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DOMESTIC WORKERS ROUNDTABLE



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

Date: 20 February 2017

**Manpower Panel
The Legislative Council
Hong Kong Special Administrative Region**

Copy to: Secretary of Labour and Welfare

**Submitted in relation to: Manpower Panel Meeting
21 February 2017**

**Re: Amendment of Employment Agency Regulations (Cap. 57A) (“EAR”)
Regulation of employment agencies placing foreign domestic helpers**

Dear Chairman and Members of the Manpower Panel,

We refer to our submission to the Hon. Matthew Cheung, Secretary for Labour and Welfare, dated 16 June 2016 and titled: “Consolidated Submission by the Domestic Workers Roundtable Issues and Recommendations re. Public Consultation on Draft Code of Practice for Employment Agencies” (the: “Submission”), a copy of which is attached for your reference.

We are encouraged by the announcement made in the 2017 Policy Address <<http://www.policyaddress.gov.hk/2017/eng/p200.html>> in which it was stated that, “The Labour Department plans to introduce an amendment bill in the second quarter of this year to provide the legal basis for the newly promulgated Code of Practice for Employment Agencies, and to impose heavier penalties on employment agencies overcharging job seekers or operating without a licence so as to achieve a stronger deterrent effect.” We are further encouraged by the announcement contained in LC Paper No. **CB(2)827/16-17(04)**

<<http://www.legco.gov.hk/yr16-17/english/panels/mp/papers/mp20170221cb2-827-4-e.pdf>>, in which it was stated that “the Administration proposed that the maximum penalty be increased from \$50,000 to \$350,000 and three years of imprisonment, with a view to attaining a more potent deterrent effect.”

We wish to express our strong support for the Administration’s effort to amend the Employment Agency Regulations (Cap. 57A) (“EAR”). Similarly, we wish to express our concern that relevant and consequential issues in addition to Agency malfeasance be considered when drafting the proposed amendments. We refer specifically to the following 5 thematic areas of concern that we have identified in the Submission:

- 1. Debt Bondage and Witness Protection**
- 2. Enforcement – Evidence Gathering and Investigative Practices**
- 3. Addressing the Underlying Issue of Forced Labour and Human Trafficking**
- 4. Continuous Education and Public Outreach to Ensure Workers and Employers Know their Rights and Obligations**
- 5. Nomenclature and Appropriate Language - Workers or Commodities?**

The Submission contains 25 recommendations in relation to the 5 thematic areas of concern. We strongly suggest that the Administration and the Legislative Council Members consider the 25 recommendations.

In the coming weeks, we shall be preparing a further submission to provide specific recommendations based on the 5 thematic areas of concern, to be considered by the Administration and the Legislative Council Members. Prior to submitting our paper, we plan to meet separately with the Consuls General of Indonesia and the Philippines and the Secretary for Labour and Welfare, the Hon. Stephen Siu, to discuss our concerns and suggestions for the amendments to the Bill

We hope the Administration and the Legislative Council Members will find our submissions helpful in considering amendments to the Bill. Please do not hesitate to contact the undersigned on 9683-7880 or allan.bell@sympatico.ca should you have any questions.

YOURS SINCERELY,



Allan Bell
Chair, DWRT



Emily Lau
Honorary Advisor, DWRT

Enclosure: Consolidated Submission to the Hon. Matthew Cheung, Secretary for Labour and Welfare by the Domestic Workers Roundtable: Issues and Recommendations re. Public Consultation on Draft Code of Practice for Employment Agencies dated 16 June 2016



DWRT



DOMESTIC WORKERS ROUNDTABLE



**Consolidated Submission by the Domestic Workers Roundtable
Issues and Recommendations
re. Public Consultation
on Draft Code of Practice for Employment Agencies**

(Summary provided in Annex A)

Submitted to the Hon. Matthew Cheung, Secretary of Labour and Welfare, HKSAR

16 June 2016

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

Terms & Abbreviations

Term	Abbreviation
Code of Practice	“ the Code” or “COP”
Foreign Domestic Worker employment agencies operating in the HKSAR	“Agency” or “Agencies”
Foreign Domestic Worker	“Worker”
Labour Department	“LD”

The submission is divided into 7 sections:

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Section 1 : Global Issues – Efficacy of the Code

1. The Code was drafted by the government in consideration of high-level recognition of serious ongoing problems created by Agency behaviour. The lack of clearly defined obligations and corresponding sanctions contained in the Code is therefore not reconcilable with the stated intention of its drafters. The additional layer of paperwork countenanced by the Code will have the unintended consequence of providing further insulation from prosecution for misconduct. Unethical Agencies must only provide documentation to substantiate compliance, rather than actual proof of compliance. The Code must have teeth and be enforceable at law; this is fundamental to the Code's efficacy. The Labour Department's stated plan to monitor adherence to the Code by agencies for a period of two years, and to apply the ultimate sanction of non-renewal of licenses in extreme cases of non-adherence, serves only to delay the inevitable necessity of implementing an enforceable Code, and as such creates an additional window of at least two years of agency impunity. Furthermore, non-renewal of licenses will not act as an effective deterrent because this sanction cannot be applied on a sufficiently wide scale against offending Agencies. The de-licensing sanction is impractical, even in the most extreme cases of Agency non-compliance, as it would require extensive monitoring and investigation by the Labour Department, which is already severely resource-challenged in its day-to-day oversight of existing legally enforceable provisions. The effectiveness of the Code will depend largely on self-reporting by Workers who by definition in such instances are exploited by, and the victims of, Agencies. There is no indication in the Code of what measures have been put in place to ensure that individuals who self-report will not be criminalized (see Section 2 below). The lack of protection of witnesses and complainants explains the longstanding reluctance of victims to provide evidence of illegality. The hard evidence required to enforce existing legal provisions – or likewise to monitor Agents adherence to the Code - will not be forthcoming unless victim protection is addressed. Given the high-level recognition of the serious problems created by unethical and unlawful Agency behaviour, there can be no justification for extending Agency impunity for an additional period of two years or more. It is therefore recommended that the Code be re-designated as draft legislation and that, in conjunction with point 2 below, immediate work commence on its passage through the legislative process.
2. The Department of Justice should be consulted and provide clear language to be included in the Code to set out the legal obligations and punishment for non-compliance, and such obligations and sanctions should be implemented as policy by the Labour Department and enforced vigorously - in a manner similar in effect to the lawful operation of the two-week rule and the live-in rule under the purview of the Department of Immigration - until such time as legislation can be enacted.
3. In the absence of enforceability of the Code as noted in points 1 & 2, and in the interim until legislation or other enforceable provisions can be effected, the

efficacy of the Code must be measurable and publically reported. Key performance indicators should be developed to provide quantitative and qualitative measures against which the performance of the Code can be assessed. There should be, at least annually, a publically available performance report on the Code's effectiveness. This corresponds with a minimum standard of transparency to which the government should commit to ensure its stated aims and objectives in developing the Code are met.

4. In addition to point 3, it is strongly recommended that the Code be implemented through readily available technology platforms. The current system is cumbersome, paper-heavy and department and location-dependent. Every Agency should scan the relevant paperwork into an online repository that the Worker can also access (keeping the originals at the Immigration/Labour Department or Agency ready for spot-inspections). Should paperwork be incomplete or missing, no employment can start and the Agency's license can be suspended, with penalties.
5. The Code should be benchmarked according to other Agency best-in-class regulations, laws and codes of practice worldwide, and especially across APEC sending and receiving countries, where the majority of the world's migrant domestic workers live and work. It is recommended that Agencies be required to conduct themselves according to the following international practices:
 - a. Agencies should not be permitted to charge recruitment fees to prospective workers directly or indirectly, in whole or in part. Further, that Hong Kong's Agencies and the relevant Hong Kong SAR government departments, should engage only with third parties that uphold this principle, and prosecutions for breaches should be rigorously supported by all available means including the deployment of undercover operations, and the lawful surveillance and interception of communication, and that such prosecutions should be publicized;
 - b. The Hong Kong Government should consider ratifying the ILO Domestic Workers Convention (No.189), which prevents employment agencies from deducting recruitment fees from Workers' salaries (article 15). That way, at least one of the vulnerabilities that stem from employment agencies can be eliminated.
 - c. Migrant workers should, at all times, have access to their identity documents and enjoy freedom of movement; prosecutions for breaches of relevant provisions should be rigorously pursued by all available means including the deployment of undercover operations, lawful surveillance and interception of communication, and that such prosecutions should be publicized;
 - d. Each Agency should sign up to a Code of Ethical and Professional Conduct to protect workers from forced labour, and that it be specified that this code applies to all parties throughout the recruitment supply chain. The Agency and Labour Department should institute a grievance mechanism with the option of anonymous reporting, and ensure that whistle blowers

are fully protected and supported throughout any investigation and prosecution (see Section 2 below).

- e. Further, that Hong Kong's Agencies and the relevant Hong Kong SAR government departments, should engage only with third parties that uphold the Code of Ethical and Professional Conduct, and where the burden of proof to show compliance falls on the Agencies;
6. It is recommended that the Code provide for accurate and up-to-date information to be available on-line to all interested parties regarding Agencies who have been and are currently under investigation in the same way that civil and criminal proceedings are in the public domain. Agencies that have been investigated more than once without being prosecuted should be listed on a publicly available Watch-list. Agencies that have been successfully prosecuted should have the names of the Agency, the owners, and relevant staff, in addition to the license details, nature of the offence and punishment, detailed on a publicly available Blacklist. The Labour Department's argument that publication of the names of agencies under investigation would expose them to defamation suits is spurious, particularly if publication was reserved for agencies that have been (a) prosecuted and convicted and (b) investigated more than once. There are two highly compelling reasons leading to the conclusion that any attempt to impugn the Labour Department for publication of such information would fail. First, the costs of bringing such an action against the government would be prohibitive. Second, there is a very strong public interest argument that would support the government's interests in publishing this information. A third less compelling but still relevant defense would be the truth of the information published. Lastly, given the relatively high evidentiary threshold required for the Labour Department to commence an investigation into an Agency, and with the understanding that sufficient evidence had been available to open an investigation into an Agency's practices on *more than one occasion*, this provides a reasonable level of doubt as to the agency's operational integrity, and it can therefore be argued that the Labour Department has a duty of care to make this information available to the public.
 7. In order to facilitate strong, ongoing input and support from stakeholders in the active monitoring of Agencies and enforcement actions of the authorities, it is recommended that the Department of Labour establish a clearly identified reporting channel, allowing stakeholders to provide relevant information and monitor the progress of any action taken.

Section 2 : Debt Bondage and Witness Protection

8. Worker debt is a significant contributing factor to Worker vulnerability and an important indicator of unlawful activity by Agencies and financing companies. It is also well recognized that Worker debt is a significant contributor to the problem of Human Trafficking (see section 4 below). Research carried out by

Enrich suggests that as many as 60 per cent of Workers struggle with debt.¹ Agencies play an enabling role contributing to the vulnerabilities that lead to forced labour in Hong Kong. A majority of Workers begin a cycle of debt upon arrival in Hong Kong, and in many cases the debt cycle begins even before leaving home. There are indications that recruitment agencies in the home countries, the Agencies in Hong Kong and loan companies collude in an obscure manner to evade authorities and charge illegal placement fees, burdening Workers with debt in order to maximize profit. The failure of enforcement agencies to crack down on the overcharging of placement fees along with other exploitative practices such as confiscation of identity or travel documents, charging penalty fees for early termination by Workers, unlawful wage deductions, and referrals to unscrupulous money lenders drives Workers into situations of debt bondage. Many Workers, often lacking in financial literacy, turn to short-term money lenders, loan companies or finance companies for loans. Many of these introductions are facilitated by Agencies. Although Agencies are encouraged to conduct their business operations in a transparent manner (section 4.5), the Code only covers the service terms and fee schedules between Agencies and Workers and does not call for transparent operations of third parties such as loan companies who are significant contributors to the debt bondage situation. Although the Code prohibits employment agencies from advising, arranging, encouraging or forcing job-seekers to take out loans from any financial institutions or individuals (section 4.12), Workers can still take out loans from loan companies directly or loans may be solicited directly by loan sharks. Hence, Workers are left in the same vulnerable position that can lead to forced labour. Furthermore, limiting the arrangement of credit/loans for Workers to finance their recruitment fees may push Workers to find other sources of loans that may be equally or more exploitative. The Labour Department must assert control over placement fees paid by Workers by prohibiting all such placement fees, instituting related legal provisions and, vigorously enforcing these provisions.

9. It is very common for Workers to forfeit, at 50% of their wage or HKD 1,800-2,000 for 5-7 months (HKD 10,000–14,000) in order to settle placement fee loans. Typically, Workers are lead to financing companies by Agencies before they receive their first month's salary and required to sign a loan agreement to pay placement fees to the Agencies. Excessive, often unlawful, interest rates are charged. The result is a spiral into serious debt where Workers lose a large proportion of their income and repayment becomes extremely onerous, and in many cases, impossible. This often leads to harassment by the financing companies, including threatening and abusive phone calls to the Worker and their employer, and visits to the Worker's place of employment. Workers' contracts are regularly terminated by their employers following such behaviour by the financing companies, causing unnecessary hardship to both Workers and employers. For these reasons, the Code must go beyond section 4.12 and include clear and unambiguous provisions stating the Agents' obligations with regard to

¹ According to surveys of 2,000 women conducted by NGO Enrich from 2008 to 2012.

non-interference in the financial affairs of Workers, and contain enforceable sanctions for non-adherence.

10. Financial gain is the driving force behind the exploitation of Workers. It is conservatively estimated that Workers are forfeiting at least USD 100 million of their earnings per year to Agencies and finance companies through placement fees and exorbitant interest rates charged on loans taken out to pay these fees. The Labour Department must find ways to strengthen oversight of Agencies' financial activities with loan companies. Regulation of relationships with third parties where they may be a conflict of interest detrimental to Workers can help flush out loan companies from the 'shadow banking' system and subject them to a heightened form of scrutiny and control. For example, an enforceable requirement for Agencies to maintain adequate accounting systems can help ensure a paper trail of payments between employment agencies and third parties is recorded and improve transparency.
11. Deduction of wages is allowed in many circumstances as provided under section 3.10 of the Code and section 32 of the Employment Ordinance; however, none of those instances allows for unlawful deductions to repay an extortionate debt owed to Agencies. Agencies often enlist employers to deduct their commission payment before paying wages, which sometimes amount to up to 80 percent of Workers' salaries for the first 7 to 8 months of employment.² This often turns into debt bondage situations where Workers are forced to accept exploitative work conditions for fear of losing their job and not being able to repay the loans. The Code must address unlawful deductions by employers to repay debts owed to Agencies.
12. Another scenario that the Code needs to address is the practice of employment agencies colluding with employers to prematurely terminate the contracts of Workers forcing Workers to look for a new placement, sign a new contract and pay additional recruitment fees. Although this is not the norm, there are reported instances of Workers' contracts being terminated by their employers before or just after their salary deduction period ended.³ This has the effect of edging Workers into an inescapable spiral of debt, taking out a second loan (often with a high interest rate) to pay off the first placement fee and cover the second placement fee. The Code must address the practice of Agencies colluding with employers to prematurely terminate the contracts of Workers, prohibiting this behaviour, providing enforceable sanctions and enabling vigorous enforcement.
13. The Code does very little to address the vulnerabilities that lead to forced labour in Hong Kong. Equally important is the fact that the Code is legally non-binding. Lack of enforceability is a serious set back (see Section 1 above and Section 3 below) particularly given that Labour officials revoked only three Agency licenses

² *Id.* at p.179.

³ Amnesty International, *Exploited for Profit, Failed by Governments: Indonesian Migrant Domestic Workers Trafficked to Hong Kong*, p.73.

in 2015 out of approximately 1,800 inspections, and there were numerous reports of collusion between employment agencies and creditors.⁴ Given that forced labour is not a crime in Hong Kong and trafficking of this type is not recognized under section 129 of the Crimes Ordinance (see Section 4 below), the lack of a labour trafficking law makes the need for policing of Agencies and due diligence even more acute. Without proper monitoring, enforcement and review mechanisms, incentives and interests are misplaced and the exploitation of Workers will remain unchanged.

14. Agencies must be held accountable for all fees that they charge to Workers, and such fees should be transparent, lawful and justifiable. Agents must be obligated to list all axillary services offered to Workers and their families together with the respective costs for each, whether such services are provided, and fees incurred, in Hong Kong or in the sending state. Agencies must be required to perform sufficient due diligence on their partner agencies in the sending states so as to ensure that any fees assigned by partner agencies for collection by Hong Kong Agencies are lawful, transparent and justifiable, including training fees (See Section 4 below). The onus for accurate disclosure of all fees must be placed on Agencies, and appropriate sanctions must be applied when Agencies are found to be in breach of this obligation.
15. Furthermore, existing legal provisions with respect to interference in the financial affairs of Workers and other related offences must be vigorously enforced, and functional systems and policies (witness protection and protection from criminalization) must be put in place to allow for complaints from both Workers and employers regarding interference in the financial affairs of Workers by Agencies and financing companies. Disclosure must be engaged as a reliable defense where evidence of illegality is provided. Workers will not make reports if they believe they may face retribution from financing companies or Agencies, or if they may be prosecuted. Vigorous enforcement requires sufficient evidence to support investigations and prosecutions. Workers must be encouraged to report illegal activity and rewarded with appropriate legal action being taken against offenders. Workers must not be punished for reporting such abuses. The government must acknowledge the high level of risk to Workers, including the risk of loss of employment, when they undertake to report illegality. Given the level of vulnerability, Workers must be protected adequately by relevant government departments to facilitate reliable reporting of illegality. Relevant government departments include the Police, the Immigration Department, the Labour Department and the Department of Justice, which must cooperate to provide protection, and to develop policies for such protection. The Code does not address the problem of enforcement, evidence gathering and witness protection. These issues must be addressed in both the Code - to the extent possible under the purview of the Labour Department, and at a practical, operational level between the relevant government departments, if the

⁴ US Department of State, *Trafficking in Persons Report*, 2015, p.180-181.

government is to be able to vigorously enforce existing provisions with relation to the interference in the financial affairs of Workers, and other offences.

16. For the purposes of facilitating consideration of points 8-15, it is recommended the government establish an Inter-departmental Working Group including but not limited to the Police, the Immigration Department, the Labour Department and the Department of Justice. The Working Group should consult regularly with stakeholders, including Workers' representatives, employers' representatives, Agencies and NGOs.

Section 3 : Enforcement – Evidence Gathering and Investigative Practices

17. The current environment in which Agents operate has effectively produced a sense of impunity amongst Agencies. According to the Labour Department, there were 12 prosecutions of Agencies following 1,300 inspections in 2015, and 2 prosecutions up to May of this year. There are approximately 1,400 Agencies working with Domestic Workers in Hong Kong, and it is well known that there is widespread unethical and unlawful behaviour amongst the Agencies. There were numerous reports of collusion between employment agencies and creditors.⁵ The lack of prosecutions of employment agencies does not reflect a lack of criminality, but instead reflects a lack of enforcement, where weak and ineffective investigation practices prevail. This is explained by three main factors:

1. The limited resources which the Labour Department deploys to investigations,
2. A lack of close collaboration by the Labour Department with stakeholders, including NGOs and the Police, and
3. The need for a witness protection programme and a non-criminalization policy for Workers and other informants (see section 2 above)

18. In the current environment of weak enforcement, the Agencies are able to exploit both domestic workers and employers alike. Amongst the three most common unlawful acts agencies engage in are: (i) overcharging of domestic workers for placement fees, (ii) interference in domestic workers' financial affairs, including the placement of loans to repay illegal charges and conspiracy in the unauthorized and unlawful deductions of wages, and (iii) detention of identity documents including passports and HKID cards. It is understood that the Code was created to help address this behaviour. This is a clear failure of enforcement, but the Code does not address this problem.

19. The Labour Department has said repeatedly that a lack of evidence is the major impediment to their ability to prepare effective briefs for recommendation to the Department of Public Prosecutions. Increased numbers of effective investigations are required to enable successful prosecutions, and improved investigation techniques are essential to improve investigative outcomes. The Agencies are

⁵ *Ibid.* at, p.180-181.

experts in hiding evidence of their illegality. The Labour Department needs to become expert at lawfully gathering this evidence, using all of the resources at its disposal. This includes close collaboration with the Police and engaging Cap. 589 – the Interception of Communications and Surveillance Ordinance.

20. To achieve increased numbers of successful prosecutions of Agencies, the Labour Department needs to focus on three things:
 1. devote more resources to investigations, including manpower, training and equipment
 2. collaborate closely with NGOs, ethical Agencies and other stakeholders - as well as supporting the implementation of a witness protection programme and non-criminalization policy - to enable the gathering of intelligence and evidence
 3. increase cooperation with the Police, particularly in regard to engaging Cap. 589 – the Interception of Communications and Surveillance Ordinance - in order to obtain prescribed authorization to collect evidence under section 3 of the Ordinance, and support the creation of an interdepartmental enforcement task force to focus on investigating and prosecuting Agencies
21. The Agencies need to be “caught in the act” in order to generate convictions. The only way to do this is with lawful covert surveillance, lawful use of undercover operatives, and the lawful interception of communications. The ICAC has proven over the last 40 years that corruption can be significantly decreased in Hong Kong with the effective use of legal resources including Cap. 589, together with special teams of well-trained personnel, and collaboration with the Hong Kong community on both education and intelligence gathering. Likewise, the Labour Department needs to adopt this tried, tested and proven approach, working with the Police and other stakeholders (the “community”) to gather evidence and combat agency impunity with increased numbers of convictions. Only this will act as a deterrent to the impunity of the agencies.

Section 4 : Addressing the Underlying Issue of Forced Labour and Human Trafficking

22. The Code does not advance the fight against modern-day slavery and does little to address vulnerabilities to servitude and forced labour that are created or contributed to by exploitative practices of Agencies. Given that forced labour is not a crime in Hong Kong and trafficking of this type is not recognized under section 129 of the Crimes Ordinance (see Section 4 below), the lack of a labour trafficking law makes the need for policing of Agencies and due diligence even more acute. The Code has failed to address these issues. The Code must also address the serious problem of Worker debt given that recruitment debt is one of the most significant predictors of Workers falling victims to forced labour (see Section 2 above).

23. Human trafficking and forced labour are crimes that can occur at various stages of employment from the recruitment process to the commencement of Worker employment. Agencies in Hong Kong are obliged by the governments of the Sending States to cooperate with recruitment agencies in the sending countries as Workers themselves are not allowed to seek work independently. The lack of requirement on Agencies to conduct due diligence on their foreign counterparts means they can choose to turn a blind eye to abuses or fraudulent practices in recruitment, placement and employment and ultimately forced labour and human trafficking that come to their attention. The positive obligation for Agents to proactively work only with ethical foreign partners is essential given that many issues including the cycle of debt start in the country of origin and perpetuate in Hong Kong. In addition, there is no requirement on Agents to conduct due diligence on the loan agencies or financial institutions that they have relationships with. If KYC and AML standards can be applied and enforced in the finance sector, they should be equally applied and enforced on Agency-foreign agency and Agency-finance company relationships. It is therefore recommended that Agents be required to (i) conduct stringent due diligence on foreign partners, where explicit guidance is provided by the Labour Department on performance of the due diligence, and be held accountable for insufficient performance of such third party due diligence and (ii) disclose the details of any relation with any financing company or financial institution with which they have a relationship, and be held accountable for failure to adequately disclose, and (iii) conduct stringent due diligence on any financing company or financial institution with which they have a relationship, and be held accountable for insufficient performance of third party due diligence. The onus must be placed on Agents to acknowledge the need for higher standards, and to perform to those standards, or risk sanctions including de-licensing, fines - which should be increased beyond the current HKD 50,000 maximum, and the introduction of criminal offences carrying custodial sentences.

Section 5 : Continuous Education and Public Outreach to Ensure Workers and Employers Know their Rights and Obligations

24. The Labour Department has taken efforts to educate Workers about their rights and obligations utilizing various channels and methods, yet there continues to be a gap in both the Workers and the employers' knowledge concerning their respective rights and obligations. Singapore requires employers to attend a training workshop prior to employing a domestic worker. It is recommended that the Labour Department consider implementing a training workshop programme for new employers, and undertake an intensive programme of Employer Outreach, inviting stakeholders, particularly NGOs, Workers, employers and Agencies, to take part in the Outreach. It is additionally recommended that a separate outreach programme be offered to Agencies to reinforce their knowledge of relevant rules and regulations, and to facilitate better cooperation between all stakeholders. Such programmes should be supplemented by use of

Public Service Announcements on Radio and TV as an effective means of reaching a wide audience.

25. Many Agencies fail to provide proper service and protection for Workers and their employers. Although the Code promulgates that employment agencies should clearly explain to Workers their employment rights and labour rights (section 4.10), there is no mention of practices that can amount to forced labour such as confiscation of passports by employers, physical or verbal abuse, non-payment of wages, excessive working hours, limited freedom of movement etc. Lack of information about their rights heightens Workers' vulnerabilities to abuses and exploitation. The same is equally true for employers where Agencies should be required to brief them on what practices are deemed unacceptable and could constitute labour violations and potentially forced labour.
26. In cases of abuse and ill-treatment by employers, most Agencies tend not to intervene and chose to continue to make money through unethical practices. There is no incentive for the Agencies to match employers with an appropriate Worker or mediate Worker-employer conflicts because placing a new Worker in the home allows for increased income. Given this conflict of interest, it is clear that there is a need for the Code to set clear guidance on the manner in which Agencies handle reports of abuse, and for provisions to hold Agencies accountable for non-adherence.

Section 6 : Nomenclature and Appropriate Language - Workers or Commodities?

27. During the Manpower Panel hearing on 3 May 2016 at which the Labour Department presented the Code to LegCo, Workers were generally referred to as mere commodities or goods. The Consumer Council was tasked to handle issues linked to what can be done when Workers were unable to do what they were contracted to do, prompting one LegCo member to ask if it is possible to 'return' Workers, and ask for a refund if employers are unhappy with their hire. This language reflects a negative bias towards Workers. The question of appropriate language and nomenclature should be raised with LegCo and the Consumer Council. Also, Hong Kong and Singapore are the only two jurisdictions that refer to Workers as Helpers. Effort must be taken by the Labour Department to change the language around Workers so as to consciously treat them as employees, as defined under the Employment Ordinance.

Annex A: Summary of Issues and Recommendations for COP

No.	Issue	Recommendation
	Section 1	Global Issues – Efficacy of the Code
1.	Lack of enforceability; Lack of provisions for debt bondage, witness protection, non-criminalization, effective evidence gathering, regulation of third party relationships, education and outreach, consultation, monitoring and transparency.	The Code should be reconsidered based on consultation with stakeholders to include legally enforceable provisions, enhanced sanctions to ensure deterrent effect, and benchmarking of best practices (point 5). To limit Agency impunity, the Code should then be re-designated as draft legislation with subsequent work to commence on passage through the legislative process.
2.	Lack of defined legal obligations and punishment for non-compliance with Code	DOJ should be consulted on the inclusion of clear and unambiguous provisions.
3.	Until legislation or other legally enforceable provisions can be effected, the efficacy of the Code must be measurable and publically reported	Key performance indicators should be developed to provide quantitative and qualitative measures against which the performance of the Code can be assessed. A publically available annual performance report on the Code’s effectiveness should be published on-line.
4.	The current administrative system is cumbersome, paper-heavy and department and location-dependent.	The Code should be implemented through readily available technology platforms. Transparency of Agency compliance will be improved and LD workload decreased through real-time monitoring accessibility and a reduction of paperwork. Agency non-compliance can result in nullification or delayed commencement of employment contracts with mandatory compensation for Workers and employers, license suspension, fines and other penalties.
5.	The Code lacks benchmarking with best practices	The Code should be benchmarked according to other Agency best-in-class regulations, laws and codes of practice worldwide.
6.	The Code lacks provisions for publication of information on offending	The Code should provide for accurate and up-to-date information to be available on-line to all interested parties regarding Agencies who are

	/ non-compliant Agencies	being, or have been, prosecuted (Blacklist), or are currently under investigation, and where they have been previously investigated on at least one prior occasion (Watchlist).
7.	Code lacks provisions for consultation and input from stakeholders, particularly with regard to monitoring of Agencies	The Code should facilitate ongoing input and support from stakeholders in the active monitoring of Agencies and enforcement actions of the authorities, The LD should establish a clearly identified reporting channel, allowing stakeholders to provide relevant information and monitor the progress of action taken.
	Section 2	Debt Bondage and Witness Protection
8.	Worker debt is not sufficiently addressed by the Code	The Code must contain clear, exhaustive and unambiguous provisions setting out Agents' obligations with regard to interference in the financial affairs of Workers, and enforceable sanctions for non-adherence.
9.	Placement fees create opportunities for exploitation of workers. The Code does not address the problem of placement fees.	The LD must assert control over placement fees paid by Workers by prohibiting all such placement fees, instituting related provisions and vigorously enforcing those provisions.
10.	Deductions from Worker wages is not sufficiently addressed by the Code	The Code should contain clear provisions concerning wage deductions with regard to repaying debts owed to Agencies, including loans for placement fees or other charges, and enforceable sanctions to deter offenders must be introduced.
11.	The Code lacks regulation of relationships with third parties where they may be a conflict of interest	The Code should contain an enforceable requirement for Agencies to maintain adequate accounting systems to help ensure a paper trail of payments between Agencies and third parties is recorded to improve transparency.
12.	The Code does not address the practice of employment agencies colluding with employers to prematurely terminate the contracts of Workers	The Code should prohibit collusive behaviour, provide enforceable sanctions and enable vigorous enforcement against this practice.
13.	Lack of transparency of	Agencies must be required to perform sufficient due

	fees charged by Agencies	diligence on their partner agencies in the sending states so as to ensure that any fees assigned by partner agencies for collection by Hong Kong Agencies are lawful, transparent and justifiable, including training fees. The onus for full disclosure of all fees must be placed on Agencies, and appropriate sanctions must be applied when Agencies are found to be in breach of this obligation
14.	Workers are reluctant to report illegality and provide evidence due to fear of criminalization as well as retribution from employers, agents and financing companies	Functional systems and policies (witness protection and protection from criminalization) must be put in place to allow for complaints from both Workers and employers regarding interference in the financial affairs of Workers by Agencies and financing companies. Disclosure must be engaged as a reliable defense where evidence of illegality is provided.
15.	The Code does not address systemic issues impeding enforcement of existing provisions – particularly evidence gathering and witness protection	A witness protection programme must be established, and immunity from prosecution provided in exchange for evidence. To facilitate vigorous enforcement of existing provisions including those relating to interference in the financial affairs of Workers, systemic issues must be addressed both in the Code - to the extent possible under the purview of the Labour Department, and also at a practical, operational level between the relevant government departments (Police, Immigration, Labour and Justice etc.).
16.	Lack of sufficient inter-departmental coordination and communication regarding enforcement – particularly evidence gathering and witness protection	The government should establish an Inter-departmental Working Group including the Police, Immigration Department, Labour Department and the Department of Justice. The Working Group should consult regularly with stakeholders, including Workers’ representatives, employers representatives, Agencies and NGOs with a view to finding <i>durable</i> solutions to the issues identified in this submission and generally through the public consultation process.
	Section 3	Enforcement – Evidence Gathering and Investigative Practices
17.	Agents operate with <i>defacto</i> impunity because of weak enforcement - ineffective investigation	The LD needs to (i) devote more resources to investigations, including manpower, training and equipment, (ii) collaborate closely with NGOs, ethical agencies and other stakeholders to gather

	practices prevail. The Codes does not address the issue of enforcement and evidence gathering.	intelligence and (iii) increase cooperation with the Police, particularly in regard to engaging Cap. 589 – the Interception of Communications and Surveillance Ordinance - in order to obtain prescribed authorization to collect evidence under section 3 of the Ordinance
18.	The LD has stated that a lack of evidence is the major impediment to enforcement	The LD needs to collaborate closely with NGOs, ethical Agencies and other stakeholders - as well as support the implementation of a witness protection programme and non-criminalization policy - to enable the gathering of intelligence and evidence.
19.	Agencies are experts in hiding evidence of their illegality	The Labour Department needs to become expert at lawfully gathering evidence, using all of the resources at its disposal. This includes close collaboration with the Police, creation of an interdepartmental enforcement task force, and engaging Cap. 589.
	Section 4	Addressing the Underlying Issue of Forced Labour and Human Trafficking
20.	The Code does not advance the fight against modern-day slavery and does little to address vulnerabilities to servitude and forced labour that are created or contributed to by exploitative practices of Agencies	The lack of a labour trafficking law makes the need for policing of Agencies and due diligence even more acute. Enhanced enforcement techniques are urgently required (see section 3 above), where the implementation of a witness protection programme and non-criminalization policy are critical elements. The onus must be placed on Agents to acknowledge the need for higher standards, and to perform to those standards, or risk sanctions including de-licensing, fines, which should be increased beyond the current HKD 50,000 maximum, and the introduction of criminal offences carrying custodial sentences.
21.	The Code lacks a requirement on Agencies to conduct due diligence on their foreign counterparts and financing company partners which means they can choose to turn a blind eye to abuses or fraudulent practices in recruitment, placement	Agents should be required to (i) conduct stringent due diligence on foreign partners, where explicit guidance is provided by the Labour Department on performance of the due diligence, and be held accountable for insufficient performance of third party due diligence and (ii) disclose the details of any relations with any financing company or financial institution with which they have a relationship, and be held accountable for failure to adequately disclose, and (iii) conduct stringent due diligence on any financing company or financial

	and employment and ultimately forced labour and human trafficking	institution with which they have a relationship, and be held accountable for insufficient performance of third party due diligence. If KYC and AML standards can be applied and enforced in the finance sector, they should be equally applied and enforced on Agency-foreign agency and Agency-finance company relationships.
	Section 5	Continuous Education and Public Outreach to Ensure Workers and Employers Know their Rights and Obligations
22.	There continues to be a gap in both the Workers and the employers' knowledge concerning their respective rights and obligations	The LD should implement a training workshop programme for new employers, and undertake an intensive programme of Employer Outreach, inviting stakeholders, particularly NGOs, Workers, employers and Agencies, to take part. A separate outreach programme should be offered to Agencies to reinforce their knowledge of relevant rules and regulations, and to facilitate better cooperation between all stakeholders. Such programmes should be supplemented by use of Public Service Announcements on Radio and TV as an effective means of reaching a wide audience.
23.	Many Agencies fail to provide proper service and protection for Workers and their employers.	In addition to what is required under Section 4.1 of the Code, Agencies should be required to brief Workers and their own employees on what practices are deemed unacceptable and could constitute labour violations and potentially forced labour.
24.	There is no incentive for the Agencies to match employers with an appropriate Worker or mediate conflicts between Workers and employers	The Code must recognize this conflict of interest and provide clear guidance on the manner in which Agencies handle reports of abuse. Agencies must be held accountable for non-adherence
	Section 6	Nomenclature - Workers or Commodities?
25.	Use of inappropriate language reflects a negative bias towards Workers	The question of appropriate language and nomenclature should be raised with LegCo and the Consumer Council. Effort must be taken by the LD to change the language around Workers so as to consciously treat them as employees, as defined under the Employment Ordinance.