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LABOUR AND WELFARE BUREAU
GOVERNMENT SECRETARIAT

Central Government Offices
Tim Mei Avenue
Tamar, Hong Kong

本函檔號 Our Ref.:

來函檔號 Your Ref.:

1 June 2016

Clerk to Panel on Manpower
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong
(Attn : Ms Betty Ma)

Dear Ms Ma,

**Panel on Manpower
Letter from Hon Kenneth Leung**

I refer to your letter of 18 March 2016 seeking the Government's views on Hon Kenneth Leung's proposed Member's Bill entitled "Public Interest Disclosure Bill 2016 ("the Bill)". We understand that after receiving the Government's views, members of Panel on Manpower ("Panel") would then decide whether the subject should be discussed by the Panel at a future meeting or a joint meeting with other relevant Panel(s).

2. Having conducted a preliminary study of the Bill in consultation with a number of bureaux/departments, we are firmly of the view that the Panel on Manpower would not be an appropriate forum to discuss this complex issue. It is important to point out that the scope of the Bill is very wide and that it would impact on different policy areas. Indeed, the

issues involved cut across a wide range of spheres many of which go well beyond the labour and manpower portfolio. Further, some of the issues call for detailed study and assessments. Besides, the Bill would appear to have implications on other pieces of legislation outside the remit of the Panel on Manpower. To facilitate you to reach a decision, we have set out below our preliminary analysis of the matter. Please note that this should not be taken as a complete and final response to the Bill by the Government.

Purpose and Scope of the Bill

3. According to the Long Title of the Bill, the purpose of the Bill is to provide protection to individuals who make certain disclosures of information in the public interest. It consists of three key elements: (i) the categories of qualifying disclosures; (ii) the channels of disclosures; and (iii) protection for employees as whistleblowers which includes immunity from civil liability, prohibition against discrimination or dismissal by the employers by reason of the fact that the employees have made a protected disclosure. Provisions of the Bill are largely modelled on the UK Public Interest Disclosure Act 1998.

Observations on the Bill

Scope of “qualifying disclosure”

4. The definition of “qualifying disclosure” as set out in section 3 of the Bill is seemingly wide and ambiguous, leading to practical problems in implementation. For example, if an employee has the reasonable belief that a criminal offence is likely to be committed, a person is likely to fail to comply with any legal obligation, that the health or safety of an individual is likely to be endangered, that a miscarriage of justice is likely to occur, or that the environment is likely to be damaged, etc, the disclosure of such information would readily be caught under “qualifying disclosure”. A wide and low threshold may give rise to numerous trivial disclosures with little significance, which should not be the purpose of the Bill.

5. The “qualifying disclosure” as provided by the Bill covers information in a number of areas. Yet on examination the coverage of these areas by the Bill warrants careful consideration. To quote some examples:

- (a) One of the “qualifying disclosures” protected by the Bill is “any individual’s health or safety being/to be endangered”. The wordings differ from the relevant provision in the similar whistleblowing law in the US and Australia which refer to “a substantial and specific danger to public health or safety”. Where this “qualifying disclosure” may apply to the food safety regime, the threshold for becoming a “qualifying disclosure” under the Bill appears to be much lower than its equivalents in overseas jurisdiction, i.e. the “any individual” requirement as compared with the “public health and safety” requirement and there is no “substantiality” and “specificity” requirements in the Bill.
- (b) Insofar as section 3(1)(d) on disclosure of information in connection with the health or safety of any individual is concerned, the importance of protecting sensitive health information, e.g. patient’s medical information, and value of disclosure of such information may need to be better balanced. Professional liability, in particular for medical/healthcare professionals is not addressed in the draft Bill. It is unclear how to strike the balance between the professional ethic/liability/duty and the Bill.
- (c) Section 3(1)(e) includes the scenario where the environment “has been, is being or is likely to be damaged” as a type of “qualifying disclosure” to be covered by the Bill. It is noted that all human activities would cause some degree of damage to the environment. Presumably, the damaging activities amounting to criminal offences under existing law will be covered by section 3(1)(a), section 3(1)(e) therefore appears to be targeted at acts which have caused, are causing or likely to cause damage to the environment but which do not amount to

criminal offences under existing laws. Such acts targeted by section 3(1)(e) are however not defined under the Bill. There will be practical problems in the implementation of section 3(1)(e).

- (d) From the perspective of Government procurement, the Bill is expected to pose significant implications for the prevailing policies and procedures on aspects such as contractual settlements, mediation and arbitration cases, tender exercises, variations/compensation events, claim settlements, public sensitive information, performance appraisals on contractors and consultants, dispute resolution matters, etc.
- (e) We also consider that the proposed bill would have read-across implications on a number of ordinances which have clauses on restriction on disclosure of information (e.g. Official Secrets Ordinance (Cap.521)). For civil servants and public officers, the implications of the Bill on government regulations and internal guidelines regulating unauthorised disclosure of official information would have to be seriously assessed.

6. The Bill seeks to provide employment protection to employees who have made or agreed to make a protected disclosure, and create a new offence under EO for breach of the prohibition on termination of employment or discrimination. The Bill is likely to have serious implication on employee-employer relationship and protection of commercial secrets/confidential information of individual employers. Thorough consultation and deliberation have to be made with employers and employees. Separately, as the scope of qualifying disclosures is very wide concerning commission of criminal offence, failure of legal obligation, miscarriage of justice, protection of health and safety (not specifically in the workplace), protection of environment, etc. which are mostly outside the purview of employment, there is a need to sort out and clarify its scope before any focused and fruitful consultation with employers and employees could be made.

Basic Law 74 Implications

7. Basic Law 74 provides:

“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.”

Members cannot introduce any bills that have any substantive effect on (and hence “relate to”) “public expenditure”, “political structure” or “operation of the government”. Members’ bills relating to “government policies” within the meaning of BL 74 may not be introduced except with the written consent of the Chief Executive.

8. Although paragraph 23 of the Background Brief on the Bill declares that “the bill does not relate to any matters of (i) public expenditure, (ii) political structure, (iii) operation of the Government, or (iv) Government policies”, a quick reviewing of the Bill gives the Government a strong impression against the validity of the statement. As can be clearly seen from observations set out in the above paragraphs, it is highly likely that the Bill would pose significant implications on different existing government policies cross-cutting various bureaux/ departments. Its impacts on public expenditure and operation of the government moreover should not be under-estimated and would need to be fully examined by all relevant Government bureaux and departments.

Conclusion

9. As requested by the Panel, we have in the above paragraphs provided a collated piece of preliminary observations by the Government on the Bill. It is apparent that the Bill has important policy issues cutting across different bureaux and departments that need to be

addressed and resolved. The legal issues to be involved would likely be even more complicated. Yet in any case the subject matters in the Bill, i.e. its involving (i) the categories of qualifying disclosures; and (ii) the channels of disclosures, may not necessarily be connected with a person's employment. On the contrary, in most cases they involve substantial cross-cutting policy issues and could not be viewed simply in the context of an employment relationship. Apart from dismissal by employers, rendering protection to an employee playing as whistleblower by way of immunity against civil liability and discrimination is moreover of a very wide scope which in most cases would fall outside the scope of an employment.

10. Against this background, we are firmly of the view that it would be inappropriate to discuss the matter in the Panel on Manpower.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Nicholas CT Chan', written in a cursive style.

(Nicholas CT CHAN)
for Secretary for Labour and Welfare

c.c. Commissioner for Labour (Attn : Ms Melody Luk)