

**President's Ruling on
Sex and Disability Discrimination
(Miscellaneous Provisions) Bill 1996
presented by Miss Christine LOH**

Introduction

Miss Christine LOH has presented me with the draft Sex and Disability Discrimination (Miscellaneous Provisions) Bill 1996 and asked for my opinion as to whether the proposed bill would have any charging effect within the meaning of Standing Order 23 of the Standing Orders of the Legislative Council.

Administration's views on whether the proposed bill has any charging effect

2. When consulted, the Administration expresses the view that the proposed bill would have charging effect to the tune of \$30.6 million in the first year and a cumulative addition of \$15.3 million per annum thereafter. The reasons advanced by the Administration are as follows:

(a) Clauses 10 and 24 of the bill seek to replace the current exception provided in Schedule 5 of the Sex Discrimination Ordinance in respect of differential treatment between persons of different marital status arising from a provision of the Civil Service Regulations (CSRs). However, clause 10 covers only one aspect of the CSRs which prohibits the concurrent receipt of double benefits by a married couple but does not prevent married officers from becoming eligible for certain benefits even when their spouses have already received the same benefits. There will therefore be financial implications.

(b) Clauses 13 and 30 of the bill seek to add discretionary duties to the Equal Opportunities Commission (EOC) to promote international standards set out in the relevant international instruments and to examine and report on proposed legislation. Two other clauses, namely, clauses 18 and 35, if enacted, will enable the EOC to seek a declaration that a provision of law is inconsistent with the Hong Kong Bill of Rights Ordinance or with article VII(5) of the Hong Kong

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Letters Patent. They will also enable EOC to intervene in proceedings under the Sex and Disability Discrimination Ordinance.

3. When arguing that there are financial implications in the above clauses, the Administration quoted the following extract from my predecessor's ruling in respect of the Sex Discrimination Bill:

“Where a new discretion is conferred, the [Equal Opportunities] Commission is of course free not to do the act, in which case no question of public expenditure will arise; but it is equally free to do the act, in which case the question of public expenditure will arise. It is in those circumstances that the effect of an amendment may be to dispose of or charge public revenue within the meaning of Standing Order 45(6).”

Miss LOH's response to the Administration's views

4. Miss LOH has advanced very sound legal arguments refuting the Administration's views that clauses 10 and 24 have charging effect. Her arguments have also been accepted by the Counsel to the Legislature as plausible. I am also satisfied with her arguments although I am of the view that the provisions in these two clauses are subject to challenge in a court of law.

5. Miss LOH argues that the duties set out in the proposed clauses 13 and 30 are discretionary in nature. Committee stage amendments similar in nature proposed to the Sex Discrimination Bill in the previous session sought to impose additional statutory duties on the EOC and were ruled by my predecessor as having charging effect. As clauses 13 and 30 of the bill seek to give new statutory discretion to the EOC, they should not have any charging effect.

6. As regards clauses 18 and 35 of the bill, Miss LOH says that the additional powers proposed to be given to the EOC in these two clauses are similar to those in new clause 68A proposed to be added to the Sex Discrimination Bill in the previous session. As new clause 68A proposed to be added to the Sex Discrimination Bill has been ruled by my predecessor as having no charging effect, clauses 18 and 35 of the bill should not have any charging effect either.

My opinion

7. I have discussed with Miss LOH her submission. Whilst accepting her legal arguments that the proposed clauses 10 and 24 may have been drafted in such a way that they have already covered the point made by the Administration regarding civil servants being still able to claim benefits which their spouses have already received and to which both they themselves and their spouses are not entitled, I am of the view that it cannot be completely sure that this interpretation will be accepted by the court. To make it entirely foolproof that these two clauses will not give rise to possible double benefits enjoyed by civil servants under all circumstances and to eliminate any possibility of these two clauses having a charging effect, I proposed and Miss LOH agreed that the words "or has received" be inserted after "receives" in clause 10 of the bill. Subject to this revision, I am of the opinion that clauses 10 and 24 would not have any charging effect.

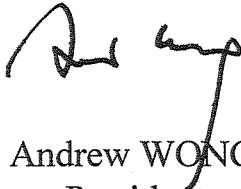
8. As regards clauses 13 and 30 of the bill, although the provisions in these two clauses are similar to the amendments proposed to clause 56(1) of the Sex Discrimination Bill in the last session and such amendments have been ruled by my predecessor as having charging effect. However, such amendments to the Sex Discrimination Bill sought to impose additional statutory duties on the EOC whereas clauses 13 and 30 of Miss LOH's present bill give only new discretionary duties to the EOC. When forwarding the extract quoted in paragraph 3 above, the Administration has failed to also include in the quote the following from the same ruling of my predecessor :

"Where the Commission had this discretion, it could legitimately decline to exercise it on the ground of insufficient funds."

I agree with my predecessor's view. As clauses 13 and 30 of the bill impose only discretion on the EOC, I am of the opinion they do not have any charging effect.

9. Clauses 18 and 35 of the bill also give new statutory discretion to the EOC. For the reason that I have given in the previous paragraph, I am of the opinion that clauses 18 and 35 of the bill would not have any charging effect.

10. However, I drew Miss LOH's attention to paragraph 11 of the Explanatory Memorandum of her bill which says "Clause 13 gives the Equal Opportunity Commission statutory authority to undertake 2 additional functions...". Although the Explanatory Memorandum is not part of the bill, it can be used by the court in the interpretation of the ordinance after the bill has been enacted. On my suggestion, Miss LOH has agreed to replace "statutory authority" in this paragraph with "a statutory discretion". For the same reason, Miss LOH has also made similar changes to paragraph 24 of the Explanatory Memorandum, which describes the purpose of clauses 18 and 35.



Andrew WONG
President

13 July 1996