

# EXECUTIVE COUNCIL

## CONFIDENTIAL

**Title of Report:** Medical Services Tax

**Paper No:** 275/10

**Date:** 25 November 2010

**Report of:** Attorney General

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### 1.0 Purpose

The purpose of this paper is to provide additional advice in relation to the name to give to the proposal to impose a tax on employment.

### 2.0 Recommendations

It is recommended that the name of the Medical Services Tax Bill remains unchanged.

### 3.0 Summary of Financial Implications

None.

### 4.0 Background

4.1 The matter has been considered previously at Executive Council meetings in July and October 2010. The advice forming the basis of that consideration and the minutes of those two meetings are set out in the annex for ease of reference.

4.2 At the October meeting of Executive Council, Members agreed that the Bill be published in the form submitted under cover of paper 242/10, ie under the name "Medical Services Tax Bill", but asked that further advice on the name of the Bill be provided to the November meeting of Executive Council.

4.3 Because the intended measure would be implemented with effect from 1 January 2011, the Tax Office has had to take practical steps in connection with informing employers of the detail of implementation as soon as possible after the measure might be passed. Printing deadlines mean that employer information packs have already been ordered by the Tax Office by reference to a medical services tax.

## 5.0 Further legal advice on naming of the Bill

5.1 The objective of legislative drafting is the production of successful legislation. One of the elements of successful legislation is legislation which is clearly and unambiguously drafted.

5.2 The Attorney General's Chambers, as drafters of the legislation and legal advisers to Executive Council, have consistently advised Executive Council that the title "Medical Services Levy Bill" is not only ambiguous in the context of this Bill, but positively seeks to obscure the real effect of the measure which the Bill would provide for.

5.3 Executive Council were also advised at the October meeting that the proposal to call the measure a medical services levy might be in breach of rule 1 of Annex A to the Constitution (ie specifically where it provides "no law shall contain anything foreign to what the title of the law imparts").

5.4 The advice previously provided (see the annex to this paper) has been critically examined. Whilst there largely appears to be no basis on which to depart from the advice, the advice described in paragraph 5.3 in relation to rule 1 of Annex A to the Constitution does merit further consideration.

### 5.5 Further advice on rule 1 of Annex A to the Constitution

5.5.1 An Ordinance commonly has two titles; the short title (which is the name by which the Ordinance is commonly known), and the long title (which is to indicate the general purposes of the Ordinance). The two titles to this Bill are respectively:

- (a) "Medical Services Tax Bill" (short title);
- (b) "a Bill for an Ordinance to impose a tax known as the Medical Services Tax; and for connected purposes" (long title).

5.5.2 Rule 1 of Annex A to the Constitution relates to "the title" of the law. The question arises whether this means the short title, the long title, or perhaps both?

5.5.3 The history of English parliamentary practice, and the standing orders of the Legislative Assembly, indicate that for the purposes of parliamentary process, rule 1 refers to the long title. In particular, standing order 47(1) repeats the relevant rule "nor shall any Bill contain anything foreign to what its title imports", and standing order 47(2) then goes on to provide the following clarification "...each Bill shall have a long title (which shall be the title of the Bill for the purposes of paragraph (1))...".

5.5.4 But does Annex 1 of the Constitution, which provides rules for "the enactment of laws" have to be interpreted in this way?

5.5.5 If it were given this interpretation, ie rule 1 relates only to the long title; the Ordinance could proceed on the basis of an amended long title as follows: " a Bill for an Ordinance to impose a tax known as the Medical Services *Levy*;...".

5.5.6 So what is the significance, if any, of rule 1 to the short title? ie should rule 1 as set out in Annex A of the Constitution be given a narrow interpretation? Does the short title simply have to use a phrase to be found in the long title, or does it have to be more meaningful? In this particular case, if the long title were amended to refer to a Medical Services *Levy*; could that phrase be used for the short title?

5.5.7 Whilst standing orders and parliamentary practice do not specifically assist, because there are no detailed rules on what must be, or should not be, included in a short title to an Ordinance, it is fair to summarise the authorities as indicating that the purpose of the short title is to identify and describe an Ordinance; and that it should be concise and informative.

5.5.8 Research on the matter indicates that in the absence of clear rules, short titles have long been the subject of political debate, ie the absence of rules have allowed short titles to legislation to be used as a political tool, and the practice of how a short title should be established has been inconsistent under English law. On this basis, it is acknowledged that there must be room for debate in relation to the extent to which that political manipulation of legislative titling is appropriate.

5.5.9 In these circumstances it is difficult to argue with absolute authority that labelling the Bill the “Medical Services Levy Bill” would be unlawful in Constitutional terms.

5.5.10 However, it seems that a detailed examination of the Constitutional issues brings the matter back in full circle and identifies that the advice consistently given is based on fundamental principles of the purpose of legislation. Looked at with a purposive approach, rule 1 of Annex A to the Constitution appears to be aimed at ensuring clarity in legislation.

5.5.11 The reality of the short title is that it is the name by which members of the public will know a law. It is almost certain that members of the public will never be aware of the existence of, let alone the content of, the long title to an Ordinance.

5.5.12 It is on this basis that the advice can be summarised in essence as:

(a) the effect of using the combination of “medical services” and “levy” in the short title of the Bill must be to mislead a reader of the short title in understanding what the Bill is about; and

(b) our advice must be that misleading legislation is bad legislation.

#### *5.6 Consideration of arguments in favour of “Medical Services Levy”*

5.6.1 Two arguments were put forward by Members at the October meeting of Executive Council in favour of calling the Bill the “Medical Services Levy” Bill as follows:

(a) some Members stood for election with the reintroduction of the medical services levy as part of their election manifesto; and

(b) members of the public understand and are aware of what is involved.

5.6.2 The question of what might have been promised in election manifestos is a purely political issue and, it is suggested, should not be used to label something in law which it is not.

5.6.3 The assumption that members of the public understand, and are aware of, what is involved in the law surely only lends weight to the argument that the measure should be labelled exactly what it is, rather than with a label that is misleading.

## **6.0 Financial Implications**

None.

## **7.0 Legal Implications**

The legal implications are set out in the body of the paper.

## **8.0 Human Resources Implications**

None.

**Extract from ExCo paper 242/10 – considered at meeting of 21 October 2010**

*“Tax or levy?”*

6.27 The draft Bill refers to a Medical Services Tax rather than a Medical Services Levy, as did the Legislative Programme. The question of what to call the measure is the subject of disagreement between the Attorney General’s Chambers on one side and the Commissioner of Taxation and the Taxation Office on the other.

6.28 This is not a new issue:

- It was considered by the previous Executive Council in the context of an earlier (unsuccessful) proposal to reintroduce this measure, which was to have been referred to as an Employment Tax rather than as a Medical Services Levy;
- This issue was explored in ExCo paper 181/10 and was discussed by Executive Council at its meeting in July 2010

6.29 The advice of AG’s Chambers remains the same and can be summarised as follows:

- (a) The Attorney General’s Chambers have, for several years, used plain language drafting for several years. This means that language should not be used to obscure (let alone conceal) the true meaning of legislation.
- (b) The measure being proposed would far more accurately (and transparently) be described as a tax rather than as a levy.
- (c) Although there are precedents from other jurisdictions for taxes to be described as levies, the nature of the proposal is that payments are to be charged as a percentage of earnings, which is a tax (whatever label is attached to it). The income tax base and the base for the proposed new tax are almost identical.
- (d) The machinery that is going to be used to collect these payments is the system of Payments on Account of Tax (for employees) and Income Tax Assessment (for the self-employed). That machinery will be operated by Taxation Officers from the Taxation Office.

6.30 There is an extensive degree of overlap with the Taxes Ordinance and a many cross-references to it in the Bill.

6.31 It is a separate issue whether the measure can even legitimately be described as a Medical Services Tax rather than as an Employment or Payroll Tax, because of how the proceeds are to be accounted for.

6.32 The reason why it was decided to re-introduce the former Medical Services Levy may have been the cost of medical services is increasing. However, although the revenue raised will be earmarked by means of a code for the Health and Medical Services budget, it will still be paid into the general Consolidated Fund and could be used for any purpose, not just medical services. The revenue raised also replaces existing funding from other sources – there is no additional funding for extra expenditure.

6.33 The Bill has been drafted on the basis of express instructions that there should be nothing to prevent the use for other purposes of funds raised from the proposed new measure.”

### **Extract from Minute of ExCo meeting of 21 October 2010**

Councillor Edwards objected strongly to this being called a Medical Services Tax. Councillor Cheek agreed and said that some MLA’s had stood with the re-introduction of the Medical Services Levy as part of their manifesto. The public were very aware of what was involved.

Councillor Cheek argued that according to her dictionary the terms levy and tax could be used interchangeably. The AG disagreed: the Falkland Islands used the phrase tax, and a move to call something a levy must mean that what was being proposed was different from a tax. That was simply not the case in relation to MSL.

Expanding on his concerns, the AG explained that he had issues with both Medical Services and Levy. In relation to the first, this was in essence a tax on employment, and it would be quite possible to decide to spend no money at all on medical services and still collect this tax – it was not hypothecated and once collected the money could be used for any purpose whatsoever. Linking the tax to medical services could be seen as misleading the public.

In relation to Levy, the AG explained that a levy was something imposed and collected on a particular item or action: a classic example would be a plastic bag levy under which retailers paid a levy of 10p on every plastic bag given to customers. So a medical services levy would be a charge imposed on the provision of medical services eg 50p on each prescription dispensed. What was proposed here was not a levy but a tax – we were charging it on income so that the amount paid was a % of income, we were using the tax system to recover the sums due, it was being administered by the Tax Office, and was being proposed by the Commissioner for Taxation.

A further legal issue was that under paragraph 1 of Annex A to the Constitution it was stated that no law should contain anything foreign to what the title of the law imports. Putting that into simpler terms, it is saying that the title of an Ordinance should be consistent with its contents. As the AG had explained, he did not think that using a title which referred to MSL would be in accordance with that provision.

### **Extract from ExCo paper 181/10 considered at meeting of 29 July 2010**

- 11.3 The Legislative Programme referred to the introduction of a Medical Services Tax instead of a Medical Services Levy and there is a clear issue as to how the measure should be described. This is not a new issue and has been considered by Executive Council (with its previous membership) in the context of an earlier (unsuccessful) proposal to reintroduce this measure, which was to have been referred to as an Employment Tax rather than as a Medical Services Levy.
- 11.4 The advice of AG's Chambers in relation to whether the measure should be described as a "tax" or as a "levy" can be summarised as follows:
- (a) The approach being taken consistently by Attorney General's Chambers in the drafting of legislation is one of "plain language drafting" and an important corollary to that approach is that language should not be used to obscure (let alone conceal) the true meaning of legislation.
  - (b) The measure being proposed would far more accurately (and transparently) be described as a tax rather than as a levy.
  - (c) Although there are precedents from other jurisdictions for taxes to be described as levies, the nature of the proposal is that payments are to be charged as a percentage of earnings, which is a tax (whatever label is attached to it). There is a high degree of congruence between the income tax base and that proposed for this measure.
  - (d) Moreover, the machinery that is going to be used to collect these payments is the system of Payments on Account of Tax (for employees) and Income Tax Assessment (for the self-employed) machinery that will be operated by Taxation Officers from the Taxation Office.
- 11.5 There is a separate issue as to whether the measure can even legitimately be described as a Medical Services Tax rather than as an Employment or Payroll Tax, because of how the proceeds are to be accounted for. Although the re-introduction may have been inspired by the increasing cost of providing medical services, there will still not be complete hypothecation (because, although the revenue raised will be earmarked by means of a code for the Health and Medical Services budget, it will still be paid into the general Consolidated Fund.) nor of additionality (because it replaces existing funding from other sources rather than representing funding for additional expenditure).

### **Extract from Minute of ExCo meeting of 29 July 2010**

Members were clear that they wanted the measure to be described to [sic] as a "levy" rather than a "tax", although it could be described as a "tax" in the Ordinance. The Acting Attorney General advised that the Attorney General's Chambers would be drafting the legislation in accordance with the good drafting principles as advised, and that a draft Bill would be submitted to Executive Council for consideration in due course.