

Urgent By Fax

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立法局秘書處
Legislative Council Secretariat
25 June 1996

Hon LEE Cheuk-yan
2/F, 101-107 Portland Street
Yaumatei
Kowloon
[Fax number: 2332 3584]

Dear Mr LEE,

**President's Ruling
on**

- (i) **The Sex Discrimination Ordinance (67 of 1995) (Commencement) Notice 1996, laid on the table of the Legislative Council on 15 May 1996**
- (ii) **The Disability Discrimination Ordinance (86 of 1995) (Commencement) Notice 1996, laid on the table of the Legislative Council on 15 May 1996; and**
- (iii) **The District Court Equal Opportunities Rules, laid on the table of the Legislative Council on 5 June 1996**

The President has directed me to send you a copy of his ruling on your above proposed amendments.

You have confirmed that you will proceed with the amendments to the District Court Equal Opportunities Rules which were laid on the table of the Legislative Council on 5 June 1996.

Yours sincerely,

[Signed]

(Ray CHAN)
for Secretary General

Encl

cc: Mr Paul TANG (D of Admin) [Fax number: 2877 0802]
Mrs Stella HUNG (SHA) [Fax number: 2834 6176]
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President's Ruling
on
Hon LEE Cheuk-yan's proposed motions to amend:

- (i) The Sex Discrimination Ordinance (67 of 1995) (Commencement) Notice 1996, laid on the table of the Legislative Council on 15 May 1996;**
 - (ii) The Disability Discrimination Ordinance (86 of 1995) (Commencement) Notice 1996, laid on the table of the Legislative Council on 15 May 1996; and**
 - (iii) The District Court Equal Opportunities Rules, laid on the table of the Legislative Council on 5 June 1996**
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Hon LEE Cheuk-yan gave notice, on 18 June 1996, of his intention to move the above motions at the Legislative Council sitting to be held on 26 June 1996.

2. I have directed, under Standing Order (SO) No 22(2)(c), that the notices of the proposed motions, with the exception of Mr LEE's proposed amendments to the District Court Equal Opportunities Rules, be returned to Mr LEE as, in my opinion, they are out of order.

3. I shall give reasons for my direction later in this ruling; it is appropriate, however, that I first set out the context in which Mr LEE seeks to amend the Notices and Rules.

Government Notices and Rules

4. On 4 May 1996, the Secretary for Home Affairs published in the Gazette, as Legal Notice 185 of 1996, the **Sex Discrimination Ordinance (67 of 1995) (Commencement) Notice 1996**, appointing 20

May 1996 as the day on which sections 63, 64, 67, 68 and 69 and Schedule 6 of the Ordinance shall come into operation. The Notice, made by the Secretary under section 1(2) of the Ordinance, was laid on the table of the Council on 15 May 1996.

5. On the same day, the Secretary for Health and Welfare also published on the Gazette, as Legal Notice 184 of 1996, the **Disability Discrimination Ordinance (86 of 1995) (Commencement) Notice 1996**, appointing 20 May 1996 as the day on which sections 62, 64 and 65 of the Ordinance shall come into operation. The Notice, made by the Secretary under section 1(2) of the Ordinance, was laid on the table of the Council on 15 May 1996.

6. According to the Administration, appointing the above date for the coming into operation of the particular specified provisions in the two Ordinances was for the sole purpose of enabling the Equal Opportunities Commission to start functioning under the Ordinances.

7. The rest of the provisions in the Sex and Disability Discrimination Ordinances, which were not brought into operation by the two Notices, form the body of substantive law relating to discrimination in matters of sex and disability. They create enforceable legal rights and obligations. It is the stated intention of the Administration to bring these provisions into operation when the Equal Opportunities Commission is fully operational, which should be in September this year. For the purposes of this ruling I am not concerned with the merits or otherwise of the Administration's proposed timetable for implementation of the Ordinance

by stages. But, as will be seen later, what is directly relevant to this ruling is that the Administration, through the two specified Secretaries, is lawfully empowered under the two Ordinances to appoint different days for different provisions of the two Ordinances.

8. On 31 May 1996, the **District Court Equal Opportunities Rules**, made by the District Court Rules Committee under section 73B and 73C of the District Court Ordinance, were published in the Gazette as Legal Notice 236 of 1996. The same were laid on the table of the Council on 5 June 1996. These Rules are for the purpose of regulating the practice of the District Court in the exercise of its jurisdiction under the Sex Discrimination Ordinance and the Disability Discrimination Ordinance; they also provide, by sub-delegation, that the Rules shall come into operation on a day to be appointed by the Chief Justice by notice in the Gazette.

Proposed amendments sought by Mr LEE Cheuk-yan

9. In regard to the Sex Discrimination Ordinance (67 of 1995) (Commencement) Notice 1996, Mr LEE seeks, in addition to the provisions in the Notice, to appoint 2 September 1996 as the day on which **all** the remaining provisions of the Ordinance shall come into operation.

10. In regard to the Discrimination Ordinance (86 of 1995) (Commencement) Notice 1996, Mr LEE seeks, in addition to the provisions in the Notice, to appoint 2 September 1996 as the day on

which **all** the remaining provisions of the Ordinance shall come into operation.

11. Lastly, in regard to the District Court Equal Opportunities Rules, Mr LEE seeks:

- (i) to appoint 2 September 1996 as the day on which those Rules shall come into operation; and
- (ii) to add a new section 7 to the Rules, as follows:

"7. Application to proceedings by or against the Crown.

For the purposes of section 73C(7) of the (District Court) Ordinance, these rules shall also apply to all proceedings by or against the Crown."

Relevant Legislative Provisions

12. Section 1(2) of the Sex Discrimination Ordinance provides that:

"(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Home Affairs by notice in the Gazette, and different days may be so appointed for different provisions."

13. Section 1(2) of the Disability Discrimination Ordinance provides that:

"(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Health and Welfare by notice in the Gazette, and different day may be so appointed for different provisions."

14. Section 3 of the Interpretation and General Clauses Ordinance (Cap 1) provides that:

""subsidiary legislation" (附屬法例) and "regulations"(規例) mean any proclamation, rule, regulation, order, resolution, **notice**, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect;"

15. Section 34(2) of the same Ordinance provides that:

"(2) **Where subsidiary legislation has been laid on the table** of the Legislative Council under subsection (1), the Legislative Council may, by resolution passed at a sitting of the Legislative Council held not later than 28 days after the sitting at which it was so laid, provide that **such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation**, and if any such resolution is so passed the subsidiary legislation shall, without prejudice to anything done thereunder, be deemed to be amended as from the date of

publication in the Gazette of such resolution."

The Administration's views on Mr LEE's proposed amendments

16. The Administration has offered the view that commencement notices are not subsidiary legislation but rather are simply administrative acts which have legal effect but not legislative effect. Hence, it argues that it is not in order for Mr LEE to seek to amend the commencement notices.

Opinion

Are commencement notices subsidiary legislation?

17. On the question of whether or not Commencement Notices are subsidiary legislation, Counsel to the Legislature has drawn my attention to the fact that, on the initiative of the Administration, such notices have been included in the items of subsidiary legislation laid on the table of the Council and shown as such for the past 29 years but that, so far as he is aware, until now the Council has never sought to take any legislative action on a Commencement Notice. He has also advised that in a recent judgment of the House of Lords (R v. Secretary of State for the Home Department, ex parte Fire Brigade Union and others (1995 2 A11 ER 244)) the court held a Commencement Order, made under powers similar in all material respects to those under the Sex and Disability Discrimination Ordinances, to be part of the legislative process because such an order brings the legislation into effect, i.e. it is a delegated

legislative act which has legislative effect.

18. I am persuaded by the very careful analysis provided by the Counsel and am of the view that the Administration has not advanced compelling grounds to show that the long-standing practice of the Council treating commencement notices as subsidiary legislation (as defined in Cap 1) should be overturned.

19. I have taken account of the Administration's reference to The Legislation Handbook published by the Australian Public Service Board in 1975 which, in effect, offers the view that a Commencement Notice is executive rather than legislative in character. However, in my opinion, the view expressed in Erskine May (21st Ed p. 538) that "The commencement of a statute may more conveniently be provided for by delegated legislation" is to be preferred in the Hong Kong context. In addition it is also significant that Bennion (2nd Ed p. 171) classifies Commencement Orders (which are the equivalent of Hong Kong Commencement Notice) as delegated legislation.

Whether Mr LEE Cheuk-yan's proposed amendments are in order under section 34(2) Cap 1

20. Having decided on the question of whether commencement notices are subsidiary legislation, the question next follows whether Mr LEE's proposals are in order under section 34(2) of Cap 1. There are, in my view, two possible interpretations of section 34(2) as regards the scope of the Council's power of amendment of Commencement Notices:

(i) **First Interpretation**

This interpretation emphasises "**in any manner whatsoever consistent with the power ...** " and suggests that the Council's power of amendment is as extensive as the scope of the delegate's statutory power to make the commencement notice. Under this interpretation, since the scope of the delegate's power extends to appointing different days for different provisions of the Ordinance, so also does the Council's power of amendment. Hence the Council can properly amend a Commencement Notice by adding

commencement days for other provisions of the Ordinance even though those provisions were specifically excluded from the Commencement Notice by the delegate. It can properly amend the Notice to include other provisions because it is within the original power of the delegate to include them, so the argument runs.

(ii) **Second Interpretation**

This interpretation emphasises that "**consistent with the power to make such subsidiary legislation ...**" must be interpreted in the context of the making of the subsidiary legislation. Hence if the delegate has not exercised the power to appoint a commencement day for certain provisions of the Ordinance. It is not in order under section 34(2) for the Council to "amend" the Commencement Notice by adding those provisions to the Notice. The basis of this interpretation is that, when passing section 34(2), the Council consciously gave itself no powers to interfere with a commencement day for a provision in an Ordinance until a Commencement Notice is issued in respect of that provision. Therefore, if a Commencement Notice is issued in respect of

only some provisions in the Ordinance the Council does not thereby acquire the power under section 34(2) to extend the Commencement Notice to other provisions.

21. The Commencement Notices in respect of the Sex Discrimination Ordinance and the Disability Discrimination Ordinance, confined as they are to those provisions which seek to enable the Equal Opportunities Commission to start to operate, are clear in scope. On the other hand, Mr LEE seeks to amend them in order to bring all the provisions in the Ordinances into operations. This raises up the question of whether or not, by so proposing, Mr LEE is going beyond the scope of the original Notices which relate only to the coming into operation of the Equal Opportunities Commission.

22. I am of the opinion that the second interpretation of section 34(2) (paragraph 20(ii)) above is the correct one and therefore it is out of order for Mr LEE to move amendments to the Notices in respect of provisions in the Ordinances for which a commencement date has not been appointed. My view is not altered by the fact that "amend" is defined in Cap 1 (section 3) to include "add to".

23. As regards the District Court Equal Opportunities Rules, applying the same reasoning, I rule that it is in order for Mr LEE to seek to move his proposed amendments to these Rules.

Conclusion

24. In conclusion, I rule that the motions proposed by Mr LEE on the Sex Discrimination Ordinance (67 of 1995) (Commencement) Notice 1996 and the Disability Discrimination Ordinance (86 of 1995) (Commencement) Notice 1996 are out of order.

[Signed]

(Andrew WONG)
President
Legislative Council

25 June 1996