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By Fax (2868 5069) and By Post

20 June 2002

Dear Mrs TING,

Public Officers Pay Adjustment Bill

I refer to your letter dated 10 June 2002 and would be pleased if you could further clarify the following questions:-

(a) Parts 2 and 3

Do you think that, in order to avoid doubt, it is desirable to give a definition of "civil servants" in the Bill?

(b) Clause 5

Thank you for your list of examples of public officers whom are to be affected by the pay adjustments provided in the Bill. I wonder if you would perhaps inform the Bills Committee whether the list of examples is exhaustive, which means that all public officers holding offices of emolument under the Government as defined under the Interpretation and General Clauses Ordinance (Cap. 1) are included.

(c) Clause 9 - Justifications for the provision

As suggested by the drafting of clauses 3(3), 4(3), 5 and 7, the contracts of employment of persons covered by these clauses already enable pay levels or

allowances to be determined or adjusted in accordance with or by reference to the civil service pay scales or ICAC pay scale. Bearing in mind of the presumption that the Legislature does not legislate unnecessarily, and that there may be situations which warrant legislation for clarification but without seeking to affect existing rights and obligations, please provide justifications for proposing to have clause 9 applicable to all the contracts of employment of persons covered by this Bill.

(d) Clause 9 - Drafting aspect

I appreciate that the Administration's policy intention of Clause 9 is "to modify those provisions of the [employment] contract dealing with pay, in accordance with the provisions of the Bill". Nevertheless, the provision in clause 9 that "[t]he contracts of employment of public officers *are to be read as* expressly authorizing the adjustments ..." implicates a construction of the contracts. Clause 9, as it now stands, seems to have the effect of imputing an intention to the parties that this was what they intended when they entered into the employment contract.

I referred to the precedents of other legislative provisions in my letter to you dated 5 June 2002, which are essentially legislative provisions modifying or overriding particular terms of certain contracts. (Sections 50(1), 51(2) and 115A(1) of the Landlord and Tenant (Consolidation) Ordinance (Cap. 7) and section 42(1) of the Employees' Compensation Ordinance (Cap. 282).) In those legislation, the provisions typically read as follows:-

"51. Meaning of 'domestic tenancy'

(2) Notwithstanding the purpose for which premises were let, in determining the nature of a tenancy for the purpose of this Part, the following provisions shall apply-"

(section 51(2), Landlord and Tenant (Consolidation) Ordinance (Cap. 7))

"42. Insurer's liability

(1) Notwithstanding anything in a policy of insurance issued for the purposes of this Part, an insurer is liable, in a proceeding under section 36LA or 44, for the amount of the liability of the employer not exceeding the available amount covered by the policy of insurance."

(section 42(1) of the Employees' Compensation Ordinance (Cap. 282))

I wonder if the Administration would reconsider clause 9 of the Bill in light of the above precedents?

(e) Clause 10 and Schedule 3

The pay of the public officers who are remunerated on a starting salary that is not linked to the annual civil service pay adjustment are not affected by any pay adjustment because of their contractual right under their employment contracts, and not because of the exemption provided in the Bill.

Again I referred to your LegCo Brief issued on 22 May 2002, "[a]n appointee recruited in a particular year on the delinked starting salary will remain on that salary until he qualifies for an increment after which he will join the respective pay scale and move along the adjusted scale in subsequent years. As a result of this delinking arrangement, *any adjustment to the civil service pay scales, whether positive or negative, will not apply to the starting salaries.* ...[w]hen these officers eventually join the adjusted pay scale, their pay level will thereupon reflect the effect of the pay reduction." (para. 17, p.6)

Similarly, judges and judicial officers, the other category of public officers who are to be exempted from the pay adjustments as set out in Schedule 3, are remunerated in accordance with the Judicial Officers Pay Scale and such pay scale does not fall within the provisions of the Bill.

If the policy objective is to make it clear that these 2 categories of public officers will not be affected by the present adjustments, perhaps the same can be achieved by putting in a clause to declare that, for avoidance of doubt, that these public officers are not affected by the adjustments provided in the Bill. To do otherwise may give an impression that the contractual rights of these public officers would also somehow be modified or disturbed but for the exemption provision.

I would be pleased if you let me have a reply in both languages as soon as possible.

Yours sincerely,

(Kitty CHENG)
Assistant Legal Adviser

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