

立法會
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**An extract of the Report of the Bills Committee on
Adaptation of Laws Bill 1998**

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錯誤！尚未指定書籤名稱。 Adaptation of reference to “Colonial Regulations”

10. The Administration proposes to adapt the reference to “Colonial Regulations” to “relevant executive order”. The new term is defined as “any executive order issued by the Chief Executive for the administration of the public service and any regulation or direction made under such order”.

11. Members express concern about the proposed adaptation. Members point out that prior to the reunification, the Colonial Regulations were imperial instruments made under the Royal Prerogative. Article 48(4) of the Basic Law confers on the Chief Executive the power to issue executive orders. However, the scope of such orders is not specified. It is doubtful whether executive orders issued by the Chief Executive would be equivalent to the Colonial Regulations and whether such orders would be confined to the administration of the public service. In the event that the Chief Executive promulgates executive orders in relation to other government policies, such promulgation would have far-reaching repercussions from the constitutional point of view. Members also express concern that there may be an increasing number of executive orders issued by the Chief Executive in future.

12. The Administration has explained that the proposed adaptation is to retain the provisions in the Colonial Regulations pertaining to the administrative details of the management of the public service. Prior to the reunification, the administration of the public service was provided in the relevant provisions in the Letters Patent, Colonial Regulations and Civil Service Regulations. Over the years, many provisions in the Colonial Regulations pertaining to the administrative details of the management of the public service were translated into the Civil Service Regulations. Provisions in the Letters Patent and Colonial Regulations which have not been translated into the Civil Service Regulations relate to the authority to appoint, dismiss and

discipline public servants; to act on representations made by public servants; and to make related disciplinary regulations. With the lapsing of the Letters Patent and Colonial Regulations upon reunification, it was necessary to replace and localise those provisions relating to the administration of the public service to maintain continuity. As the Letters Patent and Colonial Regulations were imperial instruments, it would not be possible to replace them with a mirror arrangement. An executive order issued by the Chief Executive under Article 48(4) of the Basic Law provides the legal backing to enable the SAR Government to preserve its executive authority for the continued administration of the public service.

13. The Administration has advised that Public Service (Administration) Order 1997 (PS(A)O) (Executive Order No. 1 of 1997) is, at present, the only executive order issued by the Chief Executive. The constitutionality and legality of PS(A)O were confirmed by the Court of First Instance in an application for judicial review in 1998 (*The Association of Expatriate Civil Servants of Hong Kong v Chief Executive*). The Court has also ruled that PS(A)O is not in breach of Articles 48(7) and 103 of the Basic Law. The PS(A)O and the Public Service (Disciplinary) Regulations made under that Order have effectively replaced the Colonial Regulations dealing with the administration of the public service in relation to the appointment, dismissal and discipline of public servants.

14. Some members are of the view that although the Court has confirmed the legality of PS(A)O, it does not rule on whether an executive order issued by the Chief Executive under Article 48(4) is equivalent to the Colonial Regulations. Should executive orders have legal status, the present making of PS(A)O is tantamount to conferring on the Chief Executive a legislative power. Legal backing is required for the making of an executive order under Article 48(4).

15. A member points out that the Colonial Regulations are not confined to the administration of the public service. They also deal with the budget and public finance which are mainly covered by the Public Finance Ordinance. He considers that the best alternative way of handling the adaptation in question is to formulate those provisions of the Colonial Regulations which are still applicable into regulations to be made by the Chief Executive in Council under a civil service ordinance to be enacted by the legislature. Some members consider that the adaptation of reference to "Colonial Regulations" to "relevant executive orders" is not a technical amendment, but a legal and constitutional matter. Therefore, it should not be dealt with in the context of the Adaptation of Laws exercise.

16. The Administration has pointed out that in its judgment, the Court has noted that it was "plainly not possible for instruments to be promulgated which were identical in nature to the colonial instruments which they were replacing",

and “the hallmark of the previous system was that, where procedures were to be established locally, they were established by the Governor by executive action”. In the view of the Administration, an executive order issued by the Chief Executive does not constitute a departure from the previous system adopted by the Administration prior to the reunification in which any administrative order made by the then Governor is not subject to the approval by the LegCo. The term “relevant executive order” refers to the specific executive order published in the Gazette, i.e. PS(A)O. Its application is confined to the administration of the public service.

17. As the nature and ambit of an executive order as well as the procedures for its promulgation are constitutional issues, members suggest that the matter be followed up by the relevant Panel. For the purpose of clarity and certainty, members suggest that the specific executive order in force be included in the definition of “relevant executive order”.

18. Having regard to the views of members, the Administration has proposed to replace “Colonial Regulations” by making reference to the existing executive order, i.e. the reference to “Colonial Regulations” will be adapted to “Public Service (Administration) Order”. A definition of “Public Service (Administration) Order will be provided as follows -

“Public Service (Administration) Order” means -

- (a) the Public Service (Administration) Order 1997 (Executive Order No. 1 of 1997);*
- (b) the Public Service (Disciplinary) Regulation made under section 21 of that Order (and together with that Order published as S.S. No. 5 to Gazette No. 2/97); and*
- (c) any other regulation made or any direction given under that Order.*

as amended from time to time

19. Members accept the proposed amendments. The Administration would move the relevant Committee Stage amendments (CSAs) to Schedule 3 to the Bill.

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