

Executive Summary Direct Investigation Report

Government's Regulation of Boarding Facilities for Foreign Domestic Helpers

Introduction

Since the 1970's, the Government has allowed the importation of foreign domestic helpers ("FDHs") into Hong Kong. As of September 2020, around 370,000 FDHs were employed in Hong Kong. Amid the COVID-19 pandemic, there was extensive media coverage on local infection cases of FDHs, revealing an array of problems about boarding facilities for FDHs, such as over-crowdedness, poor hygiene and suspected violations of permitted building use.

2. Given the Government's policy to import FDHs and the large number of persons involved, it has a duty to ensure reasonable protection of their well-being, including their temporary boarding facilities. In this connection, we launched a direct investigation to examine the responsibilities of relevant departments, including the Labour Department ("LD"), the Home Affairs Department ("HAD") and the Immigration Department ("ImmD"), on the regulation of FDH boarding facilities as well as their collaboration, with a view to recommending improvement measures where necessary. The focus of our investigation is on FDH boarding facilities operated by employment agencies ("EAs"). The public views we received during the investigation showed general support for the Government's stepping up of the regulation of FDH boarding facilities. After examining the work of LD, HAD and ImmD, we have the following comments and recommendations.

Our Comments

(I) Improving the Standards of FDH Boarding Facilities Operated by EAs

Justifications

3. During their stay in Hong Kong, the several hundred thousand of FDHs may need accommodation out of their employer's residence in various circumstances. In

particular, during the “two-week rule” period^{Note} upon completion or premature termination of employment contract, some FDHs may remain in Hong Kong briefly, pending return to their place of origin or the Government’s approval of visa for joining a new employer. In other words, they have a practical need to stay on such residential premises commonly known as FDH boarding facilities. The demand for FDH boarding facilities is related to the total number of FDHs imported to Hong Kong, how many of them changed employers locally, and the time taken by ImmD to process their visa applications. However, the Government has no systematic data on the demand, locations, number and facilities of those premises, nor is there any dedicated legislation for regulating FDH boarding facilities.

4. Our investigation has revealed that upon receiving complaints about FDH boarding facilities in the past, LD often referred them to HAD for handling under the Hotel and Guesthouse Accommodation Ordinance (“HAGAO”) (Cap. 349) or the Bedspace Apartments Ordinance (“BAO”) (Cap. 447). In our view, if the FDH boarding facilities are operated in the same mode as guesthouses or bedspace apartments, HAD is duty bound to follow up pursuant to the two ordinances. However, according to our understanding, EAs operate FDH boarding facilities in multiple modes. Notably, many boarding facilities operated by EAs are for FDHs’ exclusive use and are therefore not advertised openly. Meanwhile, some of them are free of charge. Those boarding facilities thus fall outside the ambit of the HAGAO or the BAO. Referrals to HAD for follow-up action under the above legislation alone are clearly inadequate in regulating FDH boarding facilities. As a matter of fact, past cases (see Chapter 4) show that some FDH boarding facilities are not within the ambit of the HAGAO and the BAO.

5. Currently, the consulates of certain FDH-exportation countries have introduced an accreditation system for local EAs, authorising them to provide job placement services for their nationals. While the measure can help ensure the basic standards of FDH boarding facilities operated by accredited EAs, the accreditation systems of consulates are not mandatory under any local legislation. Setting requirements for FDH boarding facilities by consulates alone may not be sufficient to address the problem, not to mention that protection of the well-being of FDHs is a duty incumbent upon the Hong Kong Government.

6. We appreciate that EAs perform a social function in operating boarding facilities for FDHs in need of temporary accommodation. The quality of those

^{Note} The Government’s existing policy provides that FDHs are required to leave Hong Kong upon completion of the employment contract or within two weeks from the date of its premature termination, whichever is earlier.

boarding facilities which charge minimal or no fees at all is inevitably constrained by resources. Should the Government step up the regulation of FDH boarding facilities, there may be concerns that some EAs may have to shift the rising costs to the helpers or the employers, or even cease the boarding service, thereby rendering an undesirable outcome for all three parties concerned. Our response is that FDH boarding facilities indeed perform a social function. The purpose of regulatory measures is not to stamp out those premises, but to provide the Government with a means to ensure reasonable accommodation for FDHs employed in Hong Kong and to stipulate the standards for compliance by operators. Substandard boarding facilities for FDHs are unacceptable to society from a humanitarian point of view, while tarnishing Hong Kong's reputation at the same time. Admittedly, in devising any regulatory measures, the Government has to strike a balance in light of multiple considerations, actual circumstances, opinions of various stakeholders, etc. On the issue of regulating FDH boarding facilities, the Government may candidly liaise with stakeholders to draw up a generally acceptable proposal for progressively improving/enhancing the operation standards of FDH boarding facilities.

7. Based on the above analysis, we consider it essential for the Government to adopt measures to improve the standards of FDH boarding facilities operated by EAs. We appreciate that the Government will need to study and consider a wide range of factors related to this issue (including legal implication, impact on the manpower resources of departments and on the EA sector, etc.), and consult stakeholders. Hence, we recommend that the Government first implement administrative measures in the short and medium terms, and evaluate their effectiveness. If the result is unsatisfactory, the Government should explore the feasibility of introducing a statutory regulatory regime through legislative amendments in the long run, with a view to more stringent regulation of FDH boarding facilities operated by EAs.

Responsible department

8. We consider the new improvement measures should be implemented by LD, the department responsible for labour policy and administration. First, from a legal perspective, according to its long title, the Employment Ordinance ("EO") is to regulate general conditions of employment and EAs. The EO stipulates how LD should regulate the operation of EAs and empowers LD to take different regulatory measures.

9. The EO also empowers LD to issue the Code of Practice for Employment Agencies ("CoP") setting out principles, procedures, guidelines and standards for the

operation, management or control of EAs. Paragraph 3.7.2 of the CoP stipulates the requirements for EAs providing boarding facilities or bedspaces for job seekers, i.e. EAs must ensure that relevant approvals or licences for operating the boarding facilities or bedspaces have been obtained from all relevant Government authorities, and the standards as prescribed by the relevant laws of Hong Kong are fully and satisfactorily met at all times. As seen from this and the preceding paragraphs, the EO and the CoP provide a basis for LD to take further measures towards improving the operation standards of the FDH boarding facilities provided by EAs, and closing the regulatory gap existing in those premises outside the ambit of the HAGAO and the BAO but are operated by EAs.

10. Moreover, EAs operate FDH boarding facilities for the incentive to promote their FDH placement service. Currently, LD only regulates the job placement service of EAs, although the placement and boarding services provided for FDHs are closely related. As both services form parts of the operation and major business of EAs engaged in FDH placement, it is reasonable and synergetic for LD to regulate them together. Besides, the purpose of improving the operation of FDH boarding facilities is to protect the safety and welfare of FDHs employed in Hong Kong, thereby achieving the ultimate policy objective of safeguarding the rights and interests of labour. Evidently, this is a labour-related issue, rather than simply about the management of premises.

11. As a matter of fact, past cases (see items 3 and 4 in Table 3) show that LD would take appropriate follow-up action where an EA was allegedly involved in illegal operation of FDH boarding facilities or violated the CoP or relevant legislation. Consequently, it is not entirely outside the purview of LD to handle the operation of FDH boarding facilities by EAs. It follows logically that LD is the appropriate authority to take further measures to enhance their operation standards.

12. In sum, from the perspectives of law, policy objective and actual operation, it is rational and reasonable for LD to adopt improvement measures to enhance the quality of FDH boarding facilities operated by EAs which fall outside the ambit of the HAGAO and the BAO for protecting the well-being of FDHs employed in Hong Kong.

Short- and medium-term measures

13. Given the complexity in devising and implementing a statutory regulatory regime, we are of the view that the Government may first consider making

improvements through the following administrative measures.

14. First, LD may liaise with stakeholders (including the EA sector, the labour sector, consulates, and relevant policy bureaux and departments) and request EAs to submit information about their FDH boarding facilities, thereby creating a database of FDH boarding facilities operated by EAs, covering such details as their number, locations, fees and any licences issued by HAD. The database will enable LD to obtain systematic data on the existing FDH boarding facilities operated by EAs, providing a basis for formulating improvement measures.

15. Second, LD may compile and publish a list of FDH boarding facilities operated by EAs, comprising such details as the names of EAs, addresses of boarding facilities, fees and any licences issued by HAD. While the list does not imply the Government's recognition of the standards of those boarding facilities, it can enhance information transparency and facilitate informed choices of FDHs, as well as foster improvement in the sector's operation standards by market forces. To this end, it is crucial that information on the list is comprehensive and easy to understand as far as possible.

16. Moreover, we recommend that LD issue more guidelines to the EA sector on the operation of FDH boarding facilities. According to paragraph 3.7.2 of the existing CoP, EAs providing boarding facilities for job seekers must ensure that necessary approvals or licences have been obtained from all relevant Government authorities, and comply with relevant laws of Hong Kong. LD may add new provisions in the CoP to specify the relevant laws, standards and guidelines applicable to EAs for their reference and compliance. In addition, as the pandemic revealed that some FDH boarding facilities were overcrowded with poor hygiene, LD may consider drawing up a set of guidelines for reference by the EA sector, referencing the existing guidelines of relevant departments and the requirements of consulates on the boarding facilities of EAs accredited for FDH placement. It is up to the authorities to decide, depending on actual situations, whether the guidelines should be legally binding at the initial stage of implementation. Yet, it should at least provide guidance for improving the environmental hygiene of FDH boarding facilities.

17. To take a further step, LD may introduce new licensing procedures requiring an EA to undertake, in the application for new licence or licence renewal, that if boarding facilities are provided for FDHs, it will ensure compliance with relevant legislation and requirements of Government departments, including obtaining necessary licences. LD should take appropriate enforcement action under the EA licensing regime if the EA's

boarding facilities are found in breach of other Government departments' requirements subsequently.

18. We also recommend that LD strengthen routine collaboration with stakeholder bureaux and departments for exchanging information about the operation of FDH boarding facilities, formulating regulatory measures jointly and making referrals as necessary. In our view, FDH boarding facilities operated in the same mode as "hotel or guesthouse" or "bedspace apartment" defined under the HAGAO or the BAO should continue to be regulated by HAD pursuant to the two ordinances. In this connection, HAD may consider reviewing and optimising the procedures for handling complaints about FDH boarding facilities to expedite case handling. As regards FDH boarding facilities operated by EAs that fall outside the ambit of the HAGAO or the BAO, LD can take proper action if, depending on the situations, they are in breach of the CoP and relevant legislation. Hence, LD and HAD should establish a collaboration mechanism to facilitate mutual case referrals and information sharing.

19. Meanwhile, although the operation of FDH boarding facilities falls outside the purview of ImmD, it has a role to play in the overall policy on importation of FDHs with the responsibility for processing their visa applications. ImmD, therefore, should refer cases to LD and HAD for handling and share information where necessary. Depending on the situation, the department may also review the procedures for processing visa applications from FDHs, and reallocate manpower to expedite the approval of new applications where necessary.

20. Finally, LD should step up education in urging the EA sector to actively cooperate with the Government's initiatives, and encouraging voluntary improvement of FDH boarding facilities.

Long-term measures

21. We consider that LD should evaluate the effectiveness of the above short- and medium-term measures after implementation for a certain period. If the result is unsatisfactory, LD should explore the feasibility of introducing a statutory regulatory regime through legislative amendments in the long run, with a view to more stringent regulation of FDH boarding facilities operated by EAs.

22. Should the need to implement a statutory regulatory regime in the long run arise, LD should stipulate the operation standards for FDH boarding facilities. During the

process, LD could take reference from existing regulatory regimes on the management of other premises, the standards and requirements stipulated by consulates for FDH boarding facilities of accredited EAs, and consult stakeholders including relevant authorities.

23. In considering whether to introduce a new regulatory regime, LD reiterated that the EO is intended to provide for the protection of the wages of employees, to regulate general conditions of employment and EAs, and for matters connected therewith. LD is not empowered by the EO to regulate boarding facilities operated by EAs. If a new regulatory regime is to be established, it remains to be clarified whether the EO is the suitable instrument. By way of illustration, if the boarding facilities operated by EAs are not an integral part of their business, the EO may not provide an adequate legal basis for regulating such facilities. Moreover, LD is concerned about possible loopholes to emerge upon implementation of the new regime. For instance, to evade the requirements under the new regime, EAs may arrange for unrelated persons or companies to operate the boarding facilities, or arrange to accommodate FDHs in the boarding facilities operated by other persons or organisations. We acknowledge the concerns of LD. Should the need to introduce a statutory regulatory regime by legislative amendments arise, it is incumbent upon the Government to study and consider the issue thoroughly, including how to amend existing legislation to confer adequate powers on the authorities to perform regulatory duties, and how to plug any loopholes that may emerge upon implementation. Where necessary, the Government should conduct more in-depth research in due course.

24. FDH boarding facilities operated in the same mode as “hotel or guesthouse” or “bedspace apartment” are already regulated under the HAGAO or the BAO. Should the need to introduce a new regulatory regime arise in the future, whether FDH boarding facilities within the ambit of the two ordinances should be excluded from the new regime is subject to the study and decision of LD jointly with HAD. Apart from these two types of FDH boarding facilities, we consider that the new regulatory regime, if needed in the future, should encompass all FDH boarding facilities operated by EAs.

(II) “Live-in Requirement” during Contract Period

25. The existing policy requires all Hong Kong employers to sign with their FDHs the Standard Employment Contract (“SEC”) prescribed by the Government. Clause 3 of the SEC provides that during the employment period, the FDH shall work and reside in the employer’s Hong Kong residence specified in the SEC. Clause 15 of the SEC

stipulates that any variation to clause 3 by the employer should be made with the prior consent of the Commissioner for Labour (“the Commissioner”).

26. Our investigation reveals that some employers may request their FDHs to stay in boarding facilities operated by EAs during the contract period. A common scenario is that the employer’s residence is not yet ready for accommodating the FDH upon their arrival in Hong Kong. Our findings show that some employers fail to comply with clause 3 of the SEC in the above scenario without the prior consent of the Commissioner as required under clause 15, and that it generally involves just one or a few days.

27. We consider that the “live-in requirement” under clause 3 of the SEC, aimed at protecting the welfare of FDHs in receiving free board and lodging from their employers, should be enforced stringently. We accept that some employers may be compelled to arrange temporary accommodation for FDHs via EAs, such as when their residence is not ready due to unforeseeable circumstances upon the FDHs’ arrival in Hong Kong. Yet, it is a different case if employers deliberately ignore their obligation to make advance preparation for accommodating the FDHs before their arrival in Hong Kong. From the perspectives of business operation and customer service, it is understandable for EAs to provide boarding facilities for FDHs in certain situations. But if this flexibility measure is misused or even abused, it is against the original intent of the measure and improper. As to whether the “live-in requirement” should be maintained, it is a policy issue not subject to our comments.

28. We recommend that LD step up publicity and education on the employers’ obligation to comply with the “live-in requirement” under clause 3 of the SEC and make advance preparation for accommodating the FDHs before their arrival in Hong Kong. We also recommend that LD remind the EA sector of the “live-in requirement” under clause 3 of the SEC if engaged in FDH boarding service. LD should take appropriate follow-up action if it discovers any employers or EAs ignoring their obligation by allowing FDHs to live out of the employer’s residence during the employment period.

(III) Processing of Applications for Employment Visa

29. The time taken by ImmD to process applications from FDHs for employment visa affects the demand for FDH boarding facilities. We are pleased to note that during the pandemic, ImmD has implemented measures to expedite the approval procedures, including flexible staff deployment and more extensive use of electronic services. We recommend that ImmD continue to review and improve its measures and efficiency in

processing applications for visa to change employers submitted by FDHs locally, and expedite the approval procedures as far as resources permit, thereby minimising the potential demand for FDH boarding facilities arising from their stay in Hong Kong pending visa approval.

Recommendations

30. This Office has made the following recommendations to LD, HAD and ImmD:

LD

- (1) liaise with stakeholders and request EAs to submit information about their FDH boarding facilities (if any), thereby creating a database of FDH boarding facilities operated by EAs;
- (2) compile and publish a list of FDH boarding facilities operated by EAs for better information transparency and facilitating informed choices of FDHs, as well as fostering improvement in the sector's operation standards by market forces;
- (3) revise the CoP with more specific details on the relevant laws, standards and guidelines applicable to EAs engaged in FDH boarding service for their reference and compliance; in addition, consider drawing up a set of guidelines for reference by the EA sector, taking into reference the existing guidelines of relevant departments and the requirements of consulates on the boarding facilities of EAs accredited for FDH placement;
- (4) require an EA to undertake, in the application for new licence or licence renewal, that it will ensure compliance with relevant legislation and the requirements of Government departments if it provides boarding facilities for job seekers; and take appropriate enforcement action under the EA licensing regime if the EA's FDH boarding facilities are found in breach of other Government departments' requirements subsequently;
- (5) step up education in urging the EA sector to actively cooperate with the Government's initiatives, and encouraging voluntary improvement of FDH boarding facilities;

- (6) step up publicity and education on employers' obligation to comply with the "live-in requirement" under clause 3 of the SEC, remind the EA sector of the "live-in requirement" if engaged in FDH boarding service, and take appropriate follow-up action if it discovers any employers or EAs ignoring their obligation by allowing FDHs to live out of the employer's residence during the employment period;
- (7) evaluate the effectiveness of the measures in paragraphs 30(1) to (6) and (10) after implementation for a certain period; if the result is unsatisfactory, explore the feasibility of introducing a statutory regulatory regime through legislative amendments in the long run, with a view to more stringent regulation of FDH boarding facilities operated by EAs;

HAD

- (8) review and optimise the procedures for handling complaints about FDH boarding facilities to expedite case handling;

ImmD

- (9) continue to review and improve its measures and efficiency in processing applications for visa to change employers submitted by FDHs locally, and expedite the approval procedures as far as resources permit, thereby minimising the potential demand for FDH boarding facilities arising from their stay in Hong Kong pending visa approval; and

LD, HAD and ImmD

- (10) strengthen routine collaboration between LD and stakeholder bureaux and departments for exchanging information about the operation of FDH boarding facilities, formulating regulatory measures jointly, and making referrals as necessary. HAD and ImmD should provide information and assistance as necessary.

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