

**Subcommittee of the Legislative Council on
Employees Retraining Ordinance (Amendment of Schedule 3) Notice 2008**

Administration's Views on Members' Proposed Amendments

Members are considering the following amendments to the Employees Retraining Ordinance (Amendment of Schedule 3) Notice 2008 (the "Notice") –

- (a) deletion of Sections 1(2) and 2(2);
- (b) deletion of Sections 1(2) and 2(2) in relation to foreign domestic helpers only (or deletion of Section 2(2) in relation to foreign domestic helpers only while leaving Section 1(2) intact); and
- (c) amendment of Section 1(2) to specify a date later than 1 August 2010 as the commencement date of Section 2(2).

Collectively, the above is referred to as "Members' proposed amendments".

2. Whilst the Administration is finalising its detailed submission on the matter, this paper sets out, in gist, its views on Members' proposed amendments.

Charging effect

3. Rule 31(1) of the Rules of Procedure of the Legislative Council provides that a motion or amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by (a) the Chief Executive, (b) a designated public officer, or (c) a Member, if the Chief Executive consents in writing to the proposal.

4. In the Administration's view, each of Members' proposed amendments is an amendment "the object or effect of which may be to dispose of or charge any part of the revenue or other public moneys of Hong Kong" within the meaning of the words of Rule 31(1) of the Rules of Procedure of the Legislative Council because –

- (a) the assets of the Employees Retraining Fund (the "Fund"), into which the Employees Retraining Levy is remitted, falls within the broad

description of “revenue or **other public moneys**” having regard to the nature and purpose of the Fund. The Employees Retraining Board is there to carry out a facet of public policy (i.e. to provide training and retraining services to eligible local workers to assist them in acquiring new or enhanced vocational skills so that they can adjust to changes in the economic environment), and the Fund is there to facilitate that public purpose. Whether sourced from employers by way of the statutory levy, or by subvention out of general revenue, the assets of the Fund can only be regarded as public (not private) moneys; and

- (b) Members’ proposed amendments would deprive the Fund from 1 August 2010 of an important source of its income as enacted by section 14 of the Employees Retraining Ordinance (Cap. 423), leading to the inevitable consequence of the Government having to provide subvention to top up the Fund to make good the loss of the revenue stream from the levy so as to ensure continued support by the Fund in the provision of training and retraining of eligible persons.

5. We note the previous ruling of the President of the Legislative Council under Rule 31(1) in 1998 regarding the Pneumoconiosis Compensation Fund. In the Administration’s view, the subject matter of the 1998 ruling is distinguishable from the present case. The object or effect of Members’ proposed amendments would reduce the income to and therefore the assets of the Fund. The 1998 amendment was different as it affected out-goings from the statutory fund by raising compensation levels. Furthermore, the Government has not given any funding support to the Pneumoconiosis Compensation Fund in the past other than the initial loan facility in 1980 which was already repaid in full in 1983.

Ultra vires and Section 34(2) of Cap. 1

6. The proposed deletion of Sections 1(2) and 2(2) of the Notice would be a de facto repeal of the levy provision of Section 14 of Cap. 423 and therefore ultra vires. The Chief Executive in Council has no power under Section 31(1) of Cap. 423 to do this, which may only be achieved by way of an amendment Ordinance. It therefore goes beyond the power of the Legislative Council conferred by Section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1), which provides that “subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation”.

7. The proposed deletion of Sections 1(2) and 2(2) of the Notice in relation to foreign domestic helpers only (or deletion of Section 2(2) in relation

to foreign domestic helpers only while leaving Section 1(2) intact) is also ultra vires Section 31(1) of Cap. 423, which only empowers the Chief Executive in Council to amend Schedule 3, i.e. the “amount of levy specified for the purposes of Section 14(2)”. Section 31(1) of Cap. 423 does not empower the Chief Executive in Council to specify different sums for the purposes of Section 14(2) of Cap. 423 in relation to different classes of imported employees or in respect of different schemes approved under Section 14(3). It therefore goes beyond the power of the Legislative Council conferred by Section 34(2) of Cap. 1 to make the proposed deletion of Sections 1(2) and 2(2) of the Notice (or deletion of Section 2(2) in relation to foreign domestic helpers only while leaving Section 1(2) intact) in relation to foreign domestic helpers only.

Basic Law

8. Article 74 of the Basic Law (BL 74) encompasses a much broader area. The Administration is firmly of the view that all the three proposed amendments are out of order for the reasons discussed above. It would be unnecessary to go into any discussion of BL 74. Questions of constitutional law should not be anticipated in advance of the necessity of deciding them. In the present case, we do not see the necessity of any discussion of BL 74 to address the issue of whether the proposed amendments are out of order.

Labour and Welfare Bureau
Department of Justice
10 November 2008