

DRAFT CODE OF PRACTICE FOR EMPLOYMENT AGENCIES

Written Submission to the Panel on Manpower Special meeting on Tuesday, 24 May 2016

Justice Centre Report: "Coming Clean"

Justice Centre Hong Kong welcomes the Labour Department's (LD) efforts to create a Code of Practice (CoP) for Employment Agencies (EAs) in response to public concerns from both employers and job-seekers, with special attention to the situation of migrant domestic workers (MDWs). MDWs comprise about one-tenth of the working population in Hong Kong and they are uniquely vulnerable to exploitation and abuse.

A publication released by Justice Centre on 15 March 2016 [entitled "Coming Clean: The prevalence of forced labour and trafficking for the purpose of forced labour amongst migrant domestic workers"](#) found that 17% of the 1,000 MDWs surveyed displayed all the indicators required to be considered in forced labour. Extrapolated to the general population of MDWs in Hong Kong, 1 in every 6 MDWs in Hong Kong is in situation of forced labour – whether they were not recruited into a job freely, not working in a job freely or unable to leave a job freely.

In the study, one of the most significant predictors of whether a MDW was likely to be in forced labour was recruitment debt. Respondents with excessive recruitment debt (defined as being equal to or exceeding 30% or more of their reported annual salary) were **six times more likely** to be in a situation of forced labour.

- Of those who were contracted in their home country but borrowed money in Hong Kong to cover recruitment costs, the average payback period was 6 months with an average instalment of HK\$2,496 per month, (a total debt burden of HK\$14,976).
- Of those who were contracted in Hong Kong and who borrowed money in Hong Kong to cover recruitment costs, the average payback period was 6 months with an average monthly instalment of HK\$1,515 (a total debt burden of HK\$9,090).
- Both of these debt burdens exceed the maximum of 10% of the first month's wage in fees that recruitment agencies may charge (HK\$411 at the time of this survey) and clearly demonstrate that **excessive recruitment debt is not just a problem of source country, but one in Hong Kong as well.**

Of those total respondents who felt that they were not free to quit their jobs, 37.5% were worried that it looked bad to change employers, 5.9% stated that they were still in debt and needed to repay debts, 2.2% reported that the Hong Kong employment agency said they had to stay and 0.6% said that the Hong Kong placement agency still had their passport.

Justice Centre's report makes a total of 20 recommendations in response to the findings. In relation to the need for more monitoring and regulation of recruitment and employment agencies, the report calls for: the creation and enforcement of robust, binding regulations on EAs, rather than a voluntary code of conduct, with meaningful consultation with all stakeholders. The report also recommends improved dialogue and cooperation between the HKSAR Government and sending country governments. The report also urges the HKSAR Government to strengthen the mandate and enforcement capacity of the Employment Agencies Administration (EAA) in the LD and to provide harsher penalties for employment agencies engaged in unethical, deceptive, coercive, collusive or illegal practices and facilitate MDWs' ability to file complaints to the EAA.

Compliance of EAs to Ethical Conduct

A press release on the announcement of the CoP noted that its aim was for "the EA industry's compliance to promote professionalism and quality services in the EA industry". An integral part of professionalism and quality service provision is ethical conduct. Ethical conduct would include, for example, fairness, accountability, refraining from discrimination or intimidation, respecting the human rights of employees, integrity and honesty. The CoP should expand its focus to promote the ethical conduct of the EA industry beyond the statutory requirements of the HKSAR territory. This will empower the Commissioner of Labour to include ethical conduct as a "relevant factor" in the exercise of his/her discretionary power (para. 4.1.2).

Given the frequency of concerns from the public, as well as UN human rights treaty bodies, about forced labour and human trafficking amongst the MDW population, Justice Centre believes that these merit specific mention in the CoP – as is the case for codes of conduct that have been developed [in other jurisdictions](#) for EAs. The CoP should spell out what constitutes forced labour and human trafficking with specific reference to domestic and international legal standards. Mention should be made that EAs will not be party to forced labour or human trafficking for the purpose of forced labour through placement in Hong Kong.

Moreover, part of the guidelines and information pamphlets that the EAs should provide to employers and MDWs on their rights and benefits under Section 4.10 to "promote job seekers' and employers' awareness of their rights and obligations" should include information on what constitutes forced labour and abusive and exploitative practices and where assistance may be sought if they are victim to these practices. It should also be noted that it may be more appropriate for meetings to brief MDWs on their rights, as well as about forced labour and abusive and exploitative practices separately from the meeting with employers. The process for how the information is to be provided to both parties should be more clearly articulated in the CoP.

Section 4.4 of the CoP requires EAs to "act honestly and exercise due diligence". This should extend to EAs exercising due diligence to ensure that their corollary or partner recruitment agencies in sending countries do not engage in coercive, deceptive and unethical behaviour and practices and are not engaged in activities equivalent to forced labour or human trafficking. The same due diligence should also be exercised in relation to moneylenders and finance companies with which the EAs do business. "Maintaining transparency in business operations" (4.5.1)

should include full transparency about fee structures, including any fees charged in Hong Kong for recruitment services in the home country.

Section 4.12 states that EAs should not be involved in the financial affairs of job-seekers. Justice Centre is concerned, given how prevalent this practice is, that banning the involvement of EAs in the arrangement of credit/loans for MDWs to finance their recruitment in Hong Kong may push access to credit for MDWs into the shadows and reduce the ability of the LD to monitor the practice of EAs if overcharging is not addressed more comprehensively. The CoP should require EAs to undertake due diligence of the loan companies or financial institutions they suggest MDWs use for the purpose of financing recruitment and not collude with these agencies to overcharge the worker. Monitoring the actual repayment practises of loan companies and financial institutions engaged to finance recruitment should form part of an EAs active monitoring of a MDWs after they have been placed with an employer.

Obligation of EAs to monitor the employer/employee situation

Because MDWs' work visas are tied to their employment within a particular household and with a particular employer and because they are unable to change employers save under very specific circumstances, EAs in Hong Kong should be committed to ensuring a good match between MDWs and their employers. To this end, the CoP should push EAs to extend and expand their relationship with MDWs beyond merely recruitment and placement. EAs should be induced or actively encouraged to monitor the actual conditions of the placement throughout the two-year contract. At a minimum, this should include regular home visits, but also off-site interviews with the MDW to monitor the actual conditions of employment and living arrangements. Evidence of such interviews (including but not limited to the location and time of the interview) should be provided to the EEA during inspections.

Justice Centre's study found that domestic workers were likely to turn to their employment agencies for assistance when they required help, particularly when they were new to Hong Kong. In the highly publicised case of Erwiana Sulistyaningsih, Ms. Sulistyaningsih sought the assistance of her EA when the abuse by her employer escalated. It is alleged that this particular EA sent a representative to meet with Ms. Sulistyaningsih, but only returned her to the place of abuse. It is imperative that the CoP explicitly mention that EAs have a duty not to return the MDWs to abusive or exploitative situations, and to take action to refer the worker for assistance from relevant authorities. The EA should maintain a record of employers who have been involved in complaints of abuse and/or exploitation and share these details with the relevant authorities, including the LD and ImmD.

Further, the CoP should include specific reference to the role of EAs in handling complaints and settling disputes between MDWs and their employers. This is the case in codes of conduct that have been developed in other jurisdictions for EAs. Nonetheless, while encouraging the EAs to monitor the situation between the employer and employee is a best practice, it does not absolve the government itself from the duty to monitor, regulate and sanction EAs or employers that engage in malpractices, labour violations or human rights abuses.

Enforceability and Performance of the CoP

Justice Centre notes that the CoP is legally non-binding. For EAs to comply with it, it is critical that it be endowed with robust monitoring, enforcement and review mechanisms. The fact that in 2014 the EAA received 170 complaints, most of which related to overcharging the MDW, while only four were convicted that year, and little more in 2015, despite how rampant this practice is based on evidence, merits serious attention. Many concerns have been raised about barriers to accessing justice that MDWs face and the limitations they have in being able to file a complaint, including meeting the evidentiary requirements of the EAA.

The CoP states that LD may issue warning letters to EAs for rectification of irregularities detected and consider, amongst other relevant factors, the track record of EAs and capability of meeting such requirements/standards in deciding whether to revoke, refuse to grant or renew EA licenses. However, a key concern by civil society has been the insufficient penalties in existing legislation to deter unscrupulous agencies from illegal practices. The CoP does not address this. It is unclear in the CoP how an EA's "track record" will be supervised and assessed to ensure they are in compliance with the CoP, what resources will be dedicated by the LD to monitor the CoP, or the process of handling of complaints about EAs failing to comply with the CoP, and cooperation between third parties - such as frontline NGOs - as well as other government departments on making sure the CoP is upheld by EAs.

Justice Centre notes that the CoP is non-legally binding. However, Secretary for Labour and Welfare Matthew Cheung stated, "if the CoP proves to be ineffective after a period of implementation, I will not hesitate to legislate to make them mandatory to ensure that all helpers in Hong Kong and employers are properly and fully protected..." As the Government has stated that legislation is contingent on the performance of the CoP, it is crucial that clear indicators be developed to assess the "effectiveness" of the Code with a specific time frame of what constitutes "the period of implementation" to conduct a meaningful review.

Conclusion

The Code of practice is a welcome first measure, as is the open consultation process, but it must not be a box-ticking exercise to address the broader and more systemic challenges of rampant exploitation and vulnerabilities of MDWs in Hong Kong to forced labour and human trafficking. Likewise, responsibility for ensuring the rights of MDWs are respected, protected and fulfilled cannot rest solely with the Labour Department. Much more concerted action is needed, and Justice Centre reiterates its 20 recommendations in the Coming Clean report, which themselves echo several concerns raised by UN human rights treaty bodies and other civil society organisations.

Justice Centre notes that there are examples of codes of practice for EAs that have been developed in other jurisdictions. The International Labour Organisation has often assisted governments in this regard, and Justice Centre encourages the LD to seek the technical assistance from international bodies such as the ILO, IOM, OHCHR and others, before finalising the CoP. Justice Centre furthermore urges the HKSAR Government to push sending country governments to better regulate the recruitment agencies in their own borders as well.

Lastly, the LD has stated that it will continue with public education efforts to enhance the professionalism and service quality of the EA industry, as well as promoting the awareness of job-seekers and their employers about their rights and obligations. In order to promote awareness of the rights of MDWs to the broader Hong Kong public, Justice Centre urges the government to adopt the internationally-accepted term "migrant domestic worker" over "foreign domestic helper". This would help promote the understanding that domestic work is work, deserving of labour protections like other workers, and that the relationship in the household is one of an employer-employee, with corresponding rights and responsibilities.

About Justice Centre Hong Kong

Justice Centre Hong Kong Ltd. is a non-profit human rights organisation working fearlessly to protect the rights of Hong Kong's most vulnerable people: refugees, other people seeking protection, survivors of torture, human trafficking and forced labour.

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