



Hong Kong Federation of Asian Domestic Workers Unions (Union)

Submission on the “Employment (Amendment) (No.2) Bill 2017”

13th October, 2017

1. This year, the Hong Kong SAR Government had submitted the “Employment (Amendment) (No.2) Bill 2017” (the Bill) to the Legislative Council. The Bill Committee was then set up by the Council. The Bill sought to amend the articles on regulating employment agencies in the “Employment Agency Regulations” and the “Employment Ordinance” (EO). The Union welcomes the decision made by the Government to raise the maximum penalty for the offences of overcharging job-seekers by employment agencies, which is in line with the longstanding recommendation by this Union and civil society organisations.

2. The Union is satisfied with most aspects of the Bill. However, there is an urgent need for the HKSAR government to put in place more detailed measures to tackle the high number of illegal employment agencies operating with impunity in Hong Kong. Moreover, the Bill does not examine the length of the prosecution period for overcharging offences. With these concerns in mind, the Union would like to recommend the following.

Regarding the Employment Bill

3. It is widely known that employment agencies work in collusion with finance institutions, forcing migrant domestic workers to sign loan documents, thus collecting illegal agency fees. Article 4.12 of the “Code of Practice for the Employment Agencies” (CoP) stated that the employment companies should “avoid involvement in financial affairs with the job seekers”, but the Bill does not provide relevant provisions. We recommend adding article 4.12 to the Bill with adequate penalties which are commensurate to for the offence. In this way, the CoP and the Bill will work in tandem to put an end to illegal placement fees.

4. Under existing legislation, the offence of overcharging placement fee is not classified as an “indictable offence”, with prosecution period of only six months. The insufficient time period has led to great difficulties for the Labour Department to enforce and prosecute offenders. Many victims who went to the Labor Department to lodge a complaint were unable to file their cases as the case is “expired”. The Union, investigation and prosecution departments are exhausted, working under huge time constraints and pressure. As a result, access to justice for migrant domestic workers are unnecessarily delayed or denied. We therefore recommend that the Government, as a matter of urgency, include relevant offences as “indictable offences” or extend the prosecution period to two years, so that the gravity of this offence is in line with other severe offences.

5. Although the employment agencies’ confiscation of passports and other important documents of migrant domestic workers is illegal under Hong Kong law, the practice is widespread and rarely enforced. The CoP sets out this act as a violation under the Theft Ordinance. However, in practice the Theft Ordinance does not deter this widespread practice, as agencies are not literally stealing the passports. They withhold them under

various pretexts, such as collateral for an existing debt. Therefore, we recommend that the act of withholding passports/other important documents of migrant domestic workers without legitimate reason (and to be returned in a timely manner) to be considered illegal in the Employment Ordinance. Agencies failing to comply should be liable to prosecution and conviction with adequate penalties commensurating the offence.

6. As our 2016 survey revealed^[1], nearly 45 percent of Nepalese migrant domestic workers were underpaid. Their wages ranged from HK\$1,700 to \$3,500. Our research found that employment agencies has been misleading employers in Hong Kong that these that South Asian women workers are paid less than the minimum wage. In this case, the employer may be prosecuted for wage default, but the employment agency which referred the domestic worker may only be prosecuted for abetting. The Union firmly believes that a provision in the Employment Ordinance is needed to put an end to such exploitative practices. Employment agencies which force their workers into underpaid employment, including forced labour and debt bondage, by fraudulent or any other means against the workers' will and for the purpose of making a profit, must be severely punished.

Access to justice

7. The CoP does not remove the existing disincentives and barriers that migrant domestic workers face in accessing justice. For example, many are unable to withdraw from their employment because of the Two-Week Rule, where they must find new employment within two weeks of their contract being terminated or leave Hong Kong. This adds undue pressure for the workers to stay in an abusive or exploitative situation because without their job, they would be unable to pay off their debt to the agencies or support their families. The HKSAR government should repeal the Two-Week Rule or amend it to allow migrant domestic workers a reasonable period to find new employment.

8. The CoP also fails to address the disincentives workers face during the process of prosecution. The Two-week Rule, for example, bars migrant domestic workers from employment when acting as a witness. This explains precisely the minimal number of prosecutions by the Labour Department in recent years to bring illegal employment agencies to justice. Although the Immigration Department would grant the right to work to certain migrant domestic workers involved in prosecution cases, such discretionary measure must be formalised. Only with permission to work will migrant domestic workers have a real choice to pursue justice.

Supplementary work for legislation

9. We are concerned about the amount of supplementary work, which will be needed to implement the legislation. According to the documents submitted by the Government in the Resources and Manpower of the Employment Agencies Division of the Labor Department, there are 17 members of staff working on issues relating to labour services (3 of whom are non-recurrent staff), who handle all the affairs relating to employment agencies. Currently, there are 1,397 employment agencies in Hong Kong, a large number that the Department's staff are extremely unlikely to deal with in any meaningful way. After the amendment, it is foreseeable that the agencies will use other means to avoid legal violations. Thus, the Labour

Department should increase the human resources to cope with the new situation, as the workload is likely to greatly increase.

10. At present, the Employment Services Branch of the Labour Department is the authorities investigating the illegal acts of employment agencies. Their powers are very different from those of the police. The illegal acts of the employment agencies are often not involved in the scope of the Employment Agency Ordinance . The Department must coordinate with the police and carry out co-investigation. The offence should be regarded as commercial crimes in order to reflect the gravity of the crimes. Under section 59 of the Employment Ordinance^[2], “A magistrate may issue a warrant authorizing the Commissioner, any public officer authorized in that behalf by the Commissioner or any police officer not below the rank of inspector to enter and search the domestic premises at any reasonable time”. The Department should work more closely and in cooperation with the police, and consider setting up a long-term ad hoc group for investigation. At the same time, the authorities should clarify whether they have ever cited this particular article in cooperation with police when investigating illegal agencies.

Regarding the implementation of the Code of Practice & the Bill

11. The HKSAR government should put in place effective monitoring mechanisms to ensure that all employment agencies are complying with the CoP, It should also clearly establish under what circumstance agencies would have their licence cancelled. It can be predicted that once the amendments are published, illegal agencies will circumvent the law by other means. We urge that the HKSAR government report annually to the Legislative Council, the Union and relevant civil society organisations on the implementation of the CoP.

Education of Migrant Workers' Rights and Interests

12. Mr Cheung Kin-chung, Chief Secretary for Administration, and former Secretary for Labor and Welfare Department, has promised to hold a course on legal rights for each migrant workers. Many unions agreed that this was the best way for every migrant domestic workers to understand his or her interests. However in reality, Mr Cheung’s commitment was nothing more than telling migrant domestic workers to attend the two pre-existing welcome lectures at the Indonesian or Filipino Consulate General. Other foreign consulates, such as the Indian, Nepalese and Cambodian, do not deliver such lectures so migrant domestic workers from those countries would not benefit. We urge the Government to honour its commitment, meet the requirements of the “Supplementary Labour Scheme” to hold mandatory seminars on interest and occupational safety for each newly-arrived migrant domestic workers. These should not be sponsored by foreign countries but by the HKSAR Government.