立法會CB(2)1533/15-16(07)號文件
LC Paper No. CB(2)1533/15-16(07)

SUBMISSION ON THE DRAFT CODE OF PRACTICE FOR EMPLOYMENT AGENCIES

向人力事務委員提交
就《職業介紹所實務守則草擬本》之意見書

Panel on Manpower, 24 May 2016

www.rightsexposure.org
info@rightsexposure.org
Tel: +852 6535 9446

16 May 2016

Submission by Rights Exposure to the Panel on Manpower regarding the consultation on the Draft Code of Practice for Employment Agencies

Overview

It has been over two years since the case of Erwiana Sulistyaningsih raised much-needed awareness about the widespread and systemic human and labour rights abuses migrant domestic workers experience in Hong Kong. In particular, it highlighted the failure of the Hong Kong SAR (HKSAR) government to adequately monitor, investigate and punish unscrupulous Employment Agencies (EAs). Civil society organisations, including those run by migrant domestic workers (MDWs), expected a robust and effective response from the HKSAR government, including changes to existing legislation and regulations.

However two years on, the HKSAR government's response has largely been limited to: i) a public awareness campaign about the rights and obligations of employers and migrant domestic worker; ii) bilateral talks with the Indonesian and Philippines consulates; and iii) an increase in staffing at the Employment Agency Administration (EAA). There is little or no evidence to indicate that these initiatives have effectively addressed the illegal activities of the EAs.

Rights Exposure welcomes the Hong Kong SAR government's draft Code of Practice (CoP). However, this non-binding document, as it stands, risks being ignored by unscrupulous EAs if it is not accompanied by an effective monitoring system.

In addition, the CoP does not provide for any new or amended regulation or legislation that would address the wholly inadequate penalties charged to

EAs convicted of overcharging commission to MDWs. The current law does not include a custodial sentencing option for serious offences and according to the data provided by the Labour and Welfare Bureau, the administrative fines range between HK$1,500-45,000. Given the systemic practice of overcharging excessive commission (around HK$5,000-7,000)[1], the low maximum fine clearly does not commensurate with the gravity of the offence, nor does it stand as an effective disincentive for unscrupulous EAs.

Similarly, the CoP does not remove the existing disincentives and barriers that MDWs face in accessing justice. For example, the live-in requirement increases the workers' isolation, which makes them more vulnerable to exploitation and abuse. Many are unable to withdraw from their employment because of the Two-Week Rule, where they must find new employment within two weeks of their contract being terminated or leave Hong Kong. This adds undue pressure for MDWs to stay in an abusive situation because without their job, they would be unable to pay off their debt to the agencies or support their families.

Given that it takes the Immigration Department 4-6 weeks to process an application for new employment, it is unlikely that MDWs could change jobs in two weeks, which means that the only realistic alternative is to apply for a visa extension, which does not allow the women to work. To take a case to the Labour Tribunal takes nearly two months. During this time, the workers would have to renew their visa several times and pay for their own accommodation, food and other expenses without any income. Thus, the costs of doing so make it impossible for the majority to seek redress for human and labour rights abuses.

Furthermore, statistics from the Labour and Welfare Bureau[2] show that of the 2,855 registered EAs in Hong Kong, 1,400 provide services to MDWs. Despite an increase in the number of inspections completed by the Employment Agency Administration (EAA) and the awareness raising campaign by the Labour Department to inform MDWs of their rights and mechanisms for lodging a complaint, only 12 EAs were convicted of offences in 2015. Although no breakdown of the offences were given, even if all 12 were for overcharging commission to MDWs, that would represent a mere 0.86 per cent of the total EAs inspected who provide services to MDWs. Given the broad range of research-based evidence documenting the widespread practice of overcharging commission by EAs in Hong Kong, the

[1] The HKSAR government continues to focus on the excessive fees charged by EAs in the home countries of MDWs and so claims no jurisdiction to address the problem. However, this focus fails to acknowledge the widespread practice of charging illegal fees by Hong Kong EAs where no overseas agency is involved. Research conducted by Rights Exposure, in collaboration with MDW trade unions, clearly shows Hong Kong EAs acting alone in charging fees above the legislated maximum under Hong Kong law.

[2] Written reply from the Secretary for Labour and Welfare to Hon. Emily Lau on 4 May 2016 (LEGCO Qu. No. 4).

number of convictions is likely to be a significant underrepresentation of the problem.

Questions for clarification

A. The HKSAR government stated that it will "review the need for turning the CoP into statutory requirements or introducing other regulatory measures in light of the implementation of the Code" and that it "does not rule out the options of bringing legislative amendments, including raising the maximum penalty, to tighten the regulation of EAs."[3]

1. What specific criteria will be used to monitor the effectiveness of the CoP and what methods will be used to collect evidence?
2. What threshold would need to be reached in order to prompt the HKSAR government to opt for statutory requirements (instead of the CoP) and/or pursue legislative amendments?

B. Regarding the lack of adequate measures to sanction unscrupulous EAs:

3. What penalties or sanctions, if any, can be administered under the CoP? If none, on what basis does the HKSAR government believe that the CoP - rather than legislative amendments - is an effective mechanism to ensure that unscrupulous employment agencies comply with the Employment Ordinance and Employment Agency Regulations?
4. The HKSAR government has stated on multiple occasions that MDWs who have been charged illegal fees by an employment agency should bring their case promptly to the attention of the EAA. Can you inform us how the HKSAR government intends to address the reality that agencies do not provide documentation of their illegal activities, which makes it almost impossible for MDWs to present the evidence necessary for the EAA to bring a case against an agency?

C. The CoP states that the following:
"Apart from complying with the statutory requirements (particularly those set out in Chapter 3) at all times, whether an EA licensee or an applicant can meet the standards set out in Chapter 4 is one of the important factors which C for L will take into account when considering if a person is a fit and proper person to operate an EA" (para9, p2).

"LD may issue warning letters to EAs for rectification of irregularities detected, including but not limited to failing to meet the statutory

[3] Para.13, p.4, Panel on Manpower Background brief prepared by the Legislative Council Secretariat for the meeting on 19 April 2016, "Regulation of employment agencies placing foreign domestic helpers", LC Paper No. CB(2)

requirements and/or standards set out in this CoP. C for L may also consider, amongst other relevant factors, the relevant track record[7] of the EAs and/or their capability of meeting such requirements/standards, in making decision of revoking, or refusing to grant or renew EA licenses under section 53(1)(c)(v) of EO"(para4.1.4, p21).

"For example whether systematic and intentional abuse has been detected or EAs have persistently failed to meet the requirements and / or standards set out in this CoP, as well as records of failure to rectify upon warning of LD, etc." (footnote 7).

5. What constitutes "relevant track record" of the EA and "systematic and intentional abuse"?
6. What methods will be used to recognize, identify and assess "relevant track record" and "systematic and intentional abuse"?

Recommendations:

In view of the above, Rights Exposure recommends:

1. The Labour Department to make public the criteria it will use for monitoring the CoP, in particular assessment on its effectiveness, and how it will gather evidence. This information should be part of the consultation on the CoP, allowing stakeholders to input into setting these criteria and evidence-gathering methods.

2. The Labour Department to make public the evidence it has collected and its assessment of the CoP. The assessment should incorporate the input of stakeholders, including migrant domestic workers' organisations and trade unions, and their recommendations.

3. Regarding the renewal of licences of EAs, the HKSAR government to adopt a system, as part of the CoP, requiring the Labour Department and EAA to consider the complaints made by MDWs. If this weight of evidence is sufficient to reasonably suggest breaches of the Employment Ordinance (EO) and/or Employment Agency Regulations (EAR), the Labour Department should be mandated to refuse the EA renewal of its licence.

概論

Erwiana Sulistyaningsih 一案發生已有兩年多，案件讓社會大衆意識到，在港海外家庭傭工的人權和勞工權利往往被有系統地剝削，亦突顯出香港政府未能適當地監管、調查及懲處無良的職業介紹所。對此，本地及外傭組織的公民社會團體一直期望，香港政府能提出實質而有效的回應，包括修訂現行法例。

然而事件發生兩年多以後， 香港政府僅作出以下三點回應：

1. 公衆教育，提高大衆有關僱主僱傭的責任和權力的意識；
2. 單方面與印尼和菲律賓領事商議；
3. 於勞工處的職業介紹所組增加人手。

以我們所見，此等舉措並未能有效地減低職業介紹所的違法活動。

Rights Exposure 歡迎政府草擬《實務守則》，可是，由於此文件並沒有法律效力，對於違反守則的無良職業介紹所，仍然是缺乏規管作用。

再者，現時法例對於收取外傭過高中介費的職業介紹所，明顯是過份寬鬆，而《實務守則》內卻沒有提到需要新增或修訂任何法例，以堵塞漏洞。現時法律下，嚴重濫收中介費並不會導致扣押刑罰；而根據勞工及福利局提供的數據，民事罰款額則是由一千五百到四萬五千港元不等。相比之下，現時普遍濫收中介費的數額是五千到七千港元，可見最高罰款仍是過低，不但未能反映該違法行爲的嚴重性，亦遠遠不足以阻嚇無良職業介紹所。

同時，對於阻礙外傭得到公平法律保障的各種問題，《實務守則》也能解決。例如法律上外傭必須留宿僱主家庭，如同把她們隔離，令她們更容易受到剝削和侵犯；要求外傭於終止合約後兩星期內找到新僱主否則遣返的「兩星期規定」，亦使很多外傭不敢離開僱主。外傭一旦失去工作，就不能償還債務，甚至維持一家生計，如此種種，都構成不必要的壓力，促使她們繼續忍受剝削的工作環境。

由於入境事務處需要四至六星期處理新的僱傭申請，外傭通常不能夠於兩星期內開始新工作。一般做法是申請延長簽證，但延長期間並不容許外傭工作。勞資審裁處處理案件亦需時達兩個月，期間外傭須要在沒有入息的情況下，延長簽證數次，並支付食宿費用。大部分外傭並不能負擔這筆開支，於是就此噤聲，不敢爭取被剝削的人權及勞工權利。

勞工及福利局的數據顯示，香港現有 2855 間已登記的職業介紹所，其中有 1400 間主要服務外傭。2015 年，勞工處的職業介紹所組就外傭問題增加巡查次數，也有宣傳教育工作，提高外傭對自身權利和投訴渠道的認知，但結果僅有 12 間職業介紹所被檢控。數據沒有詳述檢控內容，但即使全部十二宗案件都爲濫收中介費，亦只是所有被檢查的外傭職業介紹所的 0.86%。多項研究所得的證據顯示，濫收中介費的情況極爲普遍；我們相信，勞工處檢控的數目是遠低於現實中違法的情況。

提問

甲、香港政府表示，「因應實務守則的實施情況，政府當局將會檢討是否有必要把遵守實務守則列爲法定要求，並進行其他規管措施」，而且「並不排除會選擇提出法例修訂，包括提高最高罰款額，以收緊職業介紹所的規管。」（立法會人力事務委員會於 2016 年 4 月 19 日的會議背景資料 CB(2)1295/15-16(06) 第十三段）

1. 政府將以什麼標準來監控《實務守則》的有效性？將會如何搜集資料和證據？
2. 香港政府在什麼情況下會考慮將《實務守則》列爲法定要求，並修改現行法例？

乙、有關現行法例未能有效阻截無良職業介紹所：

1. 根據《實務守則》，違反守則的職業介紹所會面對什麼懲罰? 如果沒有懲罰，政府有什麼理由相信，在沒有修訂法例下，守則仍能有效地促使無良職業介紹所遵從現有的《僱傭條例》和《職業介紹所規例》？

2. 香港政府曾在不同場合中表示，被非法濫收中介費的外傭應該向勞工處的職業介紹所組舉報。可是，實際上職業介紹所是不會以文件記錄它們的非法行爲，請問政府，外傭可用什麼作證據來控告職業介紹所?

丙、《實務守則》中提到以下幾段：

除了要時刻符合法定要求外（特別是載述在第三章的法定要求），職業介紹所持牌人已否或申請人可否達到在第四章所載述的標準是處長考慮其是否經辦職業介紹所的適當人選時所考慮的重要因素之一。(第二頁，第九段)

勞工處可就查察到的違規事項（包括但不限於未能符合本守則所載述的法定要求及／或標準）向職業介紹所發出警告信，敦促其糾正。處長按《僱傭條例》第 53(1)(c)(v)條決定撤銷、拒絕發出或續發牌照時，可考慮所有相關因素，包括職業介紹所的相關紀錄及／或其達到這些要求及標準的能力。（《守則草擬本》第 18 頁，第四章 4.1.5 段）

例如職業介紹所有否涉及慣常和蓄意地犯規、或該職業介紹所有否持續違反實務守則中的有關法定要求及／或未能達到有關標準，以及有否被勞工處警告後仍未作出糾正的紀錄等。（《守則草擬本》第 18 頁，注解 7）

1. 當局會如何界定職業介紹所的「相關紀錄」以及是否「慣常和蓄意地犯規」？
2. 當局會以什麼方法辨認、鑒定以及評估「相關紀錄」和「慣常和蓄意地犯規」？

建議

有鑒於以上幾點，Rights Exposure 建議：

1. 勞工處應公開監察《守則》有效性的標準，以及當局如何搜集有關證據，而《守則》的咨詢內容，應該包含這些資料，讓持份者可以參與制定這些標準和蒐證方法。

2. 勞工處應公開已搜集的證據和對《守則》的評估。評估亦須包含持分者的意見，當中包括外傭組織和工會，和他們的提議。

3. 政府應在《守則》中加入一套制度，要求勞工處和職業介紹所組向職業介紹所續發牌照時，考慮外傭的投訴。如果有足夠證據和理由顯示，某職業介紹所違反《勞工條例》和《職業介紹所規例》，勞工處則應有法律責任拒絕續向其續發牌照。

Rights Exposure

2016 年 5 月 16 日

網址： www.rightsexposure.org
電郵: info@rightsexposure.org
電話： +852 6535 9446