

**President's ruling on
Hon CHAN Wing-chan's proposed
Employment (Amendment) (No. 2) Bill 2000**

Hon CHAN Wing-chan has submitted the above Bill which he intends to introduce into this Council. I am required to rule whether it relates to Rule 51(3) and (4) of the Council's Rules of Procedure.

Rule 51(3) and (4) of the Rules of Procedure

2. Rule 51(3) and (4) read as follows:

"51(3) Members may not either individually or jointly introduce a bill which, in the opinion of the President, relates to public expenditure or political structure or the operation of the Government."

"51(4) In the case of a bill which, in the opinion of the President, relates to Government policies, the notice shall be accompanied by the written consent of the Chief Executive in respect of the bill."

Purpose of the Bill

3. According to Mr CHAN's letter accompanying the Bill, the Bill seeks to exclude "chauffeur" from the definition of "domestic servant" in section 2 of the Employment Ordinance (Cap. 57) so that foreign domestic helpers (FDHs), as a kind of domestic helpers, are banned by law from performing driving duties in Hong Kong. Apart from the exclusion of "chauffeur", the Bill seeks also to make other amendments relating to chauffeurs in the Ordinance. As I understand, with effect from 1 January 2000, the Government has imposed a general ban on FDHs performing driving duties. However, the Government has also provided an administrative avenue for employers who have a genuine need for their FDHs to perform driving duties incidental to and arising from domestic duties to apply to the Director of Immigration for permission to allow their FDHs to perform such duties.

4. The Secretary for Education and Manpower has been invited to offer his comments on Mr CHAN's Bill and Mr CHAN has been invited to respond.

The Administration's view

5. The Secretary is of the view that the Bill will not achieve the intended effect of forbidding FDHs from performing driving duties because the framework governing the work of foreign domestic helpers is implemented through administrative measures. Clause 2 of the Bill proposes to exclude "chauffeur" from the definition of "domestic servant"; at the same time, clauses 3 to 8 propose to add the phrase "a chauffeur or" before the words "domestic servant" in all sections where these words appear and where the protection or exemption applies to domestic servants. It follows that the effect of clause 2 would be offset by clauses 3 to 8. The Bill, even if passed, would not cause any changes to the policies under the Employment Ordinance in any respect. Although the Bill may achieve its purpose in its literal sense, it will not achieve Mr CHAN's purpose in any substantive respect.

6. The Secretary also states that the Bill relates to the government policy that, in order not to intrude into the private life of individual households, persons employed in domestic services should be exempted from the Occupational Safety and Health Ordinance (Cap. 509) (OSHO).

7. According to the Secretary, OSHO expressly excludes "domestic servant", which has the same meaning as in the Employment Ordinance, from the definition of "employee". OSHO therefore does not apply to a chauffeur who is defined as a domestic servant under the Employment Ordinance. If "chauffeur" is to be taken out of the definition of "domestic servant", as the Bill proposes, a chauffeur will fall within the scope of OSHO. The definition of "workplace" in OSHO does not include the driver's seat of a vehicle located in a public place and domestic premises at which the only employees are domestic servants. If a chauffeur is excluded from the definition of "domestic servant" as the Bill proposes, the exception provided in OSHO would no longer apply to the domestic premises of households which employ chauffeurs.

8. The Secretary further advises that if the Bill were enacted, occupational safety officers of the Labour Department could enter premises which include domestic premises where the workplace is located to enforce provisions of OSHO and the Occupational Safety and Health Regulation with which a chauffeur and his employer have to comply. The enforcement actions would intrude into the private life of individual households and thus run contrary to the Government's policy.

9. The ultimate effect of the Bill, if enacted, would be that a chauffeur would only be exempted from OSHO in limited situations, i.e. when working at the driver's seat of a vehicle located in a public place.

Mr CHAN Wing-chan's response

10. Mr CHAN has not made a response to the Secretary's view on the practical effect of the proposed Bill. As regards the Secretary's view that the Bill relates to Government policy, Mr CHAN maintains that the Bill does not affect Government's policy as reflected in OSHO because FDHs and local domestic helpers who also perform driving duties, and local drivers who also perform domestic duties will be exempted from OSHO.

Advice of Counsel to the Legislature

11. Counsel to the Legislature agrees to the Secretary's view that the Bill would not achieve the purpose of forbidding domestic servants from undertaking driving duties and it would not cause any changes to the policies reflected in the Employment Ordinance.

12. As regards the effect of the Bill on the Occupational Safety and Health Ordinance (Cap. 509), he agrees that an amendment to exclude "chauffeur" from the definition of "domestic servant" in the Employment Ordinance would have the effect of including chauffeur as one of the types of employees covered by OSHO.

13. In section 6 in OSHO, which is one of the key provisions of the Ordinance, section 6(1) provides that, the employer's general duty of care applies to all kinds of employees unless they are excluded for application by OSHO. The situations under which the employer is imposed this general duty of care are covered by paragraphs (a) to (e) of section 6(2). Only paragraph (d) relates to the workplace specifically; other paragraphs cover broader and general situations. Currently, chauffeurs who are within the definition of "domestic servant" of the Employment Ordinance are among those excluded from OSHO. If chauffeurs were excluded from that definition in the Employment Ordinance, they would be covered by OSHO as a result.

14. Counsel to the Legislature advises that it would be sufficient for me to find that the Bill would have a substantive effect on the government policies as reflected in OSHO if I am satisfied that the Bill would have the effect of extending the statutory general duty of employer to his employees to include chauffeurs as well. He concludes that Mr CHAN's Bill relates to Government policies within the meaning of Rule 51(4).

My opinion

15. In my previous rulings on bills proposed by Members, I have stated my view that the Government policies, referred to in Rule 51(4) which has

been made to implement Article 74 of the Basic Law, include, among others, policies that have been decided by the Chief Executive or Chief Executive in Council and those that are reflected in legislation. I am in agreement with the Secretary and Counsel to the Legislature that Mr CHAN's proposed Bill relates to the Government's policy that persons employed in domestic services, including chauffeurs, should be exempted from the Occupational Safety and Health Ordinance, despite Mr CHAN's claim that the purpose of his Bill is only to seek to ban FDHs from performing driving duties in Hong Kong.

16. In examining the Bill and the arguments put forth by all the parties concerned, I was at one stage puzzled by the absence of a claim being advanced that the Bill relates to the Government's policy on the performance of driving duties by FDHs. The views of the Secretary and Counsel to the Legislature, that the Bill would not achieve Mr CHAN's purpose and would not cause any changes to the policies reflected in the Employment Ordinance, subsequently cleared my puzzlement. The fact is that the provisions in the proposed Bill cannot in their existing terms have any effect on, hence relate to, the policy which Mr CHAN purports to change, but has the effect of relating to the Government policy reflected in another piece of legislation, i.e. OSHO.

17. I have considered, assuming that the terms of the provisions in a Member's bill would not achieve his purpose and, at the same time, would not relate to any Government policy, whether I should allow the Member to introduce the bill, knowing clearly that it will have no effect at all even if passed by the Council. My conclusion for the moment is that this is a matter that the President should address when the situation arises, if it arises at all, having regard to the need to ensure that the time of the Council should not be engaged in frivolous or meaningless proceedings.

Ruling

18. Having considered the views of the Secretary and Mr CHAN, together with the advice of Counsel to the Legislature, I rule that Mr CHAN's proposed Bill relates to Government policies within the meaning of Rule 51(4).

(Mrs Rita FAN)
President
Legislative Council

28 June 2000