

**Ruling by the President of the Legislative Council
on the Employment (Amendment) Bill 1999
proposed by Hon. Andrew CHENG Kar-foo**

I have been requested by Hon. Andrew CHENG to give a private ruling on his Employment (Amendment) Bill 1999 in accordance with the Rules of Procedure. In this connection, I have sought the views of the Administration on the bill from the point of view of Rule 51(3) and (4) and Mr. CHENG's response to the Administration's views. Both the Administration and Mr. CHENG have further commented on each other's responses, with Mr. CHENG being given the last opportunity to comment. The dates of their submissions are given in **Annex I**. I have given very careful consideration to the views from both the Administration and Mr. CHENG. This ruling will only refer to those views which I consider are of relevance.

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

2. The Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region (HKSAR) were made pursuant to Article 75 of the Basic Law (BL). 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."

As the President of the Legislative Council, I am required by BL 72(6) to apply the Rules of Procedure as they stand and as I understand them, taking into account all relevant considerations including views expressed by all parties concerned who have been given reasonable opportunities for doing so and advice from the Counsel to the Legislature.

Basis on which I form an opinion under Rule 51(3) and (4)

3. Rule 51(3) and (4) are made for implementing Article 74 of the BL (BL 74) which states:

"香港特別行政區立法會議員根據本法規定並依照法定程序提出法律草案，凡不涉及公共開支或政治體制或政府運作者，可由立法會議員個別或聯名提出。凡涉及政府政策者，在提出前必須得到行政長官的書面同意。"

(English translation: Members of the Legislative Council of the Hong Kong Special Administrative Region may introduce bills in accordance with the provisions of this Law and legal procedures. Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced.)

4. In making my ruling, I have to give effect to the meaning of BL 74 when forming an opinion under the two subrules in Rule 51. In ascertaining the meaning of BL 74, I have to bear in mind the purpose of the BL and this article and the ordinary and natural meaning of its provision in its context when read in conjunction with other relevant articles in the BL. To facilitate reference to the various articles mentioned in this ruling, I provide in Annex II the text of such articles.

Purpose of Article 74 of the Basic Law

The Administration's views

5. The main theme of the Administration's submission is that BL 74 should be interpreted in the light that the intention of the BL is that the Hong Kong Special Administration Region (HKSAR) be led by the Chief Executive (CE) together with the executive authorities in order to maintain an "executive-led" government. The executive authorities of the HKSAR are vested with the functions of formulating and implementing policies and the introduction of bills and budgets (BL 62) and the CE is vested with the power to reject bills passed by the Legislative Council (BL 49). It is therefore clear that the power of the executive to introduce bills is an unqualified one. As for the

Legislature, whilst the Legislative Council may question and debate government policies and other matters of public interest under BL 64 and 73(4), (5) and (6), this is not the same as formulating policies or introducing bills to implement policies. Besides, BL 73 does not mention that the Legislative Council has the power and function of making policies.

6. The Administration nevertheless accepts that the HKSAR legislature is vested with its own legislative power, but such power is subject to the conditions or restrictions or procedures imposed by the BL. Whilst BL 74 is an empowering provision which empowers Members to introduce bill, this article at the same time imposes conditions and restrictions on this power.

Mr. Andrew CHENG's views

7. In responding to the Administration's view on BL 74, Mr. CHENG says that BL 74 must be interpreted as intending the smallest possible departure from the spirit of the Joint Declaration. He is of the view that the class of limitation imposed on the legislature by this article is unprecedented, representing a significant departure from past constitutional practices. Any such change should be presumed to intend the least alteration to prior practices in the absence of clear language that unmistakably requires a contrary result. According to his analysis, "the structure of article 74 reveals that the CE may consent to the introduction of bills relating to government policies even when they also relate to public expenditure, political structure, or the operation of the government".

My views

8. When trying to find out the meaning of BL 74, I note that BL 73 stipulates the powers and functions of the Legislative Council. Without BL 74, it may be concluded that Members of the Legislative Council may introduce bills without any constraints. However, BL 74 clearly says that "Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced". Therefore whilst Members of the Council may introduce bills into the Council, their ability to do so is subject to the restrictions stipulated in BL 74.

9. I have also referred to the speech made by Mr. JI Peng-fei, Chairman of the Basic Law Drafting Committee, when he introduced the draft BL to the third session of the 7th National People's Congress of the People's Republic of China on 28 March 1990. In the speech, when he spoke on the relationship between the executive authorities and the legislature, he said that "行政機關和立法機關之間的關係應該是既互相制衡又互相配合" (English translation: The executive authorities and the legislature should regulate each other as well as co-ordinate their activities.). Chapter IV of the BL provides for the political structure of the HKSAR. One of the main purposes of this Chapter is to allocate the respective powers and functions of the organs of government in such a way as to provide checks and balances between the executive and the legislature and to provide a framework to allow and facilitate these organs to co-ordinate their activities. In respect of the introduction of bills, BL 62 provides that the executive authorities have the powers and functions to draft and introduce bills, motion and subordinate legislation without qualification. On the other hand, whilst BL 74 says that Members of the Legislative Council may introduce bills, it also says that they may do so in accordance with the provisions of the BL and subject to the restrictions that have been imposed in this article.

10. I have therefore formed the opinion that BL 74 is an enabling article which enables Members of the Legislative Council to introduce bills, but it at the same time imposes conditions and restrictions on such introduction.

Opinions on specific terms in Rule 51(3) and (4)

11. The Administration considers that the Employment (Amendment) Bill 1999 proposed by Mr. CHENG "relates to" "government policies" and therefore the introduction of the bill requires the written consent of the CE as stipulated in Rule 51(4). Before I give my opinion in this respect, I would like to set out at this juncture the general approach I will adopt for forming my views on the terms "relate to" and "government policies" in the context of Rule 51(4).

12. As regards the general approach, I am of the view that I would be underestimating the difficulty of the task if I were to attempt to give definitions to these terms. I have taken note of the judgement of a 1985 case in the House of Lords in the United Kingdom in which the Court was examining whether a certain matter was related to a trial on indictment. In the judgement, Lord Bridge said : "If the statutory language is, as here, imprecise, it may well be

impossible to prescribe in the abstract a precise test to determine on which side of the line any case should fall, and therefore, necessary to proceed, on a case by case basis.". The principle that follows from this approach is that my views on these terms should be taken as guidelines only. They are to be applied on a case by case basis and each case would be examined on its own merits.

"Relate to"

13. When commenting on Mr. CHENG's bill, the Administration says that a bill should be considered to be relating to a matter if it has a direct, indirect, consequential or incidental bearing on the matter. However, Mr. CHENG considers that "a purposive interpretation of article 74 strongly counsels that a bill must directly relate to the four areas addressed by the provision in order for the limitations of the article to apply."

14. In my view, in order for a bill not to be caught by Rule 51(3) and (4), the implementation of the bill must not have substantive effect on one or more than one of the areas prescribed in this Rule.

"Government policies"

15. The Administration has put forward the view that government policies refer not only to decisions or policies made by the CE under BL 48(4) and 56, but also policies being formulated and decisions of the government not to formulate any policy.

16. Mr. CHENG on the other hand holds the view that "government policies" should be given a construction that distinguishes it from the BL's general use of the term "policies". He considers that a policy is a pre-determined course of action taken in order to achieve an objective and government policies exist solely to guide and determine the actions taken by the executive to achieve an end. He considers that policies being formulated are not government policies. He further submits that to attain the status of government policies, they must be decided on by the CE in Council. He also asserts that "once a bill is enacted into law any government policy that previously existed in place of the bill is extinguished once the law takes effect, the Chief Executive will no longer be able to 'decide on' any change in the policy. The existence of the law and the requirement that the Government abide by the law prohibits such a change".

17. I am of the opinion that government policies referred to in BL 74 are those that have been decided by the CE or CE in Council under BL 48(4) and 56. Policies decided by former Governors or Governors in Council prior to the implementation of the BL which are still in force are also included.

18. In my view, the enactment of a bill does not extinguish the government policy which the Administration seeks to implement through legislation. Neither would an Ordinance have the legal effect of forbidding the CE from deciding on a new government policy which is different from an existing policy reflected in legislation. What it would require the CE to do in order to implement that new policy is to introduce an amendment bill or a bill to repeal the relevant legislation. I am therefore of the opinion that policies reflected in legislation are government policies for the purpose of Rule 51(4).

19. Government policies for the purpose of Rule 51(4) should also include -

- (a) policies decided by authorised public officers; and
- (b) policies promulgated by designated public officers in the Legislative Council or its committees.

20. For the purpose of Rule 51(4), I do not regard policies which are being formulated as government policies.

21. A Member is required to obtain a certificate from the Law Draftsman under Rule 51(2) before he may introduce a bill. I would regard a government policy as being in existence if it was decided on before the day on which the Member submits his bill to the Law Draftsman for the issue of the above-mentioned certificate.

Opinion on Mr. CHENG's bill

22. Having set out my opinion on the terms "relate to" and "government policies", I now come to the bill itself.

23. The object of Mr. CHENG's bill is to impose requirements on the part of the employer to stipulate in writing and to solicit employee's consent to any variation of the terms of the employee's contract of employment and to allow employees to elect to calculate their severance and long service payments from their average wages over 12 months prior to any reduction in wages that

occurred within the 24 months prior to the date when the employee resigned or was dismissed.

24. The Administration is of the view that Mr. CHENG's bill seeks to change existing government policies on labour relations by proposing to regulate wage reduction matters by law. The existing government policy is that there is no need to regulate by law how employers should handle matters relating to wage reduction. Such matters should be dealt with through direct and voluntary negotiation between employers and employees, instead of through legislation. The Administration says that government's policies on such issues have been clearly promulgated in the speech of the Secretary for Education and Manpower during the debate on the motion "Amending legislation to regulate wage reduction" at the Council meeting on 18 November 1998. The Labour Department has also issued a document called "Guidelines on what to do if wage reductions and retrenchments are unavoidable" to offer advice to employers and employees on how to deal with wage reductions and retrenchments.

25. The Administration also says that the bill seeks to change existing government policies on the calculation of severance payment and long service payment as such calculation has already been provided for in the Employment Ordinance.

26. Mr. CHENG, however, says that although the government claims to have a policy that government encourages employers to enter into frank and sincere discussions with employees regarding wage reductions, the so-called policy, according to Mr. CHENG, is a statement with no teeth - a position involving the lack of government action rather than a policy prescribing action. He is of the view that as government policies must specify a specific course of action that the executive authorities must follow, they require affirmative action and implementation on the part of the executive in order to achieve their stated objective. As the policy that the Administration claims to exist does not prescribe any action or require implementation to be realised, it can only be regarded as government position and not policies.

27. I note that the Labour Department has issued a guideline on wage reduction matters as a result of the discussion by the Labour Advisory Board, which is a tripartite consultation machinery established to deal with policies on employer-employee relationship. It is evident that the Administration has taken action in this particular case to achieve the objective of encouraging negotiation between employers and employees instead of regulating such

negotiation through legislation. This process was promulgated at a meeting of the Legislative Council by the Secretary for Education and Manpower on 18 November 1998.

28. Mr. CHENG's Bill seeks to change the method by which severance payment and long service payment are calculated. I am satisfied that there already existed a government policy on the method of calculating severance payment and long service payment before Mr. CHENG submitted his bill to the Law Draftsman for the issue of a certificate under Rule 51(2) on 10 November 1998. Such policy is reflected in relevant provisions of the Employment Ordinance.

29. As the implementation of Mr. CHENG's bill will have substantive effect on existing government policies, I am of the opinion that Mr. CHENG's bill relates to government policies and therefore its introduction would require the written consent of the CE.

30. As regards Rule 51(3), the Administration did not consider it necessary to comment on whether the present Bill relates to public expenditure, political structure or the operation of the government. I therefore have not been offered any evidence except Mr CHENG's assertion that his Bill does not relate to the three areas prescribed in Rule 51(3). The need for me to give an opinion under Rule 51(3) therefore does not arise.

(Mrs. Rita FAN)
President
Legislative Council

16 July 1999

**Dates on which the Administration and
Mr Andrew CHENG Kar-foo sent in
their views on Mr CHENG's Employment (Amendment) Bill 1999**

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| 10 February 1999 | Mr CHENG submitted the captioned bill and sought a private ruling from the President, Legislative Council under Rule 51(3) and (4). |
| 11 February 1999 | The Administration was requested to give its views on Mr CHENG's bill as to whether it related to public expenditure or political structure or the operation of the government or government policies. |
| 8 March 1999 | The Administration sent in its views. |
| 8 March 1999 | Mr CHENG was requested to comment on the Administration's views. |
| 24 April 1999 | Mr CHENG sent in his comments on the Administration's views on his bill. (A corrigendum was sent in on 26 April 1999) |
| 24 April 1999 | Mr CHENG's comments were forwarded to the Administration for comments. |
| 14 June 1999 | The Administration sent in its comments on Mr CHENG's comments contained in his submission dated 24 April 1999. |
| 14 June 1999 | The Administration's comments were forwarded to Mr CHENG for final comments. |
| 5 July 1999 | Mr CHENG sent in his comments on the Administration's comments contained in its submission dated 14 June 1999. |

**Articles in the Basic Law referred to in the
Ruling of the President, Legislative Council on the
Hon Andrew CHENG Kar-foo's
Employment (Amendment) Bill 1999**

第 43 條 香港特別行政區行政長官是香港特別行政區的首長，代表香港特別行政區。

香港特別行政區行政長官照本法的規定對中央人民政府和香港特別行政區負責。

Article 43 The Chief Executive of the Hong Kong Special Administrative Region shall be the head of the Hong Kong Special Administrative Region and shall represent the Region.

The Chief Executive of the Hong Kong Special Administrative Region shall be accountable to the Central People's Government and the Hong Kong Special Administrative Region in accordance with the provisions of this Law.

第 48(4)條 決定政府政策和發佈行政命令

Article 48(4) To decide on government policies and to issue executive orders.

第 56 條 香港特別行政區行政會議由行政長官主持。行政長官在作出重要決策、向立法會提交法案、制定附屬法規和解散立法會前，須徵詢行政會議的意見，但人事任免、紀律制裁和緊急情況下採取的措施除外。

行政長官如不採納行政會議多數成員的意見，應將具體理由記錄在案。

Article 56 The Executive Council of the Hong Kong Special Administrative Region shall be presided over by the Chief Executive.

Except for the appointment, removal and disciplining of officials and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council.

If the Chief Executive does not accept a majority opinion of the Executive Council, he or she shall put the specific reasons on record.

第 62 條 香港特別行政區政府行使下列職權:

- (一) 制定並執行政策;
- (二) 管理各項行政事務;
- (三) 辦理本法規定的中央人民政府授權的對外事務;
- (四) 編制並提出財政預算、決算;
- (五) 擬定並提出法案、議案、附屬法規;
- (六) 委派官員列席立法會並代表政府發言.

Article 62 The Government of the Hong Kong Special Administrative Region shall exercise the following powers and functions :

- (1) To formulate and implement policies;
- (2) To conduct administrative affairs;
- (3) To conduct external affairs as authorized by the Central People's Government under this Law;
- (4) To draw up and introduce budgets and final

accounts;

- (5) To draft and introduce bills, motions and subordinate legislation; and
- (6) To designate officials to sit in on the meetings of the Legislative Council and to speak on behalf of the government.

第 73 條 香港特別行政區立法會行使下列職權:

- (一) 根據本法規定並依照法定程序制定、修改和廢除法律;
- (二) 根據政府的提案, 審核、過財政預算;
- (三) 批准稅收和公共開支;
- (四) 聽取行政長官的施政報告並進行辯論;
- (五) 對政府的工作提出質詢;
- (六) 就任何有關公共利益問題進行辯論;
- (七) 同意終審法院法官和高等法院首席法官的任免;
- (八) 接受香港居民申訴並作出處理;
- (九) 如立法會全體議員的四分之一聯合動議, 指控行政長官有嚴重違法或瀆職行為而不辭職, 經立法會通過進行調查, 立法會可委托終審法院首席法官負責組成獨立的調查委員會, 並擔任主席. 調查委員會負責進行調查, 並向立法會提出報告. 如該調查委員會認為有足夠證據構成上述指控, 立法會以全體議員三分之二多數通過, 可提出彈劾案, 報請中央人民政府決定;
- (十) 在行使上述各項職權時, 如有需要, 可傳召有關人士出席作證和提供證據.

Article 73

The Legislative Council of the Hong Kong Special Administrative Region shall exercise the following powers and functions :

- (1) To enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures;
- (2) To examine and approve budgets introduced by the government;
- (3) To approve taxation and public expenditure;
- (4) To receive and debate the policy addresses of the Chief Executive;
- (5) To raise questions on the work of the government;
- (6) To debate any issue concerning public interests;
- (7) To endorse the appointment and removal of the judges of the Court of Final Appeal and the Chief Judge of the High Court;
- (8) To receive and handle complaints from Hong Kong residents;
- (9) If a motion initiated jointly by one-fourth of all the members of the Legislative Council charges the Chief Executive with serious breach of law or dereliction of duty and if he or she refuses to resign, the Council may, after passing a motion for investigation, give a mandate to the Chief Justice of the Court of Final Appeal to form and chair an independent investigation committee. The committee shall be responsible for carrying out the investigation and reporting its findings to the Council. If the committee considers the evidence sufficient to substantiate such charges, the Council may pass a motion of impeachment by a two-thirds majority of all its members and report it to the Central People's Government for decision; and
- (10) To summon, as required when exercising the

above-mentioned powers and functions, persons concerned to testify or give evidence.

第 74 條 香港特別行政區立法會議員根據本法規定並依照法定程序提出法律草案，凡不涉及公共開支或政治體制或政府運作者，可由立法會議員個別或聯名提出。凡涉及政府政策者，在提出前必須得到行政長官的書面同意。

Article 74 Members of the Legislative Council of the Hong Kong Special Administrative Region may introduce bills in accordance with the provisions of this Law and legal procedures. Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced.