

立法會

Legislative Council

LC Paper No. CB(2)1740/18-19

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by the Administration)

Ref : CB2/PL/MP

Panel on Manpower

**Minutes of meeting
held on Tuesday, 19 March 2019, at 4:30 pm
in Conference Room 3 of the Legislative Council Complex**

Members present : Dr Hon Fernando CHEUNG Chiu-hung (Chairman)
Hon HO Kai-ming (Deputy Chairman)
Hon LEUNG Yiu-chung
Hon Starry LEE Wai-king, SBS, JP
Hon WONG Kwok-kin, SBS, JP
Hon Frankie YICK Chi-ming, SBS, JP
Hon YIU Si-wing, BBS
Dr Hon KWOK Ka-ki
Hon KWOK Wai-keung, JP
Hon POON Siu-ping, BBS, MH
Dr Hon CHIANG Lai-wan, SBS, JP
Hon CHUNG Kwok-pan
Hon Andrew WAN Siu-kin
Hon CHU Hoi-dick
Hon Jimmy NG Wing-ka, JP
Hon SHIU Ka-fai
Dr Hon Pierre CHAN
Hon LUK Chung-hung, JP
Hon Jeremy TAM Man-ho
Hon AU Nok-hin
Hon Vincent CHENG Wing-shun, MH

Member absent : Hon SHIU Ka-chun

Public Officers : Item III
attending

Mr Jeff LEUNG Wing-yan, JP
Deputy Commissioner for Labour
(Occupational Safety and Health)

Mr WU Wai-hung, JP
Assistant Commissioner for Labour (Occupational Safety)

Item IV

Mr Caspar TSUI Ying-wai, JP
Under Secretary for Labour and Welfare

Mr Carlson CHAN Ka-shun, JP
Commissioner for Labour

Ms Melody LUK Wai-ling, JP
Assistant Commissioner for Labour (Labour Relations)

Mr Raymond HO Kam-biu
Assistant Commissioner for Labour (Development)

Clerk in : Miss Betty MA
attendance Chief Council Secretary (2) 1

Staff in : Ms Rita LAI
attendance Senior Council Secretary (2) 1

Mr Ronald LAU
Council Secretary (2) 1

Miss Lulu YEUNG
Clerical Assistant (2) 1

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I. Information paper issued since the last meeting
(LC Paper No. CB(2)895/18-19(01))

Members noted that a letter dated 25 February 2019 from Mr Jeremy TAM expressing concern about the occupational safety of non-skilled employees engaged by government service contractors while

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performing cleaning service and maintenance for street lamps had been issued since the last meeting. Members further noted that the Administration had been requested to provide a written response to the issues raised in Mr TAM's letter.

II. Date of next meeting and items for discussion
(LC Paper Nos. CB(2)981/18-19(01) and (02))

Regular meeting in April 2019

2. Members agreed that the following items proposed by the Administration be discussed at the next regular meeting at 4:30 pm on 16 April 2019:

- (a) Promoting good human resource management culture and family-friendly employment practices; and
- (b) Preparatory work for the implementation of the revised statutory minimum wage rate.

3. In the light of recent media reports on the difficulties encountered by a foreign domestic helper who suffered from a serious illness in receiving healthcare services after her employment contract was terminated, the Chairman suggested and members agreed that the Panel would also discuss the subject of "Foreign domestic helpers' access to healthcare services" at the next meeting.

The Deputy Chairman took the chair during the temporary absence of the Chairman.

III. Raising penalties of occupational safety and health legislation
(LC Paper Nos. CB(2)981/18-19(03) to (04), CB(2)988/18-19(01), CB(2)1015/18-19(01) to (03) and CB(2)1025/18-19(01) to (03))

4. Deputy Commissioner for Labour (Occupational Safety and Health) ("DC for L (OSH)") briefed members on the preliminary amendment proposals of the Labour Department ("LD") to raise the penalties of the occupational safety and health ("OSH") legislation ("the preliminary proposals"), as detailed in the Administration's paper.

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5. Members noted a background brief entitled "Penalties of occupational safety and health legislation" prepared by the Legislative Council ("LegCo") Secretariat.

Occupational injuries statistics and current level of penalty for non-compliance with legislation of occupational safety and health

6. Dr CHIANG Lai-wan enquired whether the occurrence of the industrial fatalities in 2017 was mainly attributed to duty holders' or employees' disregard for work safety. DC for L (OSH) responded that while LD did not maintain such records, it was noted that nine construction fatalities involved fall of workers in work-at-height activities. The Government had completed the investigation of these industrial accidents and the findings revealed that at the time of the accidents, although employers had provided safety harnesses for the workers in seven of these cases, it was noted that in all these cases, secure anchorage point for attaching the safety harnesses was not available.

7. Mr SHIU Ka-fai expressed the view that while employers should safeguard the occupational safety of employees, it was equally important for employees to be alert to the risks at work. Mr SHIU then sought information on the number of prosecutions taken out against employees for non-compliance with section 8 of the Occupational Safety and Health Ordinance (Cap. 509) ("OSHO") and section 6B of the Factories and Industrial Undertakings Ordinance (Cap. 59) ("FIUO") in the past few years.

8. DC for L (OSH) said that there were cases of prosecution against employees for failure in taking care for the safety and health of persons (including employees themselves) who were at the employees' workplace under OSHO/FIUO but he did not have the requisite information on hand. The Administration was requested to provide the information after the meeting.

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9. Noting that duty holders, upon conviction, were subject to a maximum fine ranging from \$2,000 to \$500,000 under FIUO, OSHO and their subsidiary regulations, Mr SHIU Ka-fai sought information on the number and results of appeals filed by the Department of Justice ("DoJ") at LD's request in respect of the penalties imposed by the court on OSH offences in the past years, given that the average fine for each summons for fatal industrial accidents in the construction industry in 2018 was only about \$27,000.

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10. The Deputy Chairman held the view that applications for review of or appeal against the penalties of OSH offences should be dealt with by the Court of Appeal, such that the latter could make reference to another set of sentencing guidelines and consider imposing higher level of penalties for OSH offences.

11. DC for L (OSH) responded that in determining the appropriate sentences, the court had all along made reference to the level of fines imposed on similar OSH offences in the past. In the past four to five years, there were about 90 cases of applications for review or appeal to the court in respect of the conviction and the penalties for non-compliance with safety requirements under OSHO and FIUO. Among these applications, DoJ approved a small number of cases to proceed for review or appeal. Assistant Commissioner for Labour (Occupational Safety) added that in the past five years, there were 42 applications for review/appeal to the court in respect of the penalties imposed on non-compliant cases under OSHO and FIUO. Among which, DoJ considered that three cases had sufficient justifications, and there was one successful review case.

Proposed amendment directions

12. Mr POON Siu-ping said that the labour sector welcomed the preliminary proposals, having regard to the fact that the existing penalties for breaching the OSH legislation were too low to achieve sufficient deterrent effect and that the number of industrial fatal cases remained on the high side over the years.

13. Dr KWOK Ka-ki was of the view that the proposal to raise the penalties of OSH legislation was overdue, given that the sentences for OSH offences were too low and disproportionate to the severity of the offences. The penalties for non-compliance with OSH requirements should be raised to achieve greater deterrence.

Increasing the maximum fine

14. Mr SHIU Ka-fai and Dr CHIANG Lai-wan expressed grave concern that the proposal to pitch the maximum fine of contravening the general duty ("GD") provisions in OSH legislation at 10% of the turnover of the convicted company or \$6 million was too drastic. Mr SHIU was worried that the proposed penalty would seriously affect the operation of small and medium enterprises and the business environment.

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15. The Deputy Chairman and Mr LUK Chung-hung said that the Hong Kong Federation of Trade Unions expressed support for the proposed amendment directions of raising penalties of the OSH legislation. Mr LUK, however, raised query as to how the Administration could ensure that the sentences so imposed by the court would be proportionate to the seriousness and dire consequences of the OSH offences.

16. While raising no objection to raising penalties of the OSH legislation, Mr LEUNG Yiu-chung cast doubt about the effectiveness of the proposal in achieving greater deterrence, if the court still imposed a fine at a level far below the maximum fine. Mr LEUNG expressed further concern that under the subcontracting practice in the construction industry, the principal contractors could easily evade their legal liabilities in industrial fatalities and accidents. Dr CHIANG Lai-wan raised a similar concern.

17. Mr CHUNG Kwok-pan pointed out that the Administration should not seek to press the court to impose heavier penalties on OSH offences by raising the maximum penalties under the OSH legislation. Instead, the Administration should critically examine why the actual sentences on law-defying duty holders made by the court were on the low side.

18. In response to members' views and concerns, DC for L (OSH) said that comparing to the penalties of the OSH legislation in other advanced countries/regions (such as the United States, Singapore, Australia, New Zealand and Ontario Province of Canada), the maximum fines of the OSH legislation in most of these places far exceeded those of Hong Kong. By comparison, the penalties of the OSH legislation in Hong Kong were on the very low side. Moreover, the penalties of FIUO and OSHO had not been revised for over 20 years. To strengthen the deterrent effect of the penalties, LD had been making efforts to assist the courts to determine appropriate sentences, in particular to impose higher penalties on duty holders for serious cases. Although the amount of fines imposed by the court had on the whole increased slightly in recent years, the actual penalties were still on the low side and did not have sufficient deterrent effect to propel the improvement of OSH performance. While respecting the independence of the Judiciary, the Administration believed that the Judiciary would accordingly impose heavier penalties on OSH offences following the enactment of the relevant legislative proposals. Moreover, there would be stronger justifications for DoJ to seek review of or appeal against the penalties imposed by the court.

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19. As regards LD's proposal of amending GD provisions for employers/proprietors/occupiers of premises, DC for L (OSH) said that the provisions could be invoked as indictable offences and subject to the maximum fine of \$6 million or pitching at 10% of the turnover of the convicted company, whichever was the greater. The proposal would only be applicable to extremely serious cases of extremely high culpability or serious negligence which led to serious consequences.

20. DC for L (OSH) further advised that using turnover as a sentencing reference could assist the courts in understanding the scale of operation of the convicted entities, and thus imposing a sentence with sufficient deterrent effect. With respect to the legal liabilities under the subcontracting arrangements in the construction industry, both principal contractors and subcontractors of construction projects would be liable to prosecution if there was sufficient evidence to substantiate their non-compliance with the OSH legislation and safe work practices. The Administration had successfully initiated prosecutions against the principal contractors in the past years. DC for L (OSH) added that taking the construction industry as an example, the tenderer's past work safety records would constitute an important consideration factor in tender evaluation for awarding public works contracts.

21. Mr POON Siu-ping sought clarification about the calculation of 10% of the turnover of the convicted company, given that the convicted entity could be a subsidiary company of another holding company. DC for L (OSH) advised that the turnover for sentencing consideration would be confined to that of the convicted company only, and LD's current thinking was to refer to the turnover information shown in the convicted company's tax return.

22. Mr AU Nok-hin was worried that some large enterprises would intentionally set up a number of subsidiary companies so as to evade the legal liabilities in the event of occurrence of industrial accidents. DC for L (OSH) pointed out that business operation in Hong Kong was subject to, apart from OSH legislation, various regulatory and monitoring regimes. Splitting a company into smaller ones would incur extra management resources, and companies might be better off positively deploying resources to improve their OSH system.

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Re-alignment of seriousness levels of penalty provisions

23. Mr LUK Chung-hung and Mr POON Siu-ping were gravely concerned about LD's proposal to lower the seriousness levels of 76 penalty provisions as a result of proposed re-alignment of the penalty provisions in FIUO and its subsidiary legislation.

24. Referring to the submission from the Association for the Rights of Industrial Accident Victims, Mr AU Non-hin shared the concern about lowering the penalties of 59 provisions in FIUO as a result of re-alignment of seriousness levels as set out in Annex 4 to the Administration's paper.

25. DC for L (OSH) explained that it was proposed that the maximum fines of the 657 penalty provisions in FIUO, other than those GD provisions for employers/proprietors/occupiers of premises, would have an across-the-board three-fold increase after the proposed adjustments. However, LD's review revealed that about 128 provisions carried a maximum fine not accurately reflecting the seriousness of the offences. LD had therefore re-aligned the seriousness categories of these provisions in accordance with the categorization criteria as detailed in paragraph 22 of the Administration's paper, and the re-alignment results were summarized in paragraph 24. That said, the Administration would, in light of members' views, review the seriousness categories of the offence provisions, in particular those proposed to be lowered.

Imprisonment terms

26. The Deputy Chairman and Mr LUK Chung-hung expressed dissatisfaction that no convicted employer had so far been sentenced with immediate imprisonment term since the commencement of the OSH legislation. Mr LUK asked whether the Administration had examined the difficulties involved in taking out prosecutions against employers concerned. The Deputy Chairman asked whether the Administration would consider holding a company director liable for the work of safety management committees formed under various construction projects as well as the occurrence of industrial accidents.

27. DC for L (OSH) advised that in the course of the legislative review, it was found that the provisions in the OSH legislation for imprisonment terms were comparable to those of various overseas jurisdictions in respect of the seriousness and threshold for the relevant OSH offences.

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Individuals as a duty holder (including company director) would be liable to prosecution if there was sufficient evidence substantiating that he/she was held responsible for committing an OSH offence. LD therefore considered it necessary to step up evidence collection for OSH offences and proposed to extend the time-bar for issuing summonses from six months to one year, with a view to allowing sufficient time for LD to conduct more in-depth investigations into the cases and thus providing the courts with sufficient evidence for considering whether to impose immediate imprisonment sentence on convicted defendants.

28. The Deputy Chairman remained concerned about the difficulties in proving that an employer had intentionally committed an offence under FIUO. To plug the loophole, Mr LUK Chung-hung called on the Administration to consider introducing legislative amendments to sections 6A and 6B of FIUO to the effect that imprisonment sentence would be imposed on the duty holder in the event of occurrence of serious or industrial fatality resultant from his/her negligence as a duty holder. In response to Mr LUK's further enquiry about manpower resources for prosecution work, DC for L (OSH) advised that it would be reviewed when the amendment proposals were finalized.

Legislative timetable

29. Noting opposition from the business sector and employer groups against the preliminary proposals, Mr POON Siu-ping appealed to the Administration to be determined in implementing the proposals to raise OSH penalties and without further delay. Mr POON asked about the relevant consultation on the preliminary proposals and the legislative timetable. Mr SHIU Ka-fai asked whether consideration would be given to extending the consultation period.

30. DC for L (OSH) said that LD was in the process of consulting relevant stakeholders. LD had consulted the Labour Advisory Board in February 2019 and would meet with various trade associations and labour unions, in particular those in the construction industry. Subject to the stakeholders' views and progress of law drafting, the Administration expected to finalize the legislative amendments within the term of the current Government.

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Other issues

31. Dr KWOK Ka-ki expressed concern that the preliminary proposals could hardly penalize the developers or major principal contractors. He considered that in addition to raising OSH penalties, it was equally important to adopt other measures such as enhancing safety training to prevent recurrence of similar accidents. He asked about LD's role in ensuring the occupational safety of workers in the construction sites.

32. DC for L (OSH) clarified that summonses for violating the OSH legislation were issued to contractors at different tiers including principal contractors. He said that similar to the OSH legislation of most of the overseas countries, there were no specific penalty provisions against developers in relation to their responsibility for safety performance. He added that the concept of "Construction (Design and Management)", which was intended to ensure that health and safety issues were properly considered during a project's development, had been legislated in a few overseas jurisdictions in recent years. The Government would continue to keep in view the effectiveness of such regulation in these jurisdictions. LD performed the regulatory role in safeguarding the safety and health of workers through enforcement of the OSH legislation, and had no involvement in formulating the system of work in workplaces. To this end, LD's Occupational Safety Officers conducted inspections to workplaces and took enforcement actions against non-compliance with the OSH legislation as necessary.

[At this juncture, the Chairman resumed the chairmanship.]

IV. A proposal to create a Chief Labour Officer post in the Labour Department to take forward various measures to enhance statutory maternity leave
(LC Paper Nos. CB(2)981/18-19(05) and (06))

33. At the invitation of the Chairman, the Under Secretary for Labour and Welfare ("USLW") briefed members on LD's proposal to create one permanent post of Chief Labour Officer ("CLO") (D1) to take forward various new measures to enhance statutory maternity leave ("ML") ("the staffing proposal") as detailed in the Administration's paper.

34. Members noted an updated background brief entitled "Review of statutory maternity leave" prepared by the LegCo Secretariat.

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35. The Chairman said that members were generally in support of extending the statutory ML under the Employment Ordinance (Cap. 57) ("EO") from the current 10 weeks to 14 weeks.

36. Mr LUK Chung-hung held the view that it was the community consensus to extend the statutory ML under EO to 14 weeks, which also met the international standard. Mr LUK, however, was concerned that the rate of the ML pay ("MLP") in relation to the additional four weeks of ML would be maintained at four-fifths of the employees' average daily wages and that the Government funding support would be subject to a cap of \$36,822 which was equivalent to four-fifths of the wages of an employee with a monthly wage of \$50,000 in four weeks ("the cap"). Mr LUK enquired whether the incumbent of the proposed CLO post would follow up these issues of concern.

37. Expressing support for the staffing proposal, the Deputy Chairman was of the view that the additional four weeks' MLP should not be subject to a cap and called on the Administration to reconsider the proposal.

38. Mr LEUNG Yiu-chung held the view that employees should be entitled to full pay ML and the Administration should conduct a review of the maternity benefits. Mr LEUNG considered it unfair that the MLP rate of some higher-paid employees during the additional four weeks' ML would be lower than that in the first 10 weeks' ML because of the cap.

39. Mr Jeremy TAM expressed support for the staffing proposal. Mr TAM and the Chairman were appreciative of the Administration's proposal to amend the definition of "miscarriage" in EO such that an employee who suffered a miscarriage at or after 24 weeks of pregnancy could be entitled to ML and that a male employee would correspondingly be entitled to statutory paternity leave if his spouse/partner gave birth to a stillbirth at or after 24 weeks of pregnancy.

40. In response to members' views and concerns, USLW advised that the ML proposal was a major and unprecedented change to the existing employment benefits regime as public money would be used to subsidize employers in providing employment benefits to their employees as required under EO on a perpetual basis. In effect, the rate of MLP at four-fifths of the employee's average daily wages under EO was more favourable than that stipulated in the relevant International Labour Conventions which was pitched at not less than two-thirds of the

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employee's earnings. It was also noted that ML was unpaid in some economies and the statutory minimum wage rate might apply in some other economies. Also, MLP of some economies was subject to a ceiling and some others were only paid for a certain period of ML. Taking into consideration all relevant factors and upholding the principle of prudent use of public money, it was proposed that there would be a cap for the additional four weeks' MLP. It was also noteworthy that employees with a monthly wage of \$50,000 or below accounted for about 95% of female employees in Hong Kong (an estimate based on 2016 data). In the light of this, it was recommended that the amount of funding support for the additional four weeks' MLP (i.e. MLP for the 11th to 14th weeks) to be provided by the Government for each confinement of an eligible female employee be subject to a cap of \$36,822, the amount of which might be reviewed from time to time. To take forward the initiative, the Administration had to introduce legislative amendments to EO and develop a mechanism for making reimbursement to employers from scratch.

41. On the need for the proposed CLO post, USLW further advised that in view of the complexity of the multi-faceted tasks involved in the formulation and implementation of the new ML regime as outlined in paragraph 4(a) to (i) of the Administration's paper, an officer of sufficiently senior position and with rich experience in labour issues would be required to take charge of the matter. The Administration therefore proposed to create one permanent post of CLO at the D1 level, who would be underpinned by a dedicated office in LD, to spearhead the development of a holistic policy and implementation framework for the new ML regime. It was essential to create the CLO post on a permanent basis and as soon as possible so as to meet the targets of submitting the enabling bill to LegCo before end 2019 and effecting the reimbursement mechanism by 2021.

42. Expressing support for the staffing proposal, Mr POON Siu-ping enquired about the manpower requirements in LD for taking forward the ML proposal. He also expressed concern about the impact on the work of enhancing statutory ML if the proposed creation of the CLO post was not supported.

43. USLW responded that the Assistant Commissioner for Labour (Labour Relations) was currently underpinned by a preparatory team comprising one Senior Labour Officer and one Labour Officer to work on the ML proposal. It was anticipated that the work of enhancing

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statutory ML would be delayed if the proposed creation of the CLO post was not supported. USLW appealed to members to support the staffing proposal. Commissioner for Labour supplemented that LD was handling a number of important labour issues, including the ML proposal and abolishing the "offsetting" arrangement under the Mandatory Provident Fund System. LD's existing resources were already fully stretched and hence there was a pressing need to create the CLO post.

44. Mr LUK Chung-hung took the view that the proposed CLO post should also be tasked to follow up with the proposal of extending the period of employment protection for pregnant employees, say, six months to one year following the expiry of the statutory ML.

45. The Deputy Chairman said that to his knowledge, pregnancy discrimination against female employees was not confined to grassroots employees but also higher-paid employees. He was concerned about the entitlement to MLP for the additional four-week statutory ML in respect of those pregnant employees who were employed under fixed-term or short-term contracts if their contracts were not renewed before they gave birth.

46. Expressing concern that there were cases of indirect discrimination against female employees during their pregnancy and after child delivery at workplaces, Mr AU Nok-hin was of the view that the proposed CLO post should also study employment protection of pregnant employees from the perspective of the Family Status Discrimination Ordinance (Cap. 527). Mr AU further called on the Administration to consider amending the relevant provisions in EO to the effect that non-renewal of employment contracts for pregnant employees would be regarded as unlawful and unreasonable dismissal.

47. Responding to members' views and concerns, USLW said that the existing EO provisions accorded appropriate protection for pregnant employees on various aspects including ML, MLP, occupational health and employment protection, etc. Furthermore, under the Sex Discrimination Ordinance (Cap. 480), it was unlawful for an employer to subject a woman to a disadvantage or dismiss her on the ground of her pregnancy, including dismissal during pregnancy or upon return from ML. The Administration had currently no plan to amend the relevant EO provisions on employment protection and entitlement to MLP. That said, the proposed CLO post would also be responsible for stepping up the publicity efforts on maternity benefits and protection.

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48. The Deputy Chairman remained concerned about maternity protection for employees engaged under short-term employment contracts and appealed to the Administration to address the issue.

49. The Chairman expressed reservation about the staffing proposal. He was worried that employers would incline not to renew short-term employment contracts with pregnant employees if the ML duration was extended to 14 weeks and appealed to the Administration to assess the family and gender implications of the ML proposal when drafting the relevant amendment bill. Mr LEUNG Yiu-chung said that he would support the staffing proposal only if the main duties of the CLO post would also include reviewing the existing arrangements on employment protection for pregnant employees on contract term as well as studying the proposals of granting full paid ML and lifting the cap for the additional four weeks' MLP.

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50. USLW advised that there was no evidence in the labour market showing that employers had evaded the legal liabilities of providing ML to their employees through the adoption of fixed-term contracts. In response to the Chairman's request, the Administration agreed to provide any information LD might have on pregnancy discrimination against female employees who were engaged under fixed-term contracts, and the gender and family implications of the statutory ML proposal after the meeting.

51. In concluding the discussion, the Chairman said that members were in support of the implementation of the ML proposal as early as practicable. Most members raised no objection in principle to the Administration's proposed creation of the CLO post and its submission to the Establishment Subcommittee for consideration. The Chairman called on the Administration to take note of the concerns and views of members when drafting the relevant amendment bill.

52. There being no other business, the meeting ended at 6:27 pm.