

File Ref.: LD SMW 1-55/1/4(C)

LEGISLATIVE COUNCIL BRIEF

Minimum Wage Bill

INTRODUCTION

A At the meeting of the Executive Council on 16 June 2009, the Council ADVISED and the Chief Executive ORDERED that the Minimum Wage Bill (the Bill), at Annex A, should be introduced into the Legislative Council (LegCo).

JUSTIFICATIONS

2. The overall review of the two-year voluntary Wage Protection Movement for cleaning workers and security guards (WPM) conducted in October 2008 has exposed the limitations of promoting wage protection through voluntary participation. The Chief Executive (CE) therefore announced in his 2008-09 Policy Address that a bill on statutory minimum wage (SMW) would be introduced into LegCo in the 2008-09 legislative session. It was further announced in the same Policy Address that the SMW would apply across-the-board, in recognition of the mobility of workers amongst different low-paying sectors, the difficulty in defining “cleaning workers” and the fact that there are other occupational groups which are paid less than cleaning workers and security guards.

Design of the SMW system

3. We recognise that flexibility of wages and prices is crucial to Hong Kong’s competitiveness and resilience to external shocks, given the high degree of external orientation of our economy and the linked exchange rate system. Nevertheless, safeguarding the interests of the vulnerable and enhancing social harmony are equally important social policy objectives. Experience elsewhere suggests that the possible economic downside of an SMW can be mitigated by careful design. It is noteworthy that among those economies high in the pecking order of economic freedom compiled by internationally renowned organisations, many of them have SMW in place, such as New Zealand, Canada, Australia, the United States, Ireland and the United Kingdom¹. Arguably, there is thus no necessary correlation between

¹ All these countries achieved top ten rankings in the Heritage Foundation’s 2009 Index of Economic Freedom report and the Fraser Institute’s 2008 Economic Freedom of the World report respectively.

economic freedom and SMW and the two are not mutually exclusive.

4. The importance of designing an SMW catering specifically for Hong Kong's circumstances cannot be over-emphasised. In particular, the initial SMW rate is of paramount importance to the smooth launching of the SMW regime. An optimal SMW regime should, in essence, provide a wage floor which can prevent individuals from receiving excessively low wages for the work they do but without unduly jeopardising our labour market flexibility, economic freedom and competitiveness and without causing significant adverse impact on the employment opportunities for the vulnerable workers. With this in mind, we will adopt an evidence-based approach to setting and reviewing the SMW rate. A basket of various social, economic and employment factors that are relevant to, or affected by, the SMW level will be taken into account. These may include the wage levels, employment data, costs of business operations, inflation and relative competitiveness of Hong Kong. It is also important to conduct extensive consultations with stakeholders and an assessment of the possible displacement of disadvantaged workers. In particular, the setting and subsequent reviews of the SMW rate must take into account the possible impact of the SMW not only on the economy and overall wage and employment levels generally, but also on particular segments of the economy and the community that are more susceptible to fluctuations in the wage levels, e.g. small and medium-sized establishments and the low-paying sectors.

5. In this connection, we have examined the suitability and adequacy of the existing statistical surveys to support the SMW design. Apart from the addition and modification of statistical surveys to gauge the across-the-board wage levels and business costs to support the introduction of SMW, supplementary surveys specifically designed to gauge the situation with respect to small and medium-sized establishments and the low-paying sectors which are more susceptible to wage fluctuations will be introduced.

Minimum Wage Commission

6. Drawing reference from the experience of other countries, a statutory body will be established to study the level of minimum wage and the review mechanism. We set up, on an administrative basis, on 27 February 2009 an advisory Provisional Minimum Wage Commission (PMWC) to advise the Government on the appropriate level of the initial SMW rate. Members of the PMWC are drawn from the labour sector, business community, academia and government bureaux/departments, with all non-official members serving on an ad personam basis to help ensure objective and disinterested discussion. In accordance with its Terms of Reference, the PMWC would, in deliberating the recommended SMW rate, adopt an evidence-based approach through data research and analysis as well as extensive consultations with stakeholders. The aim will be to strike a sensible balance between forestalling excessively low wages and minimising the loss of low-paid jobs while sustaining Hong

Kong's economic growth and competitiveness. The Minimum Wage Commission will acquire a statutory status upon the enactment of the SMW legislation.

Timetable for the implementation of SMW

7. The Government has undertaken to introduce the Bill into the LegCo before its summer recess this year. The first set of statistical data to support the setting of the initial SMW rate will be available by early 2010. If everything proceeds smoothly and allowing time for LegCo's scrutiny of the Bill, the PMWC's deliberation on the initial rate of SMW and the enactment of the subsidiary legislation to give effect to the initial SMW rate, we envisage the legal and regulatory framework for implementing SMW to be ready in mid-2010, at the earliest. In line with the established practice and overseas experience, about six months' time should be allowed for the business sector to gear up for the implementation of SMW. Barring unforeseen circumstances, we expect the initial SMW rate to come into effect at the earliest by end-2010 or early 2011.

PROPOSAL

Definition of SMW

8. In practical terms, SMW, as a wage floor, would only guarantee employees a minimum remuneration but would not detract from their existing rights and benefits under current employment-related legislation, including the Employment Ordinance (Cap. 57) (EO) which is the main piece of legislation governing conditions of employment in Hong Kong. In other words, SMW will not change the nature of wages; what it does is only to set the lowest level permissible under the law. Hence, the definition of SMW and provisions of the SMW legislation should be aligned as closely as possible with those under the EO, including the definition of wages, allowable wage deductions, wage periods, employees' statutory entitlements, and offence and penalty provisions. Making the interface between the future SMW legislation and the EO as seamless as possible would ensure consistency, facilitate enforcement, forestall confusion to employers and employees, as well as keeping to the minimum the compliance cost for employers.

9. To help ensure that employees' take-home pay would be commensurate with the duration that they are at work, the SMW rate will be expressed as an hourly rate. In essence, an employee must be remunerated wages at a rate not less than the SMW on average for the hours worked in any wage period.

Coverage under the SMW legislation

10. Consistent with the principle that the SMW legislation should align

as closely as possible with the EO, we would model on the EO in defining the coverage for employees and setting out the application of the SMW. Nevertheless, we propose that exemption under the SMW regime should be given to students undertaking internships necessitated by the curricula and live-in domestic workers given their distinctive working pattern and other factors.

Student interns

11. Internship programmes are commonly adopted by post-secondary and other education institutions for training and education purposes. While the SMW legislation will only apply upon the establishment of an employer-employee relationship and full-time students would unlikely be caught under normal circumstances, some internship programmes do involve employer-employee relationship between the students and the hosting organisations during the work attachment period. Universities and other education institutions have expressed concerns over the unavoidable reduction in training opportunities should employers be required to pay students on internship at a rate not lower than the SMW. They have appealed for special treatment especially in respect of students obliged to acquire workplace training and practical knowledge as an integral element of their curricula.

12. We propose that student internships which form a compulsory or elective part of their programmes and are required for the award of the academic qualifications in full-time locally-accredited programmes as arranged or endorsed by specified education institutions should be excluded from the application of the SMW legislation. The Education Bureau, major post-secondary institutions, including the 12 degree-awarding institutions and other education institutions providing post-secondary programmes, the Vocational Training Council, as well as employers offering internship opportunities and other relevant stakeholders have been engaged and consulted on this exclusion arrangement.

Domestic workers

13. Domestic workers in Hong Kong are broadly divided into domestic helpers and other workers such as gardeners, chauffeurs, boat boys, etc. To date, domestic helpers make up the bulk of the domestic working population in Hong Kong. Generally speaking, whether a household would employ a certain kind of domestic worker, live-in or otherwise, local or foreign, would depend on its own needs and circumstances.

14. We do not have comprehensive data on the number of live-in domestic workers in Hong Kong. As an indication, however, the number of households employing foreign domestic helpers (FDHs) stood at some 207 500

in the fourth quarter of 2008, whereas the number of households employing local live-in domestic workers stood at about 1 100 in 2006.² With the large number of households at stake, it is expected that there would be community-wide concern over the inclusion or otherwise of domestic workers, especially those who live in the households of their employers, in the SMW regime. Indeed, stakeholders (including employer groups, employee groups and labour unions) have expressed different views on the exclusion or otherwise of live-in domestic workers under the SMW.

15. Having carefully considered all relevant factors and circumstances as well as the views of stakeholders, we propose to exclude all live-in domestic workers, local or foreign, from the coverage of the SMW. Our major considerations are, namely, (a) the distinctive working pattern of live-in domestic workers; (b) their enjoyment of in-kind benefits not usually available to non-live-in workers; (c) the possible significant and far-reaching socio-economic ramifications; and (d) the fundamental erosion of the long-established FDH policy.

(a) Distinctive working pattern

The distinctive working pattern, i.e. round-the-clock presence and provision of service-on-demand expected of live-in domestic workers, will give rise to insurmountable practical difficulties in bringing them under the SMW. It is common knowledge that domestic duties are multifarious and can vary day in day out, depending on the prevailing needs of the employer and his/her family members. Since the proposed SMW would be calculated on an hourly basis, it would be impossible to ascertain the actual hours worked so as to determine the wages to be paid.

As live-in domestic workers work and rest in the same place, it is also not possible for a household to keep a clear record of such working hours as required of other employers under the SMW regime. This is especially so for families whose live-in domestic workers are the only persons staying at the households for a substantial period of time while family members are at work or school.

(b) Enjoyment of in-kind benefits

Like non-live-in employees, the employment terms of live-in domestic workers vary, depending largely on the agreement between the parties concerned. Notwithstanding this, the remuneration

² The household figure is obtained from the General Household Survey conducted by the Census and Statistics Department (C&SD). According to the record of the Immigration Department, the total number of FDHs stood at around 257 000 as at end-2008. As for the number of 1 100 households employing local live-in domestic workers (including domestic helpers, chauffeurs, gardeners, etc. totalling around 1 400), it was obtained from the 2006 Population By-Census conducted by C&SD.

package for live-in domestic workers is usually distinctive for it includes in-kind benefits not available to non-live-in workers. For example, live-in domestic workers are given free accommodation. Since they live in their employers' residence, such workers are also spared the cost of commuting between home and workplace. It is also common for employers to provide free food given the round-the-clock attendance expected of live-in domestic workers. In short, the distinctive employment terms of live-in domestic workers involve, on top of wages, in-kind benefits not available to non-live-in workers. Live-in domestic workers therefore enjoy a higher disposable income.

For FDHs, the Government has long prescribed a standard employment contract by setting out the basic employment terms, including free accommodation with reasonable privacy, free food (or food allowance in lieu), free medical treatment, free passage from and to the FDH's place of origin, etc. Furthermore, to provide additional safeguard, the Government has since the early 1970s prescribed for FDHs a minimum allowable wage (MAW), currently at \$3,580³.

(c) Possible significant and far-reaching socio-economic ramifications

We fully realise that there are many families which have a genuine need for the service of live-in domestic workers, e.g. working couples with children and/or elderly at home who require the round-the-clock presence of live-in domestic workers at home.

Bringing live-in domestic workers, including FDHs, under the SMW could cause financial hardship to many such families. For families that need to stop employing live-in domestic workers owing to increased cost, either a working spouse (more likely the wife) would be forced to leave the workforce and stay home, or the working couples would need to identify a comparable alternative which may not be available.

It is noteworthy that according to figures provided by C&SD, the female labour participation rate (aged 25 to 45) increased from 66.5% to 76.6% between 1998 and 2008, whereas their median monthly earnings stood at around \$10,000 in 2008. Against the backdrop of an ageing population in Hong Kong, we should be mindful of any measure that may reduce the labour participation rate of those within the economically active age brackets.

³ The MAW is subject to regular reviews. Since its inception in early 1970s, the MAW has since been adjusted for 23 times, all but two were upward adjustments, among which five times represented 20% or more increase each. In setting and reviewing the MAW, the Administration, according to the established mechanism, takes account of Hong Kong's general economic and employment situation, as reflected through a basket of economic indicators including the relevant income movements, price change and labour market situation.

Furthermore, there is a real possibility that, should live-in domestic workers be covered in the SMW, some employers may require their workers to leave the household when there is not much work for the workers to do during day time, in order to minimise the “working time” and thus wages to be paid. We are wary of the possible social problems that this may cause.

(d) Fundamental erosion of the FDH policy

Apart from inclusion under the SMW, it has been suggested by some stakeholders that the Government should prescribe “standard working hours” and remove the “live-in” requirement to enable computation of working hours. However, both of these would amount to a significant departure from the existing FDH policy which has been put in place for good policy reasons and necessary immigration control. Also, to alter the existing FDH employment terms in such a drastic manner would certainly cause much distress to many families.

Indeed, prescribing “standard working hours” and removing the “live-in” requirement would dismantle the cornerstone of the policy of importing FDHs. It has been the Government’s established policy that the importation of low-skilled workers should only be allowed where there is confirmed manpower shortage in the local market. The importation of FDHs is designed to meet the shortfall of live-in domestic helpers providing round-the-clock services locally, thus releasing our home-makers to join the labour force. As some stakeholders have logically argued, should live-in requirement be no longer mandatory, the importation of FDHs should be subject to the Supplementary Labour Scheme restrictions⁴, on par with the arrangements for the importation of other low-skilled workers.

Removing the “live-in” requirement for FDHs would also compound the immigration control problem of ensuring that FDHs do not breach their conditions of stay in Hong Kong, e.g. working only for designated employers at designated locations only.

16. In view of the above considerations, we propose to exclude all live-in domestic workers, local or foreign, who dwell in the employer’s household free of charge, from the SMW regime. According to legal advice, exclusion of live-in domestic workers from the SMW legislation is legally tenable as there is a justifiable difference, mainly involving different working patterns and

⁴ The Supplementary Labour Scheme (SLS) regulates the importation of low-skilled workers from outside Hong Kong. Each application is considered on a case-by-case basis by the Labour Advisory Board, and normally at a ratio of every 2 local workers to 1 imported worker in the same establishment. Imported workers under the SLS are required to be paid at least the median monthly wages of local workers in comparable positions. In 2008, the total number of workers applied for importation under the SLS was 2 440, with 1 082 approved.

provision of in-kind benefits arising from dwelling in the households of their employers free of charge, between live-in domestic workers and other workers who would qualify for the SMW.

Monthly SMW for live-in domestic workers not an option

17. In arriving at the proposed exclusion of live-in domestic workers from the SMW, we have explored, and decided against, the other option of monthly SMW rate for live-in domestic workers proposed by some stakeholders.

18. A monthly SMW would give rise to practical difficulties and significant policy implications in the longer run. First, it is quite infeasible to set/assume the initial monthly SMW rate as the free accommodation and free food at present enjoyed by live-in domestic workers, even for FDHs, vary, meaning that they could have very different wages in real terms.

19. Second, the hourly SMW and monthly SMW⁵ would call for different review cycles, mechanisms and indicators (e.g. the household incomes of the FDH employers now being one of the cardinal factors for MAW reviews might be relevant for the monthly SMW, but would certainly not be so for the hourly SMW), as well as adjustment rates, owing to their very different policy objectives and target beneficiaries. Arising from their different review mechanisms, the gap between the hourly SMW and monthly SMW will fluctuate over time. The fluctuations would lead to emotive discussions as invidious comparisons would be inevitable. This would not be conducive to social harmony.

20. The difficulties in setting the monthly SMW rate aside, the risk of a fundamental erosion of the FDH policy as mentioned in paragraph 15(d) remains. One should also note that the MAW has been in place since early 1970s, long before the proposed introduction of SMW, to safeguard the interests of the FDHs. While the current MAW is not statutory, it is mandatory through the stipulation in the standard employment contract for FDHs, alongside other in-kind benefits not available to local workers.

Special arrangement for persons with disabilities (PWDs)

21. As a matter of principle, PWDs, as employees, should be no different from their able-bodied counterparts and thus PWDs taking up employment in the open market should also be protected by SMW. Nevertheless, recognising the possible employment difficulties encountered by some PWDs, a special

⁵ One of the proposals from the FDH groups is to derive the monthly SMW rate by applying standard working hours to the same hourly SMW rate minus the assumed costs of in-kind benefits.

arrangement should be introduced for those whose productivity is impaired by their disabilities, so as to minimise any possible adverse impact of SMW on their employment opportunities.

22. We have conducted formal and informal sessions with more than 50 rehabilitation organisations including non-governmental organisations providing vocational rehabilitation services with subvention from the Social Welfare Department, self-help groups and parent groups as well as the Equal Opportunities Commission. In addition, we have met with representatives from over 30 employers who have ample experience in employing PWDs. The majority view gauged is that, in order to strike a reasonable balance between providing wage protection to PWDs and safeguarding their employment opportunities, a special arrangement comprising a simple mechanism assessing a PWD's productivity in the authentic workplace should be introduced to help determine whether a PWD should be remunerated at no less than the SMW rate; and if not, the extent of discount from SMW. To forestall abuse by unscrupulous employers, the right to invoke such an assessment is vested in the PWD employee rather than his employer.

23. In order to put beyond doubt that acts done in connection with the special arrangement for PWDs would not be in breach of the Disability Discrimination Ordinance (Cap. 487) (DDO), consequential amendments to the DDO would be required.

Enforcement in relation to the implementation of SMW

24. Since breaches of SMW are no different from wage offences under the EO, the existing penalty and enforcement provisions for wages (including under-payment, non-payment and delayed payment of wages as well as unlawful deductions from wages) and offences relating to non-compliance with statutory benefit provisions (such as benefits for statutory holidays, annual leave, sickness allowance, maternity leave etc.) under the EO would also apply. The Labour Department (LD) would similarly be responsible for the enforcement of the SMW legislation.

25. Under the EO, employers are legally obliged to keep a minimum of 12 months' wage record. In order to determine whether employers have remunerated their employees not below the SMW rate, an additional requirement of keeping the number of hours worked would be included through consequential amendments to the EO.

SMW rate prescribed under the SMW legislation

26. Non-compliance with SMW is no different in nature from under-payment of wages, currently a criminal offence under the EO.

Therefore, breaches of SMW should also constitute a wage offence which is subject, on conviction, to a maximum fine of \$350,000 and imprisonment for three years. As a corollary, the SMW rate should be prescribed through a legislative act requiring the approval of the LegCo to give the same legal effect. The Bill proposes that the CE in Council, having regard to the recommendation of the Minimum Wage Commission, be empowered to prescribe the rate in a schedule by notice in the Gazette subject to the negative vetting mechanism of LegCo.

Repeal of the Trade Boards Ordinance

27. The Trade Boards Ordinance (Cap. 63) (TBO) was enacted in 1940 in Hong Kong as part of the United Kingdom's duty to discharge its responsibility under the International Labour Convention No. 26 (Minimum Wage-Fixing Machinery Convention, 1928), the ratification of which was denounced by the British Government in 1985. TBO provides, *inter alia*, that the CE in Council may, if it thinks fit, form trade boards and fix minimum wages for trades in which the wage standards are unreasonably low. Since the enactment of the TBO, the Government has never invoked the powers of the TBO.

28. The TBO has been dormant on Hong Kong's statute books for over 60 years. Its provisions are largely obsolete⁶ and legally problematic⁷, and are thus incapable of meeting the needs of the prevailing socio-economic situations. As such, taking the opportunity of the enactment of the SMW legislation, the TBO should be repealed.

THE BILL

29. The main object of the Bill is to provide for a minimum wage so as to forestall the payment of excessively low wages to employees. The minimum wage is expressed as an hourly rate but the Bill does not seek to regulate the number of hours that employees work. Furthermore, the Bill does not affect the operation of the EO except as expressly provided by it. Explanatory notes on individual clauses of the Bill are set out in its Explanatory Memorandum.

30. Part 1 of the Bill mainly deals with the application of the SMW legislation and specifies definitions that are necessary for the interpretation of

⁶ For example, the penalty laid down in certain provisions of the TBO is extremely light and thus fails to serve as a deterrent. It is stipulated, for instance, under section 5(1) that if an employer fails to pay the minimum wage, he shall be liable on summary conviction in respect of each offence to a fine of \$500 and to a fine of \$50 each day on which the offence is continued.

⁷ For example, section 5(5) stipulates that on any prosecution of a person for failing to pay wages at not less than the minimum rate, the burden of proof is on that person being prosecuted, instead of the prosecution. This is inconsistent with the Hong Kong Bill of Rights Ordinance (Cap. 383) and the Basic Law.

the Bill. It follows the EO in defining coverage for employees and setting out its application. Exclusion is provided for students who are undertaking internship in full-time locally-accredited programmes provided by education institutions specified in Schedule 1 and domestic workers who dwell free of charge in the same dwelling as the employers.

31. Part 2 provides for entitlement to minimum wage which is derived by multiplying the total number of hours worked by an employee in the wage period with the minimum hourly wage rate specified by the CE in Council in Schedule 3. For PWDs, they may, of their own volition, agree with the employers their wages during a four-week trial period as specified in Schedule 2, but which may not be less than 50% of the hourly rate in Schedule 3, and thereafter the hourly rate in Schedule 3 is granted or discounted proportionate to the extent to which their productivity is reduced by the disability according to an assessment provided for under Schedule 2. Furthermore, Part 2 contains a provision which has the effect of modifying the contracts of employment of employees to whom this Bill applies so as to provide for a top-up payment if necessary to ensure that employees are paid not less than the minimum wage. The modified contract of employment also applies when calculating entitlements and liabilities under the EO, the Protection of Wages on Insolvency Ordinance (Cap. 380), the Mandatory Provident Fund Schemes Ordinance (Cap. 485), the Employees' Compensation Ordinance (Cap. 282) and the Occupational Deafness (Compensation) Ordinance (Cap. 469).

32. Part 3 provides for the establishment of the Minimum Wage Commission and its functions and powers. The Minimum Wage Commission is tasked to report to the CE in Council its recommendations on the precise minimum hourly wage rate and the timing and frequency of rate reviews. The CE may require the Commission to make a report within a specified time period. The Minimum Wage Commission comprises the chairperson and 12 other members who are all appointed by the CE. Schedule 4 sets out the terms and conditions of appointment to the Minimum Wage Commission and regulates the procedure at meetings. In performing its functions, the Commission must have regard to the need to maintain an appropriate balance between the objectives of forestalling excessively low wages and minimising the loss of low-paid jobs and of sustaining Hong Kong's economic growth and competitiveness.

33. Part 4 provides for miscellaneous matters including the power to amend Schedules. For amendment of Schedule 3, adjustment of the minimum hourly wage rate may be in an upward or downward direction. In scrutinising a notice amending Schedule 3, the LegCo may either approve or revoke the notice.

34. Part 5 contains the repeal of the TBO as well as consequential amendments to the DDO, EO, Labour Tribunal Ordinance (Cap. 25) (LTO) and

Minor Employment Claims Adjudication Board Ordinance (Cap. 453) (MECABO). Amendments to the LTO and MECABO are introduced to ensure that the Labour Tribunal and the Minor Employment Claims Adjudication Board have jurisdiction to deal with claims arising from a breach of this Bill upon enactment.

LEGISLATIVE TIMETABLE

35. The legislative timetable will be –

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| Publication in the Gazette | 26 June 2009 |
| First Reading and commencement of Second Reading debate | 8 July 2009 |
| Resumption of Second Reading debate, committee stage and Third Reading | To be notified |

IMPLICATIONS OF THE PROPOSAL

B

36. The proposal has economic, sustainability, financial and civil service implications as set out at Annex B. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. The proposal has no productivity or environmental implications. The Bill does not contain any express binding effect provision.

PUBLIC CONSULTATION

37. The LD has undertaken an intensive and extensive engagement and consultation process with various stakeholders with a view to ensuring that the SMW regime is feasible and strikes a reasonable balance among various interests. We have briefed the Panel on Manpower of LegCo and the Labour Advisory Board and consulted them on the details of the proposed SMW regime, and they generally supported our proposals.

38. Since early 2008, LD has conducted some 60 formal and informal consultation sessions with a wide spectrum of stakeholder groups on different issues under the Bill. In the process of preparing the Bill, we have briefed major labour unions and employers’ associations on the SMW architecture. We have met with employer representatives and trade union representatives of the LD’s tripartite committees in property management, catering, retail and hotel and tourism industries to solicit views from the low-paying sectors. We have consulted major labour groups and employer groups, associations of small and medium-sized enterprises and representatives from human resources associations on various aspects of the Bill including the likely impact of SMW, definition of SMW, calculation method of average hourly wage rate and counting of commission etc. On the special arrangement for PWDs,

rehabilitation organisations including non-governmental organisations providing subvented vocational rehabilitation services, self-help groups, parents groups, employers of PWDs, the Equal Opportunities Commission, and occupational therapy and physiotherapy associations have been consulted. As for the exclusion of students on internship and live-in domestic workers from the coverage of the Bill, we have conducted meetings with universities, post-secondary institutions, the Vocational Training Council and other education institutions; labour unions (including FDH groups) and employer groups to solicit their views.

PUBLICITY

39. A press release will be issued on 24 June 2009. A spokesman from the LD will be made available to handle press enquiries.

BACKGROUND

40. For decades, prompted by cases of local workers who have been paid excessively low wages well below the market wage rate for comparable jobs, there has been a strong body of opinion, notably from pro-labour groups, calling for the introduction of SMW in Hong Kong. The lack of a consensus on whether a legislative approach should be adopted in preventing excessively low wages led to the launching in 2006 of the two-year voluntary WPM. While the WPM had brought about a culture change, with the community acquiring a new understanding of wage protection and greater acceptance of corporate social responsibility, there were limitations in promoting wage protection through voluntary participation. In his 2008-09 Policy Address, the CE announced that the Government would introduce a Bill on SMW in the 2008-09 legislative session.

ENQUIRIES

41. Enquiries on this brief should be addressed to Mr FONG Ngai, Assistant Commissioner for Labour (Policy Support and Strategic Planning), at 2852 3633 or Miss Mabel LI, Senior Labour Officer (Statutory Minimum Wage) of LD, at 2852 3756.

Labour and Welfare Bureau
June 2009

MINIMUM WAGE BILL

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A BILL

To

Provide for a minimum wage at an hourly rate for certain employees; to establish a Minimum Wage Commission; to repeal the Trade Boards Ordinance and to make consequential amendments to the Labour Tribunal Ordinance, the Employment Ordinance, the Minor Employment Claims Adjudication Board Ordinance and the Disability Discrimination Ordinance.

Enacted by the Legislative Council.

PART 1

PRELIMINARY

1. Short title and commencement

- (1) This Ordinance may be cited as the Minimum Wage Ordinance.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

2. Interpretation

In this Ordinance –

“accredited programme” (經評審課程) means a full-time programme that –

- (a) is provided by an education institution specified in Schedule 1;
- (b) is a learning programme of a kind described in section 1, 2 or 3 of Schedule 3 to the Accreditation of Academic and Vocational Qualifications Ordinance (Cap. 592); and
- (c) if provided by a school registered or provisionally registered under the Education Ordinance (Cap. 279), is at the level of post secondary education (within the meaning of that Ordinance);

- “chairperson” (主席) means chairperson of the Commission;
- “Commission” (委員會) means Minimum Wage Commission established by section 10;
- “Commissioner” (處長) has the same meaning as in the Employment Ordinance (Cap. 57);
- “contract of employment” (僱傭合約) has the same meaning as in the Employment Ordinance (Cap. 57);
- “domestic worker” (家庭傭工) means a domestic helper, carer, chauffeur, gardener, boat-boy or other personal helper employed in, or in connection with, a household;
- “employee” (僱員) means a person engaged as an employee under a contract of employment other than a person covered by section 6(2), (3) or (4);
- “employee with a disability” (殘疾僱員) means an employee who is a PWD and whose degree of productivity in performing the work required under the contract of employment has been assessed under Schedule 2;
- “employer” (僱主) has the same meaning as in the Employment Ordinance (Cap. 57);
- “hours worked” (工作時數) – see section 3;
- “member” (委員) means member of the Commission;
- “minimum wage” (最低工資), for an employee for a wage period, has the meaning given by section 7(2);
- “place of employment” (僱傭地點), in relation to an employee, means any place at which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, in attendance for the purpose of doing work or receiving training;
- “prescribed minimum hourly wage rate” (訂明每小時最低工資額) means the hourly wage rate specified in column 1 of Schedule 3;

“PWD” (殘疾人士) means a person who holds a valid Registration Card for People with Disabilities issued by the Central Registry for Rehabilitation established by the Government;

“student intern” (實習學員) means a student undergoing a period of work arranged or endorsed by an education institution specified in Schedule 1 in connection with an accredited programme being provided by the institution to the student for which the work is a compulsory or elective component of the requirements for the award of the academic qualification to which the programme leads;

“trial period of employment” (僱傭試工期) means a trial period of employment referred to in section 2 of Schedule 2;

“wage period” (工資期) – see section 4;

“wages” (工資), subject to section 5, has the same meaning as in the Employment Ordinance (Cap. 57).

3. Hours worked

(1) The hours worked by an employee in a wage period must be taken to include –

- (a) any time during which the employee is in attendance at a place of employment, irrespective of whether he or she is provided with work or training at that time; and
- (b) any time during which the employee is, in accordance with the contract of employment or with the agreement or at the direction of the employer, travelling in connection with his or her employment except time referred to in subsection (2)(b).

(2) The hours worked by an employee in a wage period must be taken not to include –

- (a) any period allowed by the employer for a meal except to the extent (if any) during that period that the employee is

doing work in accordance with the contract of employment or with the agreement or at the direction of the employer; and

- (b) any time during which the employee is travelling (in either direction) between his or her place of residence and his or her place of employment other than a place of employment that is outside Hong Kong and is not his or her usual place of employment.

4. Wage period

(1) The wage period of an employee is the period in respect of which wages are payable to the employee for work done or to be done under his or her contract of employment.

(2) Unless the contrary is proved, that period must be taken to be one month.

(3) For a completed or terminated contract of employment that has had at least one previous wage period, the final wage period is the period commencing at the end of the penultimate wage period and ending on the day of completion or termination of the contract.

(4) For a completed or terminated contract of employment that has not had at least one previous wage period, the final wage period is the period commencing at the beginning of the contract and ending on the day of completion or termination of the contract.

5. Wages

(1) A deduction from the wages of an employee made under section 25(3) or 32(2)(b), (c), (d), (e), (f), (g), (h) or (i) of the Employment Ordinance (Cap. 57) in respect of any wage period must be counted as part of the wages payable in respect of that period.

(2) A payment made to an employee in any wage period for an hour (or any part of an hour) not worked by the employee must not be counted as part of the wages payable in respect of that or any other wage period.

(3) An advance or over-payment of wages made to an employee in any wage period must not be counted as part of the wages payable in respect of that period.

(4) A payment of arrears of wages in respect of an earlier wage period made to an employee in any wage period must not be counted as part of the wages payable in respect of the wage period in which it is paid.

(5) Despite subsections (3) and (4), for the purposes of this Ordinance, any commission paid in a wage period after the first 7 days of that period, or within 7 days after the end of a wage period, must be counted as part of the wages payable in respect of that period irrespective of when the work is done or the commission is otherwise payable.

6. Application of Ordinance

(1) Subject to this section, this Ordinance applies to every employee, his or her employer and the contract of employment under which he or she is engaged.

(2) This Ordinance does not apply to a person to whom the Employment Ordinance (Cap. 57) does not apply because of section 4(2) or (2A) of that Ordinance.

(3) This Ordinance does not apply to a person who is employed as a domestic worker in, or in connection with, a household and who dwells in that household free of charge.

(4) This Ordinance does not apply to a student intern.

PART 2

ENTITLEMENT TO MINIMUM WAGE

7. Employees to be paid at least minimum wage

(1) An employee is entitled to be paid wages in respect of any wage period of not less than the minimum wage.

(2) The minimum wage for an employee for a wage period is the amount derived by multiplying the total number of hours (including any part of an hour) worked by the employee in the wage period by the minimum hourly wage rate for the employee provided by section 8.

(3) This section is subject to section 17 (transitional provisions).

8. Minimum hourly wage rate

(1) The minimum hourly wage rate for an employee is –

- (a) for a PWD undergoing a trial period of employment, the hourly rate that is the percentage specified in section 3 of Schedule 2 of the prescribed minimum hourly wage rate;
- (b) for an employee with a disability, the hourly rate derived by multiplying the prescribed minimum hourly wage rate by the employee's assessed degree of productivity as stated in the certificate of assessment provided under section 5 of Schedule 2; and
- (c) in any other case, the prescribed minimum hourly wage rate.

(2) Despite subsection (1)(c), if a PWD becomes an employee with a disability after the expiry of a trial period of employment, the minimum hourly wage rate for the employee must be taken to be the hourly rate provided by subsection (1)(b) on and from the first day after the expiry of the trial period.

(3) Schedule 2 has effect with respect to assessing the degree of productivity of a PWD and specifying the percentage of the prescribed minimum

hourly wage rate that is applicable to a PWD undergoing a trial period of employment.

9. Entitlement to at least minimum wage under contract of employment

(1) If, but for this Ordinance, the wages payable to an employee in respect of any wage period are less than the minimum wage for the employee for that period, the contract of employment of the employee must be taken to provide for all purposes that the employee is entitled to additional remuneration in respect of that period of the amount derived by subtracting from that minimum wage the amount of wages that, but for this Ordinance, is payable in respect of that period.

(2) Without limiting subsection (1), the purposes referred to in that subsection include calculating –

- (a) the amount of any wages or of any other sum payable under the Employment Ordinance (Cap. 57);
- (b) any amount payable by way of an ex gratia payment under the Protection of Wages on Insolvency Ordinance (Cap. 380);
- (c) the amount of any mandatory contribution required to be paid to a provident fund scheme under the Mandatory Provident Fund Schemes Ordinance (Cap. 485); and
- (d) the monthly earnings of the employee for the purposes of the Employees' Compensation Ordinance (Cap. 282) or the Occupational Deafness (Compensation) Ordinance (Cap. 469).

(3) To avoid doubt and without limiting subsection (1), the amount of any additional remuneration to which an employee is entitled under subsection (1) forms part of the wages payable to the employee under the Employment Ordinance (Cap. 57) and a failure to pay it may be dealt with in the same way as a failure to pay any other portion of those wages.

PART 3

MINIMUM WAGE COMMISSION

10. Establishment and constitution of Commission

- (1) A Commission is established to be known as “Minimum Wage Commission” in English and “最低工資委員會” in Chinese.
- (2) The Commission consists of –
 - (a) a person, who is not a public officer, appointed as the chairperson;
 - (b) not more than 9 other members who are not public officers of whom not more than 3 must be persons who, in the opinion of the Chief Executive, have knowledge of, or experience in –
 - (i) matters relating to the labour sector;
 - (ii) matters relating to the business sector; or
 - (iii) a relevant academic field; and
 - (c) not more than 3 other members who are public officers.
- (3) The chairperson and all other members are to be appointed by the Chief Executive.
- (4) The Chief Executive must publish in the Gazette notice of the following –
 - (a) any appointment of a member made under this section;
 - (b) any appointment of an acting chairperson made under section 3 of Schedule 4.
- (5) A notice under subsection (4) is not subsidiary legislation.
- (6) Schedule 4 has effect with respect to the Commission.

11. Functions of Commission

(1) The main function of the Commission is, when required by the Chief Executive to do so, to report to the Chief Executive in Council its recommendations about –

- (a) the amount of the prescribed minimum hourly wage rate; and
- (b) the timing and frequency of rate reviews.

(2) The Commission has any other function given to it by the Chief Executive in writing.

(3) In performing its functions, the Commission must have regard to the need –

- (a) to maintain an appropriate balance between the objectives of forestalling excessively low wages and minimizing the loss of low-paid jobs; and
- (b) to sustain Hong Kong's economic growth and competitiveness.

(4) Before arriving at the recommendations to be included in its report, the Commission may as it thinks fit –

- (a) consult any organization representative of employers or employees or any other person;
- (b) consider any submission made to it in the course of its consultations; and
- (c) analyse and consider any data derived from, and consider any other information contained in, any research or study.

12. Powers of Commission

(1) The Commission has power to do all things that are necessary for, or incidental or conducive to, the performance of its functions.

(2) Without limiting subsection (1), the Commission may form a committee for any purpose.

13. Report of Commission

(1) The Chief Executive may, by notice given to the Commission, require it to make a report required under section 11(1) within the period specified in the notice.

(2) The Chief Executive may, by further notice given to the Commission, extend the period within which a report is to be made.

PART 4**MISCELLANEOUS****14. No contracting out**

A provision of a contract of employment (whether the contract was entered into before, on or after the commencement of this section) that purports to extinguish or reduce any right, benefit or protection conferred on the employee by this Ordinance is void.

15. Amendment of Schedule 3

(1) The Chief Executive in Council may, by notice published in the Gazette, amend Schedule 3 to –

- (a) specify in column 1 an hourly wage rate or increase or reduce the then current hourly wage rate specified in that column; and
- (b) specify in column 2 the effective date for any amendment referred to in paragraph (a).

(2) In exercising a power under subsection (1), the Chief Executive in Council may have regard to any recommendation included in a report made under section 11(1) but is not bound by the recommendation.

(3) Subsection (1) only confers power to fix a single hourly wage rate that is applicable to all employees, whether directly or as a factor in calculating their minimum wage.

(4) Section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) applies to a notice under subsection (1) as if –

- (a) for the words “amended in any manner whatsoever consistent with the power to make such subsidiary legislation” there were substituted the words “wholly revoked”; and
- (b) for the words “to be amended” there were substituted the words “to be wholly revoked”.

16. Amendment of Schedules 1 , 2 and 4

(1) The Commissioner may, by notice published in the Gazette, amend Schedule 1 or 2.

(2) The Chief Executive in Council may, by notice published in the Gazette, amend Schedule 4.

17. Transitional provisions

(1) If the effective date of the first prescribed minimum hourly wage rate is a date after the beginning of a wage period of an employee, in calculating the minimum wage for the employee for that period no account is to be taken of any hour (including any part of an hour) worked by the employee in that period before that effective date nor of any wages payable to the employee for any such hour or part of an hour.

(2) If the prescribed minimum hourly wage rate is increased or reduced under section 15(1) after the beginning of a wage period of an employee, in calculating the minimum wage for the employee for that period the increased or reduced rate only applies to any hour (including any part of an hour) worked by the employee on or after the effective date of the increase or reduction.

PART 5

REPEAL AND CONSEQUENTIAL AMENDMENTS

Trade Boards Ordinance

18. Repeal

The Trade Boards Ordinance (Cap. 63) is repealed.

Labour Tribunal Ordinance

19. Schedule amended

(1) Paragraph 1(a) and (aa) of the Schedule to the Labour Tribunal Ordinance (Cap. 25) is amended by adding “or (if relevant) arising by force of section 9(1) of the Minimum Wage Ordinance (of 2009)” after “implied”.

(2) Paragraph 1(b) of the Schedule is amended by adding “, the Minimum Wage Ordinance (of 2009)” after “(Cap. 57)”.

Employment Ordinance

20. Requirement to keep wage and employment records

(1) Section 49A(3) of the Employment Ordinance (Cap. 57) is amended by adding –

“(ea) if the employee is entitled to be paid wages in respect of any wage period, or part of a wage period, of not less than the minimum wage within the meaning of the Minimum Wage Ordinance (of 2009), the total number of hours (including any part of an hour), calculated in accordance with section 3 of that Ordinance, worked by the employee in any wage period;”.

(2) Section 49A is amended by adding –

“(4) Nothing in subsection (1) requires an employer to set out in a record particulars of a kind referred to in subsection

(3)(ea) for any wage period, or part of a wage period, of an employee that occurred before the effective date of the hourly wage rate first specified in column 1 of Schedule 3 to the Minimum Wage Ordinance (of 2009) on or after the commencement of section 15 of that Ordinance.”.

21. Powers of officers

Section 72(1)(b) is amended by adding “(and, in the case of a record which includes particulars required to be included under section 49A(3)(ea), require that the particulars under section 49A(3)(a), (d), (e), (ea) and (f) are produced in a single document)” after “Ordinance”.

Minor Employment Claims Adjudication Board Ordinance

22. Jurisdiction of the Minor Employment Claims Adjudication Board

(1) Paragraph (b)(i) and (ii) of the Schedule to the Minor Employment Claims Adjudication Board Ordinance (Cap. 453) is amended by adding “or (if relevant) arising by force of section 9(1) of the Minimum Wage Ordinance (of 2009)” after “implied”.

(2) Paragraph (b)(iii) of the Schedule is amended by adding “, the Minimum Wage Ordinance (of 2009)” after “(Cap. 57)”.

Disability Discrimination Ordinance

23. Further exceptions to this Ordinance

Schedule 5 to the Disability Discrimination Ordinance (Cap. 487) is amended by adding –

“Part III

Only a person who holds a valid
Registration Card for People with
Disabilities issued by the Central
Registry for Rehabilitation

established by the Government
being allowed to have his or her
degree of productivity assessed
under Schedule 2 to the
Minimum Wage Ordinance
(of 2009)

Part III

An employer, in accordance with
the Minimum Wage Ordinance
(of 2009), paying a
minimum wage to a person with
a disability that is less than that
payable to a person without such
a disability

Part III

An employer dismissing a person
with a disability on account of
the outcome of an assessment
made under Schedule 2 to the
Minimum Wage Ordinance
(of 2009)".

SCHEDULE 1

[ss. 2 & 16]

EDUCATION INSTITUTIONS

1. The Hong Kong Institute of Education established by The Hong Kong Institute of Education Ordinance (Cap. 444).

2. University of Hong Kong established by the University of Hong Kong Ordinance (Cap. 1053).
3. The Hong Kong Polytechnic University established by The Hong Kong Polytechnic University Ordinance (Cap. 1075).
4. The Chinese University of Hong Kong established by The Chinese University of Hong Kong Ordinance (Cap. 1109).
5. Hong Kong Baptist University established by the Hong Kong Baptist University Ordinance (Cap. 1126).
6. City University of Hong Kong established by the City University of Hong Kong Ordinance (Cap. 1132).
7. The Hong Kong Academy for Performing Arts established by The Hong Kong Academy for Performing Arts Ordinance (Cap. 1135).
8. The Hong Kong University of Science and Technology established by The Hong Kong University of Science and Technology Ordinance (Cap. 1141).
9. The Open University of Hong Kong established by The Open University of Hong Kong Ordinance (Cap. 1145).
10. Lingnan University established by the Lingnan University Ordinance (Cap. 1165).
11. Approved post secondary colleges registered under the Post Secondary Colleges Ordinance (Cap. 320).
12. Technical colleges, technical institutes, industrial training centres or skills centres established under the Vocational Training Council Ordinance (Cap. 1130).

13. Schools registered or provisionally registered under the Education Ordinance (Cap. 279).

SCHEDULE 2

[ss. 2, 8 & 16]

ASSESSMENT OF DEGREE OF PRODUCTIVITY OF PWDs

1. Interpretation

(1) In this Schedule –

“approved assessor” (認可評估員) means a person who –

- (a) is of a kind specified by the Commissioner for the purposes of this paragraph under subsection (2);
- (b) has the length of experience in the provision of vocational rehabilitation or other services in relation to the employment of persons with a disability that is specified by the Commissioner for the purposes of this paragraph under subsection (3); and
- (c) is approved by the Commissioner under section 4(3) of this Schedule;

“assessment” (評估) means an assessment referred to in section 4 of this Schedule.

(2) The Commissioner may, by notice published in the Gazette, specify kinds of persons for the purposes of paragraph (a) of the definition of “approved assessor” in subsection (1), whether by reference to the profession practised by them or the occupation or qualification held by them or on any other basis.

(3) The Commissioner may, by notice published in the Gazette, specify a length of experience for the purposes of paragraph (b) of the definition of “approved assessor” in subsection (1).

2. **Trial period of employment**

(1) A PWD may, if he or she chooses to do so, agree with an employer to undergo a trial period of employment at not less than the minimum hourly wage rate provided by section 8(1)(a).

(2) The purpose of the trial period is to provide an opportunity for an assessment to be made of the degree of productivity of the PWD.

(3) Subject to subsection (4), the length of the trial period is 4 weeks or until the end of the day on which the assessment of the degree of productivity of the PWD is completed, whichever period is the shorter.

(4) On an application made to the Commissioner jointly by the PWD and the employer before the end of the trial period, the Commissioner may, in exceptional circumstances, extend the length of the trial period applying to them by up to 4 weeks.

3. **Percentage of prescribed minimum hourly wage rate applicable during trial period of employment**

For the purposes of section 8(1)(a), the specified percentage is 50%.

4. **Assessment**

(1) The purpose of an assessment is to determine the degree (if any) to which the productivity of the PWD in performing the work required under the contract of employment is affected by a disability.

(2) The assessment must be made by an approved assessor at a time agreed by the PWD and the employer, whether within the trial period of employment or after the expiry of that period.

(3) The Commissioner may, in writing, approve an assessor who satisfies the requirements of paragraphs (a) and (b) of the definition of “approved assessor” in section 1(1) of this Schedule for the purpose of making assessments under this Schedule.

(4) The Commissioner may, by notice published in the Gazette, specify methods of assessment for the purposes of this Schedule.

(5) A PWD whose degree of productivity has been assessed cannot have any further assessment made for the same work with the same employer.

(6) Only a PWD who is undergoing, or has undergone, a trial period of employment for the relevant work is entitled to have his or her degree of productivity assessed under this Schedule.

5. Certificate of assessment

(1) An approved assessor who makes an assessment of the degree (if any) to which the productivity of the PWD in performing the work required under the contract of employment is affected by a disability must provide to the PWD and the employer a certificate of assessment.

(2) The certificate of assessment must –

- (a) state the degree of productivity capable of being achieved by the PWD in performing the work;
- (b) be in the form approved by the Commissioner; and
- (c) be signed by the PWD and the employer as well as by the approved assessor.

(3) The signing by the PWD or the employer of a certificate of assessment must not be taken to indicate any agreement on their part to continue the employment relationship.

6. Status of approved assessor

In making an assessment under this Schedule, an approved assessor (other than a public officer doing so in his or her capacity as a public officer) is neither a servant nor an agent of the Government.

SCHEDULE 3

[ss. 2 & 15]

PRESCRIBED MINIMUM HOURLY WAGE RATE

Hourly wage rate

Effective date

SCHEDULE 4

[ss. 10 & 16]

MINIMUM WAGE COMMISSION

1. **Terms and conditions of appointment of members**

- (1) A member who is not a public officer –
 - (a) holds office for the term that is specified in his or her instrument of appointment and on any other terms and conditions of appointment that the Chief Executive may from time to time determine; and
 - (b) may resign from office by giving notice in writing to the Chief Executive.

(2) A member who is a public officer holds office at the discretion of the Chief Executive.

(3) A member is eligible for reappointment.

(4) A resignation under subsection (1)(b) takes effect on the date specified in the notice or, if no date is specified, on the date the Chief Executive receives the notice.

2. **Removal of members**

The Chief Executive may, by notice in writing, remove from office a member who is not a public officer if the Chief Executive is satisfied that the member is unable or unfit to carry out the duties of the office due to permanent incapacity or other sufficient cause.

3. **Acting chairperson**

(1) The Chief Executive may appoint another member who is not a public officer to act as chairperson –

- (a) during a vacancy in the office of chairperson; or
- (b) while the chairperson is absent from Hong Kong or is, for any other reason, unable or unfit to carry out the duties of the office of chairperson.

(2) An acting chairperson has and may exercise all the powers, and must carry out all the duties, of the office of chairperson.

(3) Anything done by or in relation to a person purporting to act as chairperson is not invalid merely because –

- (a) there was a defect or irregularity in, or in connection with, the acting appointment; or
- (b) the occasion for the person to act had not arisen or had ceased.

4. **Meetings**

(1) Meetings of the Commission are to be held at the times and places appointed by the chairperson.

(2) The chairperson must preside at a meeting of the Commission.

(3) The quorum for a meeting of the Commission is –

- (a) the person presiding; plus
- (b) not less than half of the other members in office for the time being including at least 3 members who are not public officers and at least one who is.

(4) Subject to this Schedule, the Commission may regulate its own procedure.

5. **Status of Commission**

The Commission is neither a servant nor an agent of the Government and does not enjoy any status, immunity or privilege of the Government.

Explanatory Memorandum

The object of this Bill is to provide for a minimum wage at an hourly rate for certain employees. The minimum wage is expressed as an hourly rate to help ensure that employees' pay is commensurate with the time that they have worked. The Bill, however, does not seek to regulate the number of hours that employees spend at work. Further, except as expressly provided by it, the Bill does not affect the operation of the Employment Ordinance (Cap. 57) but payment of the minimum wage may be enforced under that Ordinance in the same way as any other portion of unpaid wages.

Part 1 – Preliminary

2. Clause 1 provides for the short title of the Bill (when enacted) and empowers the Secretary for Labour and Welfare to appoint a day for the Bill (when enacted) to come into operation.

3. Clauses 2, 3, 4 and 5 contain definitions that are necessary for the interpretation of the Bill.

4. Clause 6 deals with the application of the Bill. The Bill applies to all employees except the categories specified in clause 6(2), (3) and (4). Domestic workers who dwell free of charge in their employing household are exempt. Student interns are also among the exempted categories. Schedule 1 lists the education institutions with which the interns must be connected.

Part 2 – Entitlement to Minimum Wage

5. Clause 7 gives employees an entitlement to be paid wages that are not less than the minimum wage in respect of any wage period. The clause sets out how the minimum wage is calculated.

6. Clause 8 specifies the minimum hourly wage rate for employees. This is relevant to the calculation of the minimum wage under clause 7. The prescribed minimum hourly wage rate specified in column 1 of Schedule 3 applies to all employees other than those with a disability or persons who hold a valid Registration Card for People with Disabilities issued by the Central Registry for Rehabilitation established by the Government (“PWDs”) and are undergoing a trial period of employment. Schedule 2 sets out a procedure for the assessment of the degree of productivity of PWDs. For employees with a disability, their minimum hourly wage rate may be discounted from the prescribed minimum hourly wage rate proportionate to the degree to which their productivity in performing the work required under the contract of employment is reduced by the disability. As for PWDs undergoing a trial period of employment, their minimum hourly wage rate may be discounted by up to 50% of the prescribed minimum hourly wage rate.

7. Clause 9 has the effect of modifying contracts of employment so as to provide for a top-up payment if necessary to ensure that employees are paid not less than the minimum wage. The clause makes it clear that the modified contract of employment applies when calculating entitlements and liabilities under the Employment Ordinance (Cap. 57), the Protection of Wages on Insolvency Ordinance (Cap. 380), the Mandatory Provident Fund Schemes Ordinance (Cap. 485), the Employees’ Compensation Ordinance (Cap. 282) and the Occupational Deafness (Compensation) Ordinance (Cap. 469). Employees therefore are entitled to any shortfall of payment under those Ordinances arising when the top-up payment is taken into account and enforcement action (including prosecution) may be brought under those Ordinances relating to any such shortfall.

Part 3 – Minimum Wage Commission

8. Clause 10 provides for the establishment of a Minimum Wage Commission (“Commission”). The members are all appointed by the Chief Executive. Not more than 10 people who are not public officers, and not more than 3 who are, may be appointed. The chairperson cannot be a public officer. Schedule 4 sets out the terms and conditions of appointment of members, specifies how members may be removed, provides for the appointment of an acting chairperson and regulates the procedure at meetings.
9. Clause 11 sets out the functions of the Commission and the need to which it must have regard in performing its functions. The clause also empowers the Commission to carry out consultations, analyse data and consider submissions before arriving at recommendations.
10. Clause 12 sets out the powers that the Commission has for performing its functions.
11. Clause 13 enables the Chief Executive to specify the timeline within which the Commission must report.

Part 4 – Miscellaneous

12. Clause 14 prevents the parties to a contract of employment contracting out of the provisions of the Bill (when enacted).
13. Clause 15 enables the Chief Executive in Council to amend Schedule 3 having regard to any recommendation included in a report made by the Commission without being bound by the recommendation. In scrutinizing a notice amending Schedule 3, the Legislative Council may either approve or revoke the notice.
14. Clause 16 enables the Commissioner for Labour to amend Schedule 1 or 2 and the Chief Executive in Council to amend Schedule 4.
15. Clause 17 contains transitional provisions to cover situations where the first prescribed minimum hourly wage rate, or an increase or reduction in the

prescribed minimum hourly wage rate, occurs during the course of a wage period.

Part 5 – Repeal and Consequential Amendments

16. Clause 18 repeals the Trade Boards Ordinance (Cap. 63).
17. Clause 19 amends the Labour Tribunal Ordinance (Cap. 25) to ensure that the Labour Tribunal has jurisdiction to deal with claims for sums of money arising from a breach of the Bill (when enacted) other than claims specified in the Schedule to the Minor Employment Claims Adjudication Board Ordinance (Cap. 453).
18. Clauses 20 and 21 amend the Employment Ordinance (Cap. 57) to require employers to keep records of the total number of hours worked by an employee in a wage period while a prescribed minimum hourly wage rate is in force and to produce those records in a single document with certain other employment records.
19. Clause 22 amends the Minor Employment Claims Adjudication Board Ordinance (Cap. 453) to ensure that the Minor Employment Claims Adjudication Board has jurisdiction to deal with claims for up to \$8,000 arising from a breach of the Bill (when enacted).
20. Clause 23 amends the Disability Discrimination Ordinance (Cap. 487) to provide an exception for certain acts.

Economic, Sustainability, Financial and Civil Service Implications of the Proposal

Economic implications

As a wage floor applicable to all sectors and all jobs, statutory minimum wage (SMW) can potentially entail great economic implications for Hong Kong. Since Hong Kong has no experience of implementing an SMW, potential market responses arising from such a policy, and hence the exact economic impact, are difficult to gauge in detail before introduction.

2. Conceptually, SMW will entail an increase in the cost of doing business for those sectors employing low-paid workers, particularly for the low-paying sectors and small and medium-sized enterprises. The resultant increase in business cost may impact on inflation and hence competitiveness and economic growth, depending on the extent to which these labour cost increases can be passed on to the output price level. The precise impact will hinge on the SMW level, review mechanism, market response, and economic and labour market conditions at the time of introduction. In general, the higher the SMW level, the greater will be the impact. If the SMW level is set too high and goes way above the level commensurate with the productivity of workers, this could result in job displacement, especially for the more vulnerable workers with lower education, lower skills and older age.

3. Given Hong Kong's high degree of external economic orientation and the linked exchange rate system, flexibility of nominal wages and prices, particularly in the downward direction, is crucial to Hong Kong's competitiveness and resilience to external shocks. Preserving wage and price flexibility is thus especially important at a time when the economy is severely hit by the global financial crisis and recession. Should there be undue downward rigidity in wages, adjustment to external shocks as severe as in the present episode would need to take the form of a significant increase in unemployment.

4. Overseas experience suggests that the economic impact of an SMW can be somewhat mitigated by proper design and careful implementation. To minimise the adverse impact from SMW, the SMW regime including the review mechanism should be designed carefully¹,

¹ This is echoed in the International Monetary Fund's 2008 Article IV Consultation Report. It suggests that Hong Kong's minimum wage policy "should be designed carefully to avoid distortions and preserve labour market flexibility. It should be applied uniformly across employment groups, be set at a level to protect

taking into account factors including labour market conditions, business cost, Hong Kong's competitiveness, the economic situation, inflation, and the need to maintain as much flexibility as possible in the labour market. To this end, the Minimum Wage Commission established under the SMW regime will adopt an evidence-based approach through conducting data research and analysis as well as extensive consultations with stakeholders, with a view to ensuring a sensible balance between forestalling excessively low wages and minimising the loss of low-paid jobs, while sustaining Hong Kong's economic growth and competitiveness.

Sustainability implications

5. SMW would help prevent excessively low wages and narrow the prevalent wage gap. By providing a statutory wage floor to enhance the protection of vulnerable workers, it would also be conducive to the sustainability principle of fostering a harmonious society and upholding social equality and justice.

Financial and civil service implications

Non-staffing resources arising from SMW implementation

6. As mentioned in paragraph 2 above, the precise impact of SMW hinges on a number of factors including the level of SMW. Pitching the SMW at a high level could result in job loss, and workers with lower education, lower skills and older age are more vulnerable to such employment displacement. Some of these displaced workers may fall into our social security net for financial assistance to support their daily living, thereby increasing Government's expenditure on the Comprehensive Social Security Assistance (CSSA) Scheme. On the other hand, depending on whether there would be any substantial employment displacement, some low-income workers originally receiving supplements under the low earnings category of the CSSA Scheme may leave the welfare net after their wages have been raised to a higher level following the introduction of the SMW. Our CSSA expenditure on this front may be reduced as a result². The precise net effect of these "push" and "pull" factors on CSSA expenditure would largely hinge on how the proposed SMW level impacts on employment and the profile of those affected.

lower-income workers without unduly damaging their employment prospects."

² By way of background information, as at April 2009, there were 33 500 unemployment cases and 16 100 low earnings cases out of a total of 289 200 CSSA cases.

7. With regard to the special arrangement for persons with disabilities (PWDs), details of the assessment mechanism have to be further thrashed out in consultation with the rehabilitation sector and the stakeholders. As far as the civil service is concerned, PWDs are not paid lower than their counterparts (other things, such as seniority, being equal) in the same rank/post. The special arrangement has no impact on the civil service.

8. Depending on the level of SMW set, the Administration's policy to pay its employees no less favourably than the prevailing minimum wage rate stipulated under the SMW legislation (as and when enacted) should have minimal financial implications for the Government as an employer. This is because the pay for government employees, both civil servants and non-civil servants, would probably be above the minimum wage rate to be determined from time to time.

Staffing resources arising from SMW implementation

9. Given the wide and complex policy implications of SMW, the Labour Department (LD), the Economic Analysis and Business Facilitation Unit (EABFU) and the Census and Statistics Department have been provided with additional resources in taking forward the legislative exercise. Any resources required by LD, EABFU and the Judiciary for implementing and enforcing the SMW legislation in the long term will be sought according to the established resource allocation mechanism if necessary.