the "Quarterly Report of Wage and Payroll Statistics December 2010" compiled by the Census and Statistics Department, whichever was the higher. He requested the Administration to provide the Panel with a copy of the newly revised SEC.

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Other issues

49. Responding to Mr WONG Sing-chi's concern about the difficulties faced by operators of private residential care homes for the elderly ("RCHEs") in coping with the increase in wage costs arising from the implementation of SMW, SLW advised that the Social Welfare Department was assessing the impact of the initial SMW rate on the operation of private RCHEs with a view to coming up with measures to assist RCHEs which might have difficulties in meeting the SMW requirement. The Administration would revert to the Panel on Welfare Services once it was in a position to do so.

50. Mr LEUNG Kwok-hung, Ms Miriam LAU and Mr WONG Kwok-kin expressed deep concern about the difficulties encountered by both employers and employees in getting through LD's 24-hour telephone enquiry hotline 2717 1771. They cautioned that as SMW was a new policy, employers and employees might, at the initial stage of SMW implementation, seek advice from or make enquiries with LD more frequently than expected, particularly when they were yet in full understanding of their respective obligations and entitlements under MWO and the method for calculating wages. In the light of this, the Administration should ensure that callers who dialled up the hotline could receive immediate response and support.

51. SLW advised that the Administration would stand ready to help employers and employees. Enquiries on MWO were also handled by 10 District Offices of LD's Labour Relations Division. If necessary, the 24-hour hotline service would be strengthened.

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V. Statutory minimum wage: reference guidelines for employers and employees
(Reference Guidelines on Statutory Minimum Wage for Employers and Employees & LC Paper No. CB(2)1461/10-11(07))

52. Mr Ronny TONG expressed concern over the legal basis for the Administration to take such a decision to mandate government service contractors to provide their non-skilled workers with paid rest days only, instead of both paid rest days and meal breaks.

53. In response, SLW emphasized that in deciding on the new arrangement, the Administration had considered the elements of existing government service contracts, the expected outcome and impact of the implementation of SMW, and the present proposal sought to strike a balance among various factors. The new arrangement was a lawful, reasonable and sensible measure.

54. Responding to Mr WONG Kwok-hing's enquiry, SLW reiterated that to ensure that the monthly wage level of non-skilled employees engaged under government service contracts could meet the SMW rate of $28 irrespective of the number of calendar days in a month, the monthly rate to be entered into in SEC would have to be set on the basis of 31 days per month for those working six days a week. As such, a worker who worked eight hours a day and six days a week would be entitled to monthly wages of not less than $6,944.

55. Mr Tommy CHEUNG expressed grave concern about the slow progress of the Administration in drawing up and finalizing the reference guidelines on SMW for employers and employees. He said that to his knowledge, many employers of small and medium enterprises were yet in full understanding of their obligations under MWO and the method for calculating SMW. These employers were particularly worried that they might breach the law unknowingly. They hoped that at the initial stage, the Administration would be lenient in enforcing the law.

56. SLW responded that LD had finalized the general reference guidelines for wide distribution in March 2011. As SMW was a new policy, the Administration had launched publicity and promotional activities vigorously to facilitate employers' and employees' better understanding of the legal provisions and their respective obligations and entitlements under MWO. For cases of breach of the SMW requirements, LD would consider the circumstances of each case in determining

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whether prosecution should be instituted. If employers had inadvertently miscalculated employees' working hours, LD would require employers to settle the wages owed. Enforcement action would be taken against wilful breaches of the law.

57. Mr Jeffrey LAM sought clarification as to whether it was stipulated in the legislation that meal break and rest day with pay should be provided to employees for the purpose of computing SMW.

58. In response, SLW reiterated that -

(a) EO did not prescribe that meal breaks and rest days should be paid, and MWO did not alter this well-established principle;

(b) all along, employers and employees could negotiate and agree on the terms of employment such as working hours, including arrangements and any payment for meal breaks having regard to the nature of work, characteristics of the industries and operational needs of the company. However, if an employer and his employees had agreed under their employment terms that meal breaks were hours worked, the employer should not unilaterally vary or remove such employment terms without the consent of employees; and

(c) according to MWO, if an employee was, during his meal breaks, in attendance at a place of employment in accordance with the contract of employment or with the agreement or at the direction of the employer, such time should be counted as hours worked by the employee for computing SMW, irrespective of whether he was provided with work or not.

59. Referring to Example 33 in the general reference guidelines, Ms Miriam LAU noted with grave concern that payments made to an employee in the wage period for any time that was not hours worked, for instance, rest day pay and statutory holiday pay, could not be counted as part of the wages payable in respect of the wage period. She expressed concern that the "actual" wages of an employee might vary from one month to another because of the complication arising from the difference in the number of statutory holidays falling in each month or paid leave taken by an employee, and the monthly monetary cap at $11,500 to exempt employers from the requirement to keep records of the total

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number of hours worked by employees would become a meaningless and misleading figure. She said that this would cause confusion to employers regarding the requirement on keeping record of the total number of hours worked by employees.

60. Sharing similar concern, Mr Andrew LEUNG and Mr Paul TSE asked whether and how the Administration would address the issue. Mr TSE said that employers might wish to consider entering into a new employment contract with their employees, with wage period fixed at one year to avoid the likely fluctuation.

61. In response, Assistant Commissioner for Labour (Development) ("AC for L(D)") explained that the monthly monetary cap of $11,500 followed the same definition of wages payable which was used in determining whether the employee had been paid not less than the SMW level.

62. SLW pointed out that the crux of all the contention was whether payments for time that was not hours worked such as rest days and meal breaks were payable contractually. He said that in determining whether the wages met the minimum wage, the following two factors should be considered -

(a) the minimum wage for the employee for the wage period, i.e. the multiple of the total number of hours worked and the SMW rate; and

(b) the wages payable to the employee in respect of the wage period.

If wages payable in (b) was not less than the minimum wage in (a), the minimum wage requirement would be met and employers needed not pay additional remuneration.

63. Mr Paul TSE asked whether employers could enter into a new employment contract with their employees, with wage period fixed at one year with provisional payments made at the interim to avoid the likely disputes over the calculation of SMW.

64. AC for L(D) responded that section 22 of EO provided that the wage period in respect of which wages were payable under a contract of employment should, unless the contrary was proved, be deemed to be one month, and a similar provision was found in section 5 of MWO. While

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employers and employees might agree on the duration of the wage period, in determining its validity in dispute, the true intention of the parties would have to be ascertained especially where the wage period was as long as one year and interim payments were involved. It was necessary for both sides to consider the pros and cons of the above arrangements in the light of the protection to employees and impact on employers, in contemplating any change to the employment terms.

65. Mr WONG Sing-chi expressed dissatisfaction that the Administration had provided in the general reference guidelines too many illustrative examples which in his view appeared to be tips on how to offset the additional SMW-induced costs by cutting staff remuneration and benefits without violating the law.

66. SLW responded that he could not agree with Mr WONG Sing-chi's comment. Highlighting Example 20 wherein rest day with pay and paid lunch break were provided, SLW stressed that the Administration had all along been actively encouraging employers to treat their employees well so as to maintain harmonious labour relations. As a matter of fact, the Administration had stated clearly in the guidelines that where feasible, employers should not reduce employees' existing remuneration and employment benefits upon the implementation of SMW, and should not pay employees a monthly wage lower than what they received before the implementation of MWO.

67. Mr LEUNG Kwok-hung said that the Administration should consider amending the relevant provisions of EO such that an employer could not vary the employment terms and conditions of his employees to the effect that the variation would adversely affect the interest of the employees.

68. Dr PAN Pey-chyou enquired about the measures taken by the Administration to prohibit employers from forcing their employees to enter into a new employment contract for the purpose of reducing their entitlements or benefits.

69. In response, SLW advised that -

(a) section 32 of EO provided restrictions on deductions from wages. In the example of damage to or loss of the employer's goods attributable to the employee's neglect or default, the total amount recoverable by deduction in any one case referred to in subsection (2) should not exceed the

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equivalent in value of the damage or loss suffered by the employer or $300, whichever was the less; and

(b) employers should not unilaterally vary employment terms and conditions. Employees who suspected their employment rights infringed might make enquiries with or seek assistance from LD.

70. Mr IP Wai-ming asked whether and when the Administration would make available on LD's webpage the industry-specific guidelines on SMW for easy reference, access and retrieval by the public.

71. Mr CHEUNG Kwok-che expressed concern about the method for calculating hours worked for the purpose of computing SMW for those employees working in and required to stay overnight in residential care homes.

72. C for L responded that LD was seeking the comments of industry-based Tripartite Committees, related employers' associations, trade unions and stakeholder groups on the draft industry-specific guidelines addressing the particular needs and characteristics of individual sectors. Subject to stakeholders' comments, LD aimed at finalizing the guidelines for nine industries before 1 May 2011. The guidelines would be uploaded onto LD's webpage, once finalized.

73. Mr LEUNG Yiu-chung said that consideration should be given to making it a mandatory requirement for all employers to make reference to SEC and incorporate the terms and conditions therein contained into their employment contracts with individual employees.

74. SLW advised that to the understanding of the Administration, many NGOs and public bodies, such as the Hong Kong Trade Development Council and the Hong Kong Airport Authority, also required their service contractors to use SEC in the employment of non-skilled workers. The total number of workers who would benefit from the new wage arrangement as proposed for non-skilled workers engaged under government service contracts would thus exceed 40 000.

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

Council Business Division 2
Legislative Council Secretariat
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