

**President's ruling on
Hon CHAN Kwok-keung's proposed
Legal Aid (Amendment) Bill 2000**

Hon CHAN Kwok-keung 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 the Bill's Explanatory Memorandum and Mr CHAN's letter accompanying the Bill, his purpose in proposing the Bill is to amend the Legal Aid Ordinance (Cap. 91) to empower the Director of Legal Aid (DLA) to grant legal aid to a person involved in litigations (including appeals) pertaining to the provisions in the Employment Ordinance (Cap. 57) or cases concerning employment contracts, even though the person's financial capacity exceeds the eligibility limit for the standard legal aid scheme.

4. The Director of Administration has been invited to offer her comments on the Bill and Mr CHAN has been invited to respond.

The Administration's view

5. The Director of Administration (D of Admin.) considers that the Bill relates to "public expenditure", "operation of the government" and "government policies" under Article 74 of the Basic Law, for the reasons stated in the following paragraphs.

Public expenditure

6. The Bill, if enacted, would give rise to additional legal costs and staff costs for the Legal Aid Department, because the Department will have to process the merits of legal aid applications in cases involving employees compensation, employment disputes and wage claims, even if the applicants fail the means test, in order that the DLA may consider whether to exercise the discretion as provided in the Bill. According to the D of Admin.'s estimation, the additional staff costs are about \$0.7 million a year. Where the DLA exercises the discretion and grants legal aid in meritorious cases, the estimated additional legal costs are in an amount which could well exceed \$11.76 million a year. Furthermore, the D of Admin. estimates that the resultant additional cases going to the courts for adjudication will incur an additional staff cost of about \$2.4 million a year for the Judiciary.

Operation of the Government

7. The D of Admin. states that because the Bill will require the Legal Aid Department to also process the legal aid applications which fail the means test in order to determine their merits, it relates to the operation of the Department.

Government policies

8. The D of Admin. states that the Government's policy is that legal aid should only be made available to persons who otherwise do not have the financial resources to pursue justice. All legal aid applicants are therefore subject to the means test. The only exception to this policy is in respect of meritorious applications involving claims of a breach of the Bill of Rights Ordinance or of an inconsistency with the International Covenant on Civil and Political Rights as applied to Hong Kong, in which the DLA has a discretion as a matter of human rights policy. This policy was promulgated by the then Chief Secretary when moving the Second Reading of the Legal Aid (Amendment) Bill 1995 in the Legislative Council. The effect of Mr CHAN's Bill is that legal aid may be granted at the DLA's discretion in meritorious cases irrespective of the means of the applicants; hence it relates to the Government's policy.

Hon CHAN Kwok-keung's response

9. Mr CHAN does not agree to the D of Admin.'s views stated above. Mr CHAN contends that:

- (a) no additional staff costs need to be incurred as the estimated additional workload in processing applications could well be

absorbed under the Government's Enhanced Productivity Programme which is applicable to the Legal Aid Department;

- (b) the estimated additional legal costs need not be incurred if the legal aid cases are handled by the Department's in-house lawyers;
- (c) the Judiciary need not incur additional expenses as the effect of the additional cases could be offset by a longer waiting time for cases to be processed; and
- (d) the Bill seeks to implement the rights of employees under the Basic Law and international labour conventions as applied to Hong Kong, and cannot contravene government policies or affect the operation of the government.

Advice of Counsel to the Legislature

10. Counsel to the Legislature advises that the Bill proposes to empower the Director of Legal Aid to also waive the limit of financial resources when considering whether to grant a legal aid certificate in respect of the proceedings relating to:

- (a) a breach of the provisions of an employment contract or the Employment Ordinance and such breach is related to an employee's benefits under the employment contract or the Ordinance; or
- (b) the appeal or the enforcement of the decisions of the Labour Tribunal or the court in such cases.

What the Bill, if enacted, would cover are cases heard in the District Court and Court of First Instance which fall within the description of the above two categories.

11. The nature of work required for implementation of the proposed Bill is related to the processing of applications. This entails the assessment of the merits of the applications; it is not purely administrative. The main theme of the Member's response is that these costs could be avoided by the Legal Aid Department and the Judiciary absorbing the additional work. Counsel to the Legislature considers that this argument cannot stand unless the additional work involved is such that it is unlikely to impose more than a minimal continuing demand on public expenditure.

12. As regards the Administration's submission that the Bill would have

effect on the operation of the Legal Aid Department in handling applications for legal aid, Counsel to the Legislature is of the view that, whilst the Bill would enlarge the categories of cases in respect of which the Director may exercise discretion to waive limits of financial resources, he doubts if that amounts to affecting the operation of the Government.

13. As regards "government policies", referring to my previous rulings that the fact that a bill does not run contrary to or substantially deviate from existing policies or that a bill is aimed at implementing certain provisions of the Basic Law does not necessarily mean that the bill is not related to government policies, Counsel to the Legislature advises that the Bill relates to government policies.

My opinion

14. In my previous rulings on bills proposed by Members, I stated that in order for a bill not to be regarded as "relating to" public expenditure; political structure; operation of the government; or government policies (hence caught by Rules 51(3) and (4) which have been made to implement Article 74 of the Basic Law), the implementation of the bill must not have a substantive effect on one or more than one of these four prescribed areas.

15. I also stated, in regard to the term "public expenditure", that the term is wider in scope than "the disposal of or charging any part of the revenue or other public moneys of Hong Kong" under Rule 57(6). A bill will relate to public expenditure if its implementation has the effect of either increasing or reducing public expenditure and the amount involved is substantial and is such that I must not ignore.

16. As for the term "operation of the government", I said that if the implementation of a proposed bill would have obvious long-term effect on the structure or procedure of the executive authorities, then I would form the opinion that the bill relates to the operation of the government.

17. As regards "government policies", I said they include, among others, policies that are reflected in legislation.

18. I find it difficult to agree to Mr CHAN's reasons for his claim that the estimated additional expenditure in the amount of about \$15 million a year need not be incurred to implement this Bill if enacted. The Bill does give rise to substantial additional work and expenses in processing legal aid applications and it is not good enough to say that the expenses can be absorbed or that the work can be deferred by a longer queue.

19. On the other hand, I do not think that the Bill will have any significant

impact on the structure or procedure of the executive authorities, as the nature of processing of legal aid applications by using the means test and the merit test will not be changed.

20. I consider that the Bill relates to the Government policy, which is reflected in the Legal Aid Ordinance, that with the exception of legal aid applications involving human rights issues, DLA may not grant legal aid to applicants whose financial capacity exceeds the eligibility limit for the standard legal aid scheme.

Ruling

21. Having taken into account the views of the Director of Administration and Mr CHAN Kwok-keung, together with the advice of Counsel to the Legislature, I rule that Mr CHAN's proposed Bill relates to government expenditure and government policies within the meaning of Rule 51(3) and (4) of the Rules of Procedure. Mr CHAN may not introduce the Bill.

(Mrs Rita FAN)
President
Legislative Council

29 June 2000