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**Report of the Panel on Manpower  
on issues relating to the Employment (Amendment) Bill 2019  
for submission to the Legislative Council**

**Purpose**

This paper reports on the deliberations of the Panel on Manpower ("the Panel") on issues relating to the Employment (Amendment) Bill 2019 ("the Bill"). It will be tabled at the Council meeting when the Bill resumes its Second Reading debate in accordance with Rule 77(14) of the Rules of Procedures ("RoP") of the Council.

**Background**

2. Under the Employment Ordinance (Cap. 57) ("EO"), a female employee is entitled to a continuous period of 10 weeks' maternity leave ("ML") if she is employed under a continuous contract<sup>1</sup> immediately before her ML commences and has given notice of pregnancy and her intention to take ML to her employer. If the employee has been employed under a continuous contract for not less than 40 weeks immediately before the commencement of her scheduled ML and has given notice of pregnancy and her intention to take ML to her employer, she is further entitled to ML pay ("MLP") at the rate of four-fifths of her average daily wages. An employer who fails to grant ML to a pregnant employee or fails to pay MLP to an eligible pregnant employee is liable to prosecution and, upon conviction, to a fine at level 5 (\$50,000).

3. The Chief Executive ("CE") announced in the 2018 Policy Address that the Government had completed the review of the statutory ML and proposed to extend the statutory ML from the current 10 weeks to 14 weeks. The rate of the additional four weeks' MLP ("additional MLP") would be maintained at the current statutory rate of MLP, i.e. four-fifths of the employees' average daily

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<sup>1</sup> Under section 3 of EO and the First Schedule to EO, an employee who has been employed continuously by the same employer for four weeks or more, with at least 18 hours worked in each week, is regarded as being employed under a continuous contract.

wages, subject to a cap of \$36,822 per employee. The Government would also fund the additional MLP by way of reimbursement to employers.

4. The Secretary for Labour and Welfare ("SLW") introduced the Bill into the Legislative Council ("LegCo") on 8 January 2020. SLW's motion moved under RoP 54(4) that the Second Reading debate on the Bill be adjourned and the Bill be referred to the Panel instead of the House Committee ("HC") was passed at the Council meeting of 15 January 2020. In the light of this, the Panel held four special meetings between March and May 2020 to discuss with the Administration issues relating to the Bill.

### **Deliberations of the Panel**

5. The Panel notes that the main purposes of the Bill are to amend EO to:
- (a) extend the statutory ML by four weeks;
  - (b) introduce a cap on the additional MLP;
  - (c) shorten the period of pregnancy mentioned in the definition of "miscarriage";
  - (d) allow a certificate of attendance to be accepted as proof in respect of entitlement to sickness allowance for a day on which a female employee attends a medical examination in relation to her pregnancy; and
  - (e) provide for transitional and related matters.

The Panel also notes that the Bill, if passed, would come into operation on a day to be appointed by SLW by notice published in the Gazette. According to the Administration, an eligible female employee who meets the 40-week requirement as well as other existing eligibility criteria under EO would be entitled to the 14 weeks' ML and the additional MLP if her confinement occurs on or after that date.

6. The deliberations of the Panel on the Bill are summarized in the following paragraphs.

#### Referring the Bill to the Panel in accordance with RoP 54(4)

7. Some members have expressed grave concern about the unprecedented arrangement of referring the Bill to the Panel, instead of HC, in accordance with

RoP 54(4). These members are of a strong view that it is inappropriate for the Panel to scrutinize the details of the Bill, which has deviated from the usual practice of LegCo of scrutinizing a bill by a Bills Committee. They are particularly concerned that the scrutiny of the Bill by the Panel has not gone through the due process.

8. Some other members, however, take the view that it is in order for the Panel to examine the policy aspects of the Bill given that the Bill is referred to the Panel by a motion passed by the Council in accordance with RoP 54(4). These members have pointed out that pending the election of HC Chairman for the 2019-2020 session, HC cannot discharge its functions properly, including the formation of Bills Committees if detailed scrutiny of a bill is considered necessary. If a Bills Committee on the Bill is to be formed after the election of HC Chairman, the Bill would unlikely be passed within the current LegCo term.

9. The legal adviser to the Panel has drawn members' attention to RoP 54(4) which stipulates that "....., the debate shall be adjourned and the bill shall be referred to the House Committee unless the Council, on a motion which, with the consent of the President, may be moved without notice by any Member, otherwise orders". While a bill would normally be referred to HC after the Second Reading debate on the bill has been adjourned under RoP 54(4), the provision does not preclude the Council from ordering the Bill to be referred to the Panel. In the circumstances of this case, the Bill is referred to the Panel by a motion passed by the Council in accordance with RoP 54(4). The legal adviser has advised that in the light of RoP 77(3) and the Panel's terms of reference, the Panel may wish to focus on studying the policy aspects of the Bill. As opposed to the operation of a Bills Committee, the Panel would not usually conduct clause-by-clause examination of the Bill. However, the Panel may examine whether the policy intent has been adequately reflected by the provisions of the Bill.

10. After discussion, members agree that in the light of RoP 77(3) and the Panel's term of reference, the Panel would focus on studying the policy aspects of the Bill. While the Panel would not conduct clause-by-clause examination of the Bill, it would examine whether the policy intent is adequately reflected by the provisions of the Bill, if so warranted. Members further agree that the Panel would submit a report to the Council on its deliberations on issues relating to the Bill.

#### Extending the duration of maternity leave

11. Members are in general supportive of the proposal to extend the duration of statutory ML from the existing 10 weeks to 14 weeks and call on the early implementation of the legislative proposal. Some members, however, have

expressed concern that the duration of the extended statutory ML in Hong Kong is still shorter than that in some other economies such as Singapore, the United Kingdom, France, etc. These members have questioned the considerations for extending the duration of ML by four weeks only in the Bill.

12. The Administration has advised that maternity benefits in different places vary according to their unique circumstances in terms of economic development, social security and social welfare systems, etc. According to the research findings of the Labour Department ("LD") on the maternity benefits of some other economies, the duration of statutory ML varies from one place to another. Furthermore, MLP to be payable to employees taking ML in most of these places is funded either wholly by public funds or national insurance, or partly by public funds or national insurance and partly by the employer. In some places, different levels of MLP also apply to different periods of ML. As such, it is not appropriate to make a direct comparison between Hong Kong and other places in ML arrangements. The Government would, having regard to the pace of Hong Kong's social changes and economic developments, the interests of employees and affordability of employers, continue to give careful consideration to improving employees' rights and benefits progressively.

#### *Implementation of additional four-week maternity leave*

13. On the implementation of the proposed extension of ML, the Administration has stressed that it is committed to taking forward the proposal as soon as practicable. Apart from introducing the Bill, LD is in parallel developing the new reimbursement scheme for reimbursing employers the additional MLP paid to their eligible employees. Subject to the passage of the Bill and the funding approval by the Finance Committee ("FC") for the development of the new disbursement information system<sup>2</sup> within the 2019-2020 session, it is expected that the reimbursement scheme can be implemented by end of 2021. However, the relevant work of kicking off the proposed disbursement information system would be delayed if the Bill cannot be passed and/or funding approval cannot be secured within this legislative session.

14. Some members have queried the need for implementing the additional four weeks ML and the reimbursement scheme in one go, which are expected to come into operation by end of 2021. They take the view that the Government should honour its undertaking made in the CE's 2018 Policy Address to extend the statutory ML to 14 weeks without further delay. In these members' view,

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<sup>2</sup> The Panel was briefed at its meeting on 21 January 2020 on the Administration's funding proposal to develop a new disbursement information system for implementing the proposed extension of statutory ML under EO. Please see paragraph 17 below regarding the reimbursement of the additional MLP.

pregnant employees should be entitled to the extended ML and the additional MLP immediately after the passage and gazettal of the Bill. Pending the development of the reimbursement scheme and the related disbursement information system, the employers concerned can pay the additional MLP to their eligible employees in the first place and seek reimbursement from the Government afterwards.

15. Dr KWOK Ka-ki has indicated his intention to propose an amendment to clause 1 of the Bill under his own name to the effect that pregnant employees who meet the relevant requirements under EO would be entitled to 14-week ML with immediate effect from the date of publication of the Employment (Amendment) Ordinance 2019 ("Amendment Ordinance") in the Gazette. A motion moved by Dr KWOK requesting the Administration to adopt his proposal was passed by the Panel.

16. The Administration has advised that under Dr KWOK's proposal, employers would be required to pay the additional MLP to their employees when the Amendment Ordinance is published in the Gazette, which is well before the implementation of the reimbursement scheme. This would impact on the cash flow and manpower deployment of employers with staff taking ML. This deviates from the arrangement proposed under the Bill and the consensus of the Labour Advisory Board ("LAB"). The Administration has further advised that after the passage of the Bill, it has to launch extensive publicity and promotional activities to facilitate public awareness and understanding of the new provisions and employers to make arrangements necessary for compliance with the new requirements. Taking account of the lead time required for the development of the disbursement information system after funding approval by FC, the reimbursement scheme is expected to be put in place by end-2021. It is therefore proposed in the Bill that the Amendment Ordinance would come into operation on a day to be appointed by SLW by notice published in the Gazette.

#### Additional maternity leave pay

17. The Panel notes that the current statutory rate of MLP, i.e. four-fifths of the employees' average daily wages, would apply to the additional MLP in respect of the extension of ML, but subject to a cap of \$36,822 per eligible employee. The cap of \$36,822 is equivalent to four-fifths of the wages of an employee with a monthly wage of \$50,000 in four weeks.<sup>3</sup> The additional MLP would be wholly funded by the Government on a reimbursement basis, subject to the employer having paid MLP to the eligible employee and making an application for the Government's reimbursement. According to the

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<sup>3</sup> The four weeks' MLP for an employee with a monthly wage of \$50,000 as calculated in accordance with EO will be:  $(\$50,000 \times 12 \text{ months} / 365 \text{ days}) \times 28 \text{ days} \times 4/5 = \$36,822$ .

Administration, if an employee is entitled to the existing 10 weeks' MLP under EO, the employer, after the commencement of the Amendment Ordinance, would be required to pay the additional MLP to the employee on the normal pay day as what the employer does now for payment of the current 10 weeks' MLP. The employer may seek reimbursement from the Government by way of an administrative scheme for the additional MLP paid to the employee subject to proof of payment to the eligible female employee, etc. Members are further advised that the estimated annual recurrent expenditure of the additional MLP would be around \$444 million with reference to the situation in 2018.

18. Members welcome the proposal of funding the additional MLP by the Government and note that the business sector in general supports the reimbursement scheme which would help alleviate the financial burden of employers in paying the additional MLP.

19. As to funding the additional MLP, according to the Administration, MLP in most of the countries/places is fully or partially financed by social insurance system with contributions from both employers and employees, and there is adverse impact on women's employment opportunities if the cost of MLP is to be fully borne by individual employers. Having considered the standard of ML recommended by the International Labour Organization and the practices of other economies, it is considered appropriate for the Government to take up the responsibility of financing the additional MLP. With regard to the financial implications, the Administration has advised that the proposal is not a transitional arrangement, but a recurrent commitment by the Government to enhance the employment benefits of pregnant employees while protecting their employment opportunities.

#### *Introduction of a cap on the additional MLP*

20. Most members have queried the rationale for introducing a cap for the additional MLP at \$36,822. These members are of the view that the proposed arrangement is unfair to higher-paid female employees and the MLP rate of these employees in the additional four weeks' ML would be lower than that in the first 10 weeks' ML because of the cap. Some members have also expressed concern as to whether the proposed arrangement would constitute discrimination against the higher-paid employees. Pointing out that no consensus has been reached by LAB on introducing a cap on MLP for the extra four-week ML, these members have strongly urged the Administration to seriously consider removing or raising the cap for the additional MLP.

21. The Administration has advised that it has looked into the maternity benefits of other economies and finds that MLP in most of these economies is subject to a ceiling or some other limitations. In some other economies, MLP

is only paid for a certain period of ML. The Administration has pointed out that the current ML proposal is a major and unprecedented change to the existing employment benefits regime as public money would be used to fund employers in providing employment benefits to their employees as required under EO on a recurrent basis. Given the wide spectrum of female employees' wages and the need to ensure the prudent use of public money, the Government's funding support should only aim at covering the great majority of the cases but not those with exceedingly high pay. Employees with a monthly wage of \$50,000 or below accounted for about 95% of female employees in Hong Kong based on 2016 data.

22. In response to members' enquiries on setting a cap covering 99% of all female employees and removing the cap, the Administration advised that the corresponding monthly wage for setting the cap covering 99% of all female employees is about \$100,000 with reference to the situation in 2018. If there is no upper limit for the additional MLP, the extra annual recurrent expenditure to be borne by the Government would be around \$31 million (an estimate based on 2018 data). However, the Administration has stressed that if there is no upper limit for the additional MLP, a substantial portion of the Government funding may be used to fund the additional MLP for those female employees with exceedingly high pay, which is not proportionate to the number of eligible female employees in this group.

23. In the light of the Administration's response, Dr Fernando CHEUNG has provided for the consideration of the Panel his proposed amendment to clause 13 of the Bill which seeks to raise the cap of the additional MLP to \$100,000, which is equivalent to four-fifths of the wages of an employee with a monthly wage of \$136,000 in four weeks. A motion moved by Dr CHEUNG that the Panel Chairman should move the above proposed amendment on behalf of the Panel was passed by a majority of the members present.

24. Separately, Mr KWOK Wai-keung has also provided for the consideration of the Panel his proposed amendment to clause 13 of the Bill to the effect that the cap of the additional MLP would be raised to \$73,644, which is equivalent to four-fifths of the wages of an employee with a monthly wage of \$100,000 in four weeks. Members note that Mr KWOK would move the above proposed amendment under his own name.

25. On members' enquiry about how the two proposed amendments to raise the cap of the additional MLP would affect the spending of public money, the Administration has reiterated its view that taking into consideration all relevant factors, it is considered that there should be a cap for the additional MLP as proposed in the Bill and the amount reimbursable to employers. That said, the cap would be reviewed from time to time and thus the reimbursable amount

would be adjusted accordingly. Nonetheless, employers can offer maternity benefits that are more favourable than those stipulated under EO.

### *Rate of MLP*

26. Some members have expressed disappointment that the Bill does not seek to change the rate of MLP given that the rate of MLP being equivalent to four-fifths of the employee's average daily wages has been in force since 1995. Moreover, it is inappropriate to align the rate of MLP with those of paternity leave and sick leave, which are of a different nature. These members have urged the Administration to conduct reviews of the relevant pay rates, and in particular to increase the rate of statutory MLP to full pay.

27. The Administration has advised that the rate of the additional MLP would be maintained at four-fifths of the employees' average daily wages. As a matter of fact, the rate of MLP at four-fifths of the employee's average daily wages under EO is more favourable than that stipulated in the relevant International Labour Conventions which is pitched at not less than two-thirds of the employee's earnings. The Administration has further advised that it has no intention to increase the rate of MLP from four-fifths to full pay.

### Review mechanism

28. To further enhance maternity protection and benefits for female employees, some members are of the view that the Administration should consider spelling out expressly in the Bill a review mechanism for the statutory ML, in particular the review timetable for the cap of the additional MLP. Some members have also pointed out that LAB has not deliberated as to whether a review timetable for the statutory ML and related benefits should be specified in the Bill. They have therefore asked about the circumstances under which a review of the statutory ML and related benefits (including the cap of the additional MLP) would be kick-started.

29. The Administration has advised that after the coming into operation of the Amendment Ordinance, it would conduct reviews from time to time on account of the actual circumstances upon the implementation of the policy, as well as the social changes and economic development of Hong Kong. As compared to rigidly stipulating a timetable in the Bill for reviewing the statutory ML and related benefits (including the cap of the additional MLP), the Administration considers the established arrangement of conducting reviews of labour legislation in a timely manner would be more flexible and responsive to the actual social conditions of Hong Kong in reviewing statutory ML.



30. Most members do not subscribe to the Administration's response and strongly urge the Administration to reconsider the suggestion of specifying a review timetable for the statutory ML and related benefits in the Bill. The Administration has, however, reiterated its view that it does not see the need to specify in the Bill a review mechanism or timetable for the statutory ML and related benefits.

31. In the light of the Administration's response, Dr Helena WONG has provided for the consideration of the Panel her proposed amendment to clause 6(4) of the Bill which seeks to impose a statutory obligation on the Commissioner for Labour to review the level of the cap on the additional MLP every 12 months after the commencement of the Amendment Ordinance. The amount so amended shall not fall below the existing level. Separately, Dr Fernando CHEUNG has also provided for the consideration of the Panel his proposed amendment to clause 6(4) of the Bill to the effect that amendments to the level of the cap on the additional MLP would be subject to LegCo's approval i.e. the positive vetting procedure. Motions moved by Dr Helena WONG and Dr Fernando CHEUNG that the Panel Chairman should move these two proposed amendments on behalf of the Panel were passed by a majority of the members present.

32. The Administration has pointed out that at present, no mandatory and regular review is stipulated under EO for any of the employees' benefits provided therein. By its mandatory and regular nature, the review which Dr Helena WONG's proposed amendment is seeking to impose on the Government is distinctively different from the reviews conducted by the Government as and when appropriate. The Administration has also advised that it is proposed under the Bill that the Commissioner for Labour may amend the maximum amount of the additional MLP as specified in Schedule 1A to EO by notice published in the Gazette, i.e. subject to the negative vetting procedure. The subsidiary legislation subject to the negative vetting procedure would usually take effect after the scrutiny period has expired, whereas the scrutiny period of an item of subsidiary legislation subject to the approval of LegCo is usually longer and hence the commencement date would be delayed.

#### Amending the definition of "miscarriage"

33. Under section 2(1) of EO, "miscarriage" is defined to mean the expulsion of the products of conception which are incapable of survival after being born before 28 weeks of pregnancy. The Panel notes that the Bill seeks to, among others, amend the definition of "miscarriage" by shortening the period of pregnancy to 24 weeks. Members generally welcome and support the proposed amendment such that an eligible female employee whose child is incapable of survival after being born at or after 24 weeks of pregnancy would be entitled to ML.

34. Pointing out that pregnant employees who suffer from miscarriage before 24 weeks of pregnancy would only be entitled to sick leave and sickness allowance under EO, some members consider that these employees should be entitled to ML. There is a view that the Administration should take the opportunity to consider introducing "miscarriage leave" for these female employees.

35. The Administration has advised that it has no plan to review pregnant employees' leave entitlement under EO in case of miscarriage occurring before 24 weeks of pregnancy. It should be noted that the proposal to introduce a technical change to update the definition of "miscarriage" in EO is drawn up after taking into consideration the relevant guidelines issued by the Hong Kong College of Obstetricians and Gynaecologists, etc. so as to dovetail with the prevailing medical definition and practices.

#### Allowing a certificate of attendance to be accepted as proof

36. Currently, a female employee who is absent from work for attending a medical examination in relation to her pregnancy and can produce an appropriate medical certificate issued by a specified medical professional would be entitled to sickness allowance under section 33 of EO. However, section 33 does not cover a certificate of attendance for a medical examination.

37. Members welcome and support the proposal of accepting a certificate of attendance issued by professionally trained persons as documentary proof for entitling the eligible employee to sickness allowance in relation to her pregnancy.

#### Proposed amendments to the Bill

38. Members note that the Administration has not yet indicated its intention to propose any amendment to the Bill. The amendments to be proposed by the Chairman of the Panel on behalf of the Panel are elaborated in paragraphs 23 and 31 above. The Panel also takes note that Dr KWOK Ka-ki and Mr KWOK Wai-keung have indicated their respective intention to propose amendments to the Bill as detailed in paragraphs 15 and 24 above.

39. The legal adviser to the Panel has advised that the admissibility of a proposed amendment is a matter to be decided by the President of LegCo, including whether it is in compliance with RoP 57(4)(a) and 57(6) if the proposed amendment is opposed by the Administration on the grounds that it is not relevant to the subject matter of the Bill and the amendment has a charging effect within the meaning of Rule 57(6). The legal adviser has also advised

that in considering the admissibility of Hon WONG Ting-kwong's proposed amendment to the Employment (Amendment) Bill 2018 which sought to require the Commissioner for Labour to review the number of days of paternity leave at specified intervals, the President was satisfied that the proposed amendment in that case would have a charging effect within the meaning of RoP 57(6) and it was ruled inadmissible.

40. Members also note that SLW will give the notice of resumption on the Second Reading debate on the Bill in accordance with RoP 54(5) after the Panel has completed its deliberations on the Bill.

Council Business Division 2  
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