CB(2)605/99-00(01)

(立法會秘書處譯本，只供參考用)

(香港海外女傭僱主協會用箋)

(譯文)

致：人力事務委員會秘書
(代行人：林培生先生)

林先生：

謹此附上本會1999年8月30日及1998年7月21日兩封函件的複本。本會在上述函件中表達對本港外籍家庭傭工政策檢討的關注，以及就政府部門對《僱傭條例》是否適用於留宿家庭傭工的檢討及其建議(勞工處，1999年6月)提出意見。

本會感謝人力事務委員會的委員付出時間研究此事，本會亦樂於更詳盡地解釋我們所提出的意見。事務委員會的委員倘有意聯絡本會，請於下午的時間隨時來電(電話號碼：28805558、90733682或94855948)。

主席

容馬珊兒(簽署)

1999年12月10日

M1428

香港海外女傭僱主協會的信頭

檢討本港僱傭條例（第 57 章）是否適用於*留宿*家庭傭工

敬啓者： 拜讀勞工處於今年六月三十日致函本會就上述檢討問題作出建議之諮詢文件，本會同仁深感遺憾。本港官員的不負責任處事態度實令萬民失望，不慎重考慮本港僱傭條例（第 57 章）適用於住宿家庭傭工帶來僱傭條例的不公平現象，漠視本港家庭僱主的應有合理權益，部份法例更嚴重剝削本港人士的應有權利及引領家庭人士於不可解決的局面。

諮詢文件**第 5 頁(III)爲留宿家庭傭工在懷孕期間作出更靈活的安排，以照顧其獨特的僱傭情況**清楚說明本港住宿家庭傭工的工作性質有別於其他行業，而全港留宿家庭傭工接近全數屬申請到港工作的東南亞外地人士（目的到港工作）。諮詢文件顯示僱傭條例（第 57 章）有關生育保障條文嚴重影響家庭人士，文件內容足以反映僱傭條例（第 57 章）條文不適用於留宿家庭傭工，然勞工處仍抱著敷衍塞責的心態輕率處事（這是否港府的慣性處事作風），全不思考更有效的應變措施。檢討報告內容強詞奪理，表現非任何國家政府防衛本地民生利益的所爲，更給人懷疑本港政府的意向可有其背後原因。諮詢文件中文版第 3 頁(I)7(b)I 段“temporary migrants”翻譯爲“臨時移民”必須修正爲“臨時居留人士”或更貼切的翻譯名詞（請參閱附件 1），以免再效 1997 年香港回歸前因入境條文未清楚列出外地勞工及傭工非通常居港身份，導致數萬名只獲有條件之居留人士擁有本港居民之立法局、市政局和區議會選舉權。幸好至特區政府成立才得以修正，否則將造成香港入境失控，增加無可估計的經濟禍害。深盼尊敬的香港特別行政長官董建華先生、律政司司長梁愛詩女士、政務司司長陳方安生女士及教育及人力統籌局局長王永平先生閣下能正視本港外傭／勞政策及研究適用於留宿家庭傭工／外地傭工的法例，保障雙方，造福香港。

（一）本會就勞工處發表上述檢討報告及建議之諮詢文件提出以下意見：—

1． 建議未能協助僱主解決問題：

勞工處建議僱主在雙方同意下可終止僱傭合約，僱主不會視爲不合理及不合法解僱傭工；僱主須支付諮詢文件附件列出之款項。建議未能協助僱主解決問題，更加重僱主前所未有的負擔，可見港府官員只聆聽外國官員及代表外地勞工利益者的意見，不惜犧牲本港人士的權利。上述建議『雙方同意』四字表示傭工可不同意終止合約，即說與現時法例相同；不同之處只是列明僱主須支付的補償款項。依據現時法例，傭工是在任何時間也可提前終止合約（只需給與僱主一個月通知期），因此如僱傭雙方同意提前終止合約，僱主也不會視爲不合理及不合法解僱傭工。條文如建議修訂後，傭工不同意提前終止合約，僱主處於現時無助狀態不異。建議修訂的條文未能解決諮詢文件第 5 頁(III)提及僱主的問題，未有理會本會於 1996 至 1998 年向政府提出的有待解決問題和意見，同時忽視本會於 1998 年 7 月 21 日提交教育及人力統籌局局長閣下之意見書。

…二頁

2． 加重僱主前所未有的負擔：

依據現時法例，傭工是在任何時間也可提前終止合約，傭工須給與僱主一個月通知期。即說傭工可因懷孕而希望提前回鄉待產。據悉航空公司因傭工懷孕七個月以上不適宜乘機，拒絕出售機票於需要回鄉產子的傭工，因此傭工必須於懷孕七個月前乘機回鄉待產。由此顯示本港僱傭條例（第 57 章）不適用於外地到港工作的留宿家庭傭工之處：僱主必須給與傭工最早於預產四星期前放取產假。依據現時法例，傭工意欲提前回鄉待產，或因懷孕而不與僱主續約，因傭工十星期產假並不在受聘期內，傭工沒有資格領取產假津貼，僱主無需支出任何款項。建議修訂的條文加重僱主前所未有的負擔，可見勞工處是有意替傭工爭取更進一步的勞工福利，對協助外國政府關注外地勞工在港工作爭取勞工福利理應記一大功，且不失號稱『勞工處』。

3． 報告文件顯示港府必須正視外地傭工在港分娩的問題：

港府於 1996 年答覆本會有關外地傭工在港分娩問題個案相等於零。報告文件說出於 1998 年外地傭工在港共誕下 159 名嬰兒，已可證明 1997 年 6 月 27 日獲通過之新修訂分娩保障法例嚴重鼓勵外地傭工在港分娩，深信非港府及本港居民之意願。外地傭工在港分娩及問題個案之增加高百分比率實屬驚人數字，而教育及人力統籌局屬下勞工處居然可在報告書內誤導本港市民爲低數目，可說爲不負責任的報告，更缺乏爲香港社會作出未雨綢繆的能力。香港整體經濟蕭條，投資人士卻步，教育及人力統籌局是責無旁貸。報告書的分析內容使人懷疑勞工處負責當事者的哲思能力，實屬可悲。

4． 報告文件並未確切落實研究本會自 1996 至今提交文件內的意見：

包括盡快豁免外地到港工作的留宿家庭傭工於 1997 年 6 月 27 日獲通過之新修訂分娩保障法例及爲長遠計草擬外地留宿家庭傭工的法例，保障雙方。事實上，依據現時法例，外地留宿家庭傭工與本地勞工已有著不同的勞工條例保障。合約規定外地留宿家庭傭工可享有最低薪金、醫療費用（包括住院及緊急牙病費用）、交通費、食宿和便服等一切費用。本地勞工並未能享有上述外地留宿家庭傭工之條例保障。政府計算外地勞工到港工作的條件可有違反國際公約時，應以外地勞工在港工作給與的全套條件爲準則，而不可只計算本港僱傭條例（第 57 章）給與留宿家庭傭工作出的保障，否則欠缺全面性公平計算準則。僱傭條例（第 57 章）適用於外地留宿家庭傭工的政策造成本地勞工一定的障礙，事因每當提出修訂僱傭條例時，必須考慮提出修訂的僱傭條例（第 57 章）是否不適用於外地留宿家庭傭工，嚴重延誤僱傭條例（第 57 章）的修訂時間。基於家庭工作的性質、環境及僱主經濟背景與工商界完全不同，外傭進港工作亦受入境條例監控，訂定分開保障法例絕對談不上歧視問題，使市民懷疑的問題是本港政府有關部門是否不願意花功夫進行任何改變或害怕外國政府和外地勞工之背後支持者的聲音，甘願墨守成規和犧牲本地居民的權利。

…三頁

5． 報告文件強詞奪理，並無誠意協助僱主，刻意保留現狀：

檢討結果內容全屬敷衍了事，不符現實環境。中文版第 3 頁(I)應否把留宿家庭傭工豁免於【僱傭條例】的適用範圍之外(a)部份，上一段第(4)點及本會於 1998 年 7 月 21 日提交教育及人力統籌局局長王永平先生閣下之意見書中，已具詳盡解釋。第 3 頁(I)(b)i.部份提出的理據非常牽強，表現不解民情。再把家庭特殊環境與工商界一同比較（輸入勞工與輸入家傭作比較），不考慮工作牽涉照顧人口（老人及嬰孩）；ii.家庭僱主屬個別人士，與非牟利團體不可相提並論，後者仍屬一機構，背後有足夠的經濟支持力（包括政府或社會各階層人士）解釋不合情理；iii.重複把家庭特殊環境與工商界一同比較，不考慮實際環境，視生命如一般貨物，認爲嬰孩、老弱可隨時放下不顧，可見檢討結果分析者是何等愚昧、甚或知民情而不理會或屬偏見砌詞狡辯或不重視民情；iv.既知悉家庭環境的要求獨特，仍堅持強調留宿家庭傭工不宜豁免於【僱傭條例】範圍之外，實屬官場文章，表現出負責檢討結果分析者對事件漠不關心的態度，且偏重勞方。寧失信於全港家庭僱主，不可失信於…？政府如何能教人信服？實使萬民失望！

6． (II)應否豁免留宿家庭傭工受有關生育保障、疾病津貼和僱傭保障的條文規限的檢討結果分析：勞工處放棄正視僱傭雙方公平合理原則，建議強差人意，不像港府愛護子民的父母官員的工作態度：

對於(a)部份，本會認爲外地到港任職留宿家庭傭工的目的和檢討結果(III)第 9、10 段提出的理由已有充分理據豁免留宿家庭傭工受有關生育保障、疾病津貼和僱傭保障的條文規限。外傭與僱主同居一宅，傭工健康（染上傳染病）直接影響僱主家人的健康。傭工因懷孕身體不適需要僱主的照顧，僱主的工作百上加斤。由於僱主需負起 24 小時看護的責任，僱主須放棄個人的工作。外地留宿家庭傭工到港的目的是工作，到港只任職四星期（可能只有 20 天），便享有與本地居民的生育保障，產後亦可辭職，港府仍不考慮本港有充分的理由豁免外地臨時留宿家庭傭工於有關生育保障、疾病津貼和僱傭保障的條文規限。

(b)i.段的分析顯示政府的訊息薄弱，輕視民情。本會自 1997 年有關上述分娩保障法例生效後，接獲家庭僱主求助電話及信件急升，其中傭工申明不會擔任原有多項職務者眾，懷孕引致傭工需長時間在床上休息，不能或不願工作者亦眾。勞工處自 1997 年 6 月至 1999 年 5 月 31 日沒有接獲留宿家庭傭工（包括外傭）作出任何申訴有關在懷孕期間僱員不應被指派粗重、危險或有害工作的問題，只可證明香港的家庭僱主是完全負責照顧懷孕的留宿家庭傭工。家庭僱主是位於無處申訴，求助無門的處境，苦忍一切麻煩和困擾。港府缺乏僱主申訴處協助僱主排難解紛，勞工處給僱主的印象是只協助勞工的部門。外傭沒有本港永久性居所，離開僱主的住所後，僱主申訴無助。外傭享有本國勞工部及港府勞工處的支援，香港家庭僱主單身應付一切訴訟，再加上不公平的僱傭法例，家庭僱主成爲港府錯誤政策的受害者。相信愛護港民的父母官教育及人力統籌局局長王永平先生閣下不會罔顧港民合理權益，放棄細心閱讀這份檢討報告不妥善之處及研究本會現呈交之意見書作更深入了解和分析。

…四頁

有關(b)ii.、iii.、及 iv.段本會已在本文第 3 點作出不認同的意見。結果分析清楚顯示港府官員之不負責任態度和刻意狡辯，實屬遺憾。本會認爲(b)v.段的意見已顯示出調查方式的不可信性及其不可靠性。本會於 1998 年 7 月 21 日呈交意見書予王永平局長閣下時，兩位立法局議員周梁淑怡議員、蔡素玉議員同時出席作證、張建宗處長及多位勞工處官員親臨會議，聽取民意，是日出席之家庭僱主均屬受上述新法例條文嚴重影響他們的家庭生活的非本會會員人士。(b)v.段的意見並未有顧及真正受害者的個案，同時表示上述教育及人力統籌局、勞工處與本會及本港受害申訴者當日的會議如同虛設，白費時光。

7． 檢討結果分析欠缺全面性：

外地輸入的家庭傭工須受入境條例控制，檢討結果時，應加入境控制條例作分析參考的基礎，及以香港家庭僱主聘請外傭的合約條文作爲藍本。『外傭到港工作，雙方簽署合約也須獲入境處批准才可成爲合法的僱傭關係。因此本港僱傭條例（第 57 章）屬實不適用於外地輸入的留宿家庭傭工。香港家庭僱主聘請外傭，合約列明僱主對傭工的責任。僱主給與外傭合約內註明的保障條款超越本港勞工可獲得的保障，其中包括衣食住行及醫療費。如本港僱傭條例（第 57 章）同時適用於外傭，家庭僱主需肩負不合理的雙重經濟責任。現時合約內僱主須提供外傭無限額的醫療保障，屬一明顯例子。此例子亦顯示港府訂定合作條款時，未能即時察覺條例的不可行性。深信世界各地之勞工保障法例也不會規定僱主必須負責無限額的非因工受傷之醫療費，只是港府慷本港居民之慨。』檢討結果分析不正視全面實情，反映結果分析的不準確性，實不可作爲政府的參考資料，除非港府一意孤行，漠視本地民生。

（二）本會建議：

1. 保留本會於 1996-1997 年提交前任港督彭定康先生、教育及人力統籌局、勞工處及立法局議員的意見書內容，包括豁免外地到港工作的留宿家庭傭工於 1997 年 6 月 27 日獲通過之新修訂分娩保障法例。港府應於短期內盡快修訂法例豁免外地到港工作的留宿家庭傭工於 1997 年 6 月 27 日獲通過之新修訂分娩保障法例。
2. 研究及實行本會於 1997-1998 年提交香港特別行政長官、教育及人力統籌局局長閣下的意見書內容，其中包括建議爲外地到港工作的留宿家庭傭工訂立一套保障法例，保障外地勞工。
3. 只可考慮檢討報告書附件 i 頁(A)「建議僱主在雙方同意終止僱傭合約下所須支付的款項」改爲「建議僱主在終止僱傭合約下所須支付的款項」，無須僱傭雙方同意。接受 ii 頁(B)僱主在終止僱傭合約時須支付(i)(a)、(i)(b)和(iii)提出的款項，但不接受 ii 頁(B)僱主在終止僱傭合約時須支付(ii)及(iii)的款項，理由已在本文（一）第 2 點：「加重僱主前所未有的負擔」段內作清楚解釋。

4. 如港府仍畏懼受國際批評，必須奉行劃一僱傭條例，則應立刻刪除合約內本地勞工沒享有的勞工福利保障，以示劃一公平原則，否則使人懷疑政府的處事標準和當事人的幕後背景。

上述意見關係本港十多萬家庭人士的生活影響、本港職業婦女的職業保障，幼童老弱的生活照顧，入境控制問題，港府有關部門不可處事優柔寡斷，損害香港社會整體利益。敬希王局長閣下能惠澤港民，從速研究修訂公平合理之法例，保障社群。此致

香港教育及人力統籌局局長王永平先生

主席

容馬珊兒謹上

一九九九年八月三十日

附上本會於 1998 年 7 月 21 日提交教育及人力統籌局局長閣下之意見書影印本乙份。

副本寄：
香港特區行政長官董建華先生
香港律政司司長梁愛詩女士
香港政務司司長陳方安生女士
香港勞工處處長張建宗先生
香港保安局局長葉劉淑儀女士
香港入境事務處處長李少光先生
香港立法局主席／議員范徐麗泰女士
香港立法局議員周梁淑怡女士
香港立法局議員蔡素玉女士

諮詢文件中文版第 3 頁(I)7(b)I 段“temporary migrants”翻譯爲“臨時移民”有修正爲“臨時居留人士”或更貼切的翻譯名詞之必要。“Temporary migrants”中“migrants”在牛津高階英漢雙解辭典第 932 頁解述“migrant workers”爲“those who travel to another region or country to work　流動工人”，明確指出與“immigrants”一字之不同解釋。“Immigrant”在牛津高階英漢雙解辭典第 739 頁解釋爲“person who has come to live permanently in a foreign country（自外國移入的）移民”。即清楚解釋“migrant”一字是臨時性移居工作地區或國家的人士身份，但不屬當地區的居“民”，不應翻譯爲“移民”，容易混淆“Immigrant”一字翻譯爲“移民”的正確解釋。國際勞工公約第 97 號【Convention concerning Migration for Employment (Revised 1949)就業移民公約】中包括了第 6 條款(Article 6)特別關注“Immigrants”而加上之條款。(Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to **immigrants** lawfully within its territory.....。)上述國際勞工公約第 97 號全文以**“migrant workers”**爲主，獨是第 6 條款(Article 6)強調**“immigrants”的關注問題，清楚顯示“migrant workers”與“immigrants”**的不同，可見國際勞工公約已給與世界各地因應其地方環境、情理、特別原因而作彈性處理權。世界各地當以保障民生、人口控制等不同的問題作出有利本地社會經濟、治安、入境控制的條文，確保社會不會受公約條文影響民生和秩序。

註：港府也應爲加強防衛本港人口控制及確保所有申請有條件到港工作的臨時居留人士履行進港目的，進一步研究應變方案，維護社會整體利益。

Letterhead of HONG KONG EMPLOYERS OF OVERSEAS DOMESTIC HELPERS ASSOCIATION

21 July 1998

Mr Joseph W P Wong
Secretary for Education and Manpower Bureau

Dear Mr Wong,

RE : EMPLOYMENT ORDINANCE REVIEW

We write further to our Association's response to your letter dated 27 May 1998.

As it is Government's stated intent to review recent amendments to the Employment Ordinance. we believe that now is an appropriate time to review the question of separate legislative provision for temporary migrant workers who are live in domestic helpers where the work place is in the home.

We believe that the extent of those parts of the Employment Ordinance which are incompatible with the position of live-in domestic helpers who are temporary migrants is such as to prove compelling grounds to make separate provision for them. We further believe that the Employment Ordinance as currently drafted has not been drawn up with any or any sufficient regard to the reasonable and legitimate interests of employers of live-in domestic helpers who form a particular group in society with different concerns and difficulties from commercial or industrial organisations and their employees for whom the Employment Ordinance has been tailored to address.

MATERNITY PROTECTION

The effect is to discriminate against local women's right to work

The effect of the Employment Ordinance as currently drafted is to discriminate against the interests and rights of local women in employment through granting extensive and far reaching rights, in particular in regard to maternity protection, to temporary migrant live-in domestic helpers. The most important effect of this discrimination is the limitation and disruption it causes to local women's ability to work.

The recent amendments to the Employment Ordinance by the Employment (Amendment) Bill 1996 ("the 1996 Bill")

It is our Association's position that maternity protection afforded by the Employment Ordinance as amended ("the Ordinance") is inappropriate to the circumstances prevailing for temporary migrant live-in domestic helpers.

The 1996 Bill introduced 3 main provisions which we find unacceptable:-

1. The qualifying service for protection was reduced from twelve weeks to four weeks. Four weeks is not sufficient time to verify a foreign domestic helper ("FDH")'s condition (i.e. whether or not she is pregnant) as we recruit her from overseas and have no chance of meeting her till she arrives in Hong Kong.

2. There is no limit on the number of children an FDH may have to qualify for maternity leave pay. This will expose the employer to an open-ended commitment.

3. An employer has to cease, as soon as practicable but not later than fourteen days, to request a pregnant employee to do any heavy work if she produces a medical certificate specifying her unfimess to do so. The amendment makes the employer's request a criminal offence. In a FDH's situation, many household chores may be regarded as heavy and it is virtually impossible to find a replacement within fourteen days especially where the work involves young children. FDHs are temporary migrants who are on two-year contracts. The law appears to condone their being out

of service for a substantial part of that period, and yet terminating their contracts under these circumstances is prohibited.

The Administration mentioned in their letter dated 15 May 1997 that "incapability because of severe ill health may frustrate the contract of employment. "Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from which was undertaken by the contract." (per Lord Radcliffe in Davis Contractors Ltd v Fareham Urban District Council [1956] A.C. 696). Where a contract is frustrated, it is terminated automatically by the operation of law without the need for any action by the employer or employee. Such termination of a contract of employment is not caught by S.15(1) of Employment Ordinance. In other words, where the circumstances so warrant, an employer can rely on the doctrine of frustration and put an end to the employment contract."

We have grave doubts as to the application of frustration in those circumstances. We find the incomplete citing by the Administration misleading. In Davis Contractors Ltd, Lord Radcliffe, after stating what was quoted by the Administration, went on to say "It is for that reason that special importance is necessarily attached to the occurrence of any **unexpected event** that, as it were, changes the face of things".

The doctrine of frustration will not apply to the circumstance where the event is such as the parties must be taken to have regarded as a risk inherent in the contract. Amalgamated Investment and Property Co Ltd v John Walker & Sons Ltd.

It is an inherent risk that a female FDH of child bearing age may become pregnant during her course of employment and that there is an inherent risk in any pregnancy that there may be complications. The Employment Ordinance clearly provides that the pregnant employee cannot be terminated even if she is totally unable to perform her duties under the contract during a total of 14 weeks whereby she is incapacitated, this is provided in S.12(2) of the Ordinance. As a legal principle, statute overrides common law, frustration in the circumstances cannot apply.

EMPLOYMENT PROTECTION

Amendments to the Employment Ordinance by the Employment (Amendment) (No. 2) Bill 1997 ("1997 Bill")

The provisions in the employment protection section of the Ordinance have compounded the heavy burden of maternity protection in that the amendments operate to invite every FDH whose term is not renewed to challenge the employer to justify such non-renewal. FDHs have a strong incentive to bring proceedings because this will secure for them an automatic extension to their visa and thus avoiding the 14-day rule which applies upon the expiration of their contract. This is coupled with a monetary incentive of obtaining an award of up to HK$150,000.00 for being unlawfully dismissed.

The main provisions which we find unacceptable are:-

1. S.32A of the 1997 Bill effectively destroys the idea of a limited 2-year term contract for FDHs. They are effectively entitled to a renewal unless the employer brings himself within S.32K. It is open for the FDH to argue when she comes to Hong Kong that she has a reasonable expectation to be granted a visa to work in Hong Kong beyond a 2-year term as her employment is almost guaranteed under the Employment Ordinance. This appears to go against immigration policy.

   The 24-month term for a FDH is imposed by the Government on employers without any choice or say in the matter. S.32K compounds this by seriously infringing the employers' right to choose freely after the initial 2-year term whether to renew the FDH's contract and to choose whom we can employ in our home. A home onvironment where the employee lives close to the family 24 hours around the clock is very different from the ordinary commercial or industrial work place.

2. S.32A(5) enables the employee to use an incident within a 12-month period to accuse ""the employer of breach under this section. We feel that the 12-month period is excessive in any case as an incident many months before the termination is too remote to be inferred as the true ground for dismissal.

3. Under S.321, notice of a claim must be given to an employer within 3 to 6 months. This poses immigration problems. FDHs are required to leave Hong Kong within 14 days of termination of their contracts. This gives a pretext to FDHs to extend their stay after their contracts have been terminated. This concern is by no means imaginary, employers of FDHs face numerous unmeritorious claims designed to prolong their stay in Hong Kong.

THE ADMINISTRATION'S VIEWS

The Administration's comments on the above mentioned Bills were given in a letter dated 9 April 1997 to the Bills Committee. The Administration submitted that the Bills are in conformity with the International Labour Convention ("ILC") No. 3 concerning the employment of women before and after child birth, the provisions of the Convention on the Elimination of all forms of Discrimination against Women ("CEDAW") and the practices in neighbouring countries. This we have found to be untrue.

ILC No. 3

ILC No. 3 itself distinguishes domestic from commercial and industrial enterprises. There is therefore clear international acceptance of a distinction between a domestic and an industrial or commercial enterprise which justifies separate treatment.

CEDAW

CEDAW seeks to ensure among other things, equal employment opportunities for women, and to eliminate discrimination against women in employment in order to ensure equal rights to work. In passing the Bills the Administration have ignored the effect they have on the right to equal opportunities of its own nationals. The Ordinance as it now stands amended by the Bills discriminates against the rights of local women to such a degree that it now fails to meet the requirements of CEDAW. FDHs are in the majority of cases employed in households where both the husband and the wife work. If the FDH becomes pregnant even when there are no complications she will not work for a period of 10 weeks and will not be able to carry any heavy household items for an even longer period.

The medical report by the Department of Health relied on by the Administration clearly point out that it is generally recognised that pregnant women tend to experience fatigue more easily, are prone to non-specific backache and may have decreased concentration. These symptoms alone would make them unsuitable for caring for young children. It makes having them around the home a potential hazard. Whereas a pregnant wife takes her own risks in her own home, a pregnant maid is the responsibility of her employer where the maid's workplace is in the employer's home.

The Government prescribed FDH contract requires the employer to bear all medical expenses incurred by the FDH whether or not arising from her employment. The burden is greater than any other employer - employee relationship prescribed by law in Hong Kong and there is no justification for it.

When a FDH in a household is incapacitated for any length of time, it is impossible and impracticable to find any temporary live-in domestic helpers for replacement.

The Administration must acknowledge the fact that if there were sufficient local live-in domestic helpers, there would not have been a FDH scheme in the first place.

An application for a new FDH will take at least three months to process and even if a finished contract helper can be found locally. an employer would still have to enter into a government prescribed two-year contract with the new helper, they cannot be engaged on a temporary basis. The result where a live-in domestic helper becomes pregnant is invariably that the wife will have to give up work to return home. We emphasise that at the very least the FDH will not work for a period of ten weeks.

It must be borne in mind that live-in domestic helpers come to Hong Kong on a two-year contract. If they become or are already pregnant during the two-year term, the burden on the employer is disproportionately high. She looses the domestic helpers' services for a substantial part of the contract.

The Administration maintain that small businesses are in a similar situation to families, however in saying this it clearly fails to appreciate that a lower degree of trust is required to run a small business as supposed to the much higher degree of trust required to run an

employer's home which is much more intimate and personal. The degree of trust required is even higher when it comes to caring for very young children. This is another reason why it is so difficult to find temporary replacements for live-in domestic helpers.

With FDHs there is no question of re-deployment of tasks within the household as would apply in the case of a business especially when most employers have only one FDH.

Those matters raised above demonstrate that a domestic environment is different from that of an industrial or commercial enterprise. The Ordinance was drafted to deal with industrial and commercial employees. It clearly was not drafted with domestic employees in mind. Yet the Ordinance applies equally to both and as a result operates unfairly to discriminate against local women's rights. This is in marked contrasts to other countries which have clearly recognised the distinction between the commercial and the home environment and legislated accordingly. see our detailed comments below.

SEVERANCE PAY AND LONG SERVICE PAYMENT

FDHs are temporary migrant workers who are allowed to enter into Hong Kong on a temporary basis' to perform a 2-year fixed term contract. They are not given the expectation that they will be guaranteed job opportunities beyond the two years. They are different from local workers whose right to a job in their country of residence is regarded as a right that must be protected by its own government.

There is no reason why the burden of keeping temporary migrant workers employed in Hong Kong should rest on the shoulders of Hong Kong employers. FDHs, therefore, should not be entitled to severance pay and long service payment in the circumstances.

SEPARATE PROVISION IS NOT DISCRIMINATION

The Administration have cited the ILC No. 97, International Convention on Civil and Political Rights ("ICCPR"), and the Bill of Rights as the reason why there must be equal application of the Employment Ordinance to all. This argument is ill-founded.

ILC No. 97

ILC No. 97 governing migration for employment provides in Article 6 that "Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race ..... to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals .....", whereas in every other section in the Convention reference is made to "migrants for employment". The choice of the different wording is deliberate and shows that the Convention draws a distinction between provisions to be afforded to "immigrants" who come to a country to settle and the provisions to be offered to migrant workers who do not come to a country to settle.

ICCPR and the Bill of Rights

There are clear guidelines and justification for differentiation of treatment for individual groups within society. The United Nations Human Rights Committee provided clarification on this issue by stating "Not every differentiation of the treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".

The European Court of Human Rights has held that differential treatment has to have objective and reasonable justification and the difference of treatment must have been adopted in pursuit of a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim to be realised.

Indiscriminate application of the Employment Ordinance means burden on employers of FDHs are disproportionately high because this group of employers are often the employers of one employee, they are not running a business whereby the employee's salary is a tax deductible expense. The hiring of FDHs has its immigration restrictions which makes temporary replacement difficult to find, unlike small businesses which involve the hiring of temporary local workers.

The Administration maintain that providing separate provision for FDHs amount to racial discrimination, this is misconceived. It argues that it would discriminate against Filipinos who make up the majority of all domestic helpers in Hong Kong. The majority of FDHs are

Filipinas at present because of the unreasonable and unjustifiable ban on Mainland Chinese domestic helpers working in Hong Kong. This disproportionately large amount of Filipinos is artifioially created by our own Government. In any event, any separate provision would apply to live-in domestic helpers of all races who are subject to immigration control, and would not on any proper and objective definition of the words amount to racial discrimination. To try to import a concept of "indirect" discrimination in the circumstances is to improperly strain the use of the language.

Where the workplace is in the home, the burden on the employer is far greater because if an employee falls ill, she cannot go back to her own family and be looked after by her members of the family, she remains in the workplace and therefore is still the responsibility of the employer.

Practical experiences by employers in Hong Kong

Practical experience by employers with FDHs who have become pregnant shows that they refuse to perform any household chores, goad or challenge the employers to terminate them and then institute legal action against the employers for unlawful dismissal. Some employers have experienced FDHs who are terminated for misconduct who have subsequently found themselves pregnant are now bringing action against employers for unlawful dismissal and claiming $150,000 in compensation.

In all of these cases, the employers are dragged through our time consuming legal system, taking time off work and enduring mental anguish to deal with foreseeable but unnecessary problems created by the Employment Ordinance.

EXPERIENCE IN OTHER COUNTRIES

The information gathered by us on overseas experience regarding the treatment of domestic helpers shows that other countries draw a distinction between a domestic and commercial or industrial environment. This includes countries in western democracies which are signatories to the ICCPR.

In the United Kingdom, all employees get maternity protection and statutory maternity pay provided they meet certain requirements. However, even in the U.K. which is a signatory to the ICCPR recognises a distinction between small employers and bigger enterprises. Small employers, defined as those having 5 or fewer employees, are exempted from certain employment provisions. One such provisions exempt small employers from having to keep a vacancy open for a female employee to return to work after childbirth. Certain legislation such as sex and race discrimination does not apply to employment in a domestic household. Also, there are separate provisions governing domestic employees. Employers of domestic employees may recover 100% (as compared to a lower percentage for other employers) of the statutory maternity pay they pay to their employees from the U.K. Government.

In the United States, there is no overall Federal Regulation on maternity rights, with generally ungenerous provision by the private sector, varying with the establishment's size and resources, with recent concessions on maternity sickness leave (classified as disability) and medical cover. There is generally entirlement to about six weeks unpaid maternity leave, but no mandatory entitlement to paid maternity leave, the attitude being that it is an individual's choice to have a child and therefore unfair to expect the employer to pay for it, unless he feels able to do so. Only when the pregnant woman receives medical certification of disability that she becomes entitled to paid disability leave claimable under the company's health insurance scheme. The right to return to work is acknowledged.

In Taiwan, it is a condition of the FDHs' entitlement to stay and work in the country that they should not become pregnant. They are required to be medically tested for pregnancy regularly and will be deported to their country of origin as soon as they are found to be pregnant.

In Singapore, the Employment Acts does not apply to FDHs. There is separate legislative provision for them. Maternity protection afforded by the Singapore Employment Acts does not apply to domestic helpers.

It is generally recognised internationally that each country's government have to have its nationals' interest as a priority, that is why immigration control is regarded as an acceptable and reasonable practice. If local woman's rights are being impinged on because of an

indiscriminate application of legislation, leading to an unfair treatment of local employers who are themselves employees, the Administration have a responsibility to rectify it.

CONCLUSION

The nature of live-in domestic helpers and the fact that FDHs are temporary migrants who have no right to make Hong Kong their home justify differential treatment.

Giving FDHs full rights under the Employment Ordinance will seriously infringe upon the rights of local women to employment.

Indiscriminate application of the Employment Ordinance leads to wide-spread abuse as more and more migrants from poor countries will come into Hong Kong to give birth and to make use of our finite medical and social facilities thus depriving our local population of such facilities.

The Employment Ordinance's application to FDHs coupled with the FDHs' contract impose the heaviest burden on the most vulnerable type of employers who are not even running a business concern.

Given the above cogent reasons, we subrnit that FDHs are a different category from other employees which justifies separate treatment. We urge the Administration to support our submission before more employers fall victim to further injustices inflicted on them by the indiscriminate application of the Employment Ordinance.

Yours sincerely,

MRS BETTY YUNG-MA SHAN YEE
Chairperson