

立法會
Legislative Council

LC Paper No. LS109/01-02

**Paper for the House Committee Meeting
on 7 June 2002**

**Legal Service Division Report on
Public Officers Pay Adjustment Bill**

I. SUMMARY

1. **Objects of the Bill** To provide a one-off reduction of the pay of, and the amounts of certain allowances payable to, public officers.

2. **Comments**
 - (a) The one-off reduction will, with effect from 1 October 2002, affect all civil servants, including the Director of Audit and ICAC Officers and all public officers whose pay is pegged to civil service pay scales, but exclude those on a starting salary not linked to annual service pay adjustment and judicial officers.

 - (b) The percentages of reduction are specified for different salary bands as set out in the Bill.

3. **Public Consultation** The Administration notified the staff sides of the 4 central consultative councils of the pay adjustments on 22 May 2002 and provided them with a copy of the draft Bill for comment. The staff sides were concerned that the proposed legislation would set a precedent for the Government to further cut back the conditions of service of civil servants in future. They suggested that an independent Committee of Inquiry should be set up under 1968 Agreement between the Hong Kong Government and the Main Staff Associations (the 1968 Agreement) to deal with the issue of 2002 civil service pay adjustment.

4. **Consultation with LegCo Panels/ Committees** The policy aspects of the Bill were discussed at the meetings of the LegCo Panel on Public Service ("PS Panel") on 23 May and 29 May 2002. A majority of Panel Members present at the meetings queried the need to implement civil service pay reductions by legislation.

5. **Conclusion** In view of the controversial issues involved and the representations made, it is recommended that a Bills Committee be formed to study the Bill in detail.

II. REPORT

Object of the Bill

To provide for a one-off reduction of the pay of and the amounts of certain allowances payable to public officers.

LegCo Brief Reference

2. CSBCR/PG/4-085-001/30-3 Pt 4 issued by the Civil Service Bureau dated 22 May 2002.

Date of First Reading

3. 5 June 2002.

Comments

4. The Bill essentially seeks to reduce the pay of civil servants pertaining to the points on the civil service pay scales and the ICAC Pay Scale and other public officers whose pay is determined or adjusted in accordance with or by reference to the civil service pay scale by the percentages specified in the Bill. It also seeks to reduce the rate of salary payable to the Director of Audit. Similarly, the pay of public officers who are not civil servants or ICAC officers but whose pay is determined or adjusted in accordance with or by reference to a civil service pay scale or ICAC Pay Scale is also reduced.

5. One particular aspect of the Bill is that it seeks to provide for an interpretation of the employment relationship between public officers and the Government so as to allow the proposed reduction. Clause 9 provides that contracts of employment of public officers are to be read as expressly authorizing the adjustments to pay and amount of the allowances made by the Bill. However, clause 8 provides that the adjustments made by the Bill to the pay and amounts of allowances payable to public officers do not prohibit or affect any adjustment to the pay or the adjustment of allowances payable to public officers after 1 October 2002.

6. An exemption is made with respect to the remuneration of public officers who is remunerated on a starting salary which is not linked to the annual civil service pay adjustment and judicial officers (clause 10). The list of exempted public officers and allowances may be amended by the Chief Executive in Council by notice published in the Gazette.

Public consultation

7. The Administration notified the staff sides of the 4 central consultative councils of the pay adjustments on 22 May 2002 and provided them with a copy of the draft Bill for comment. The 4 central consultative councils are:-

- (a) Senior Civil Service Council,
- (b) Model Scale One Consultative Council,
- (c) Disciplined Services Consultative Council, and
- (d) Police Force Council.

Consultation with LegCo Panels/Committees

8. At the LegCo Panel on Public Service ("PS Panel") meetings on 23 May and 29 May 2002, Members noted the strong objection raised by the 4 central staff consultative councils and 7 major civil service unions to the Administration's proposal to implement civil service pay reduction by legislation.

9. While the Panel Members had no objection to a civil service pay reduction in accordance with the findings of the Pay Trend Survey, they expressed concerns over -

- (a) the need to implement civil service pay reduction by legislation;
- (b) whether there are other feasible options to implement the pay reduction, e.g. by using the existing mechanism provided under the 1968 Agreement or the variation clause in the Memorandum on Conditions of Service (MCOS) applicable to civil servants;
- (c) whether the variation clause in MCOS applicable to civil servants is not sufficient for enabling the Government to reduce the pay of civil servants, as claimed by the Administration; if not, whether this means that there is no legal basis for the Government to reduce the pay of civil servants, and whether such reduction in pay would contravene Article 100 of the Basic Law;
- (d) whether the implementation of civil service pay reduction by legislation would deprive civil servants of the right to claim for compensation, damages or other remedies; and

- (e) whether it is more appropriate for the court than the legislature to deal with the contractual disputes between the Government and civil servants on the issue of pay adjustment.

10. A majority of the PS Panel Members queried the need to implement civil service pay reduction by legislation.

Conclusion

11. In view of the controversial issues involved and the representations made by various sectors, it is recommended that a Bills Committee be formed to study the Bill in detail.

12. The Legal Service Division is seeking clarifications from the Administration on certain technical aspects of the Bill and will report to Members in due course (as per attached letter).

Prepared by

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Assistant Legal Adviser
Legislative Council Secretariat
3 June 2002

Encl.

LS/B/30/01-02
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Mrs Jessie TING
Deputy Secretary for Civil Service
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By Fax (2868 5069) and By Post

5 June 2002

Dear Mrs TING,

Public Officers Pay Adjustment Bill

I am in the course of scrutinizing the legal and procedural aspects of the above Bill on behalf of Members and would be pleased if you could clarify the following questions:-

(a) Part 3

Please clarify the meaning of "public officers" in the Bill. Is it possible to provide a list of the "public officers (not being a civil servant or ICAC officer)" referred to in clause 5 of the Bill?

(b) Clause 9

Clause 9 provides that the contracts of employment of public officers are to be read as expressly authorizing the adjustments to pay and the amounts of the allowances made by the Bill.

It seems that the effect of clause 9 is that the legislation will retrospectively impute an intention to a party of an employment contract (i.e. a public officer) that this was what he or she intended at the time the employment contract was entered into. I appreciate that it is not uncommon to enact a legislative provision to override the intention of contracting parties, for example, sections 50(1), 51(1) and 115A(1) of the Landlord and Tenant (Consolidation) Ordinance (Cap. 7) and section 42(1) of the Employees' Compensation Ordinance (Cap. 282) (copies enclosed). Could the Administration supply examples where a legislative provision is made to re-interpret the intention of contracting parties?

(c) Clause10

By virtue of clause 10 and paragraph 1 of Schedule 3, the Bill does not apply to the pay of the public officers who are remunerated on a salary, being a starting salary, that is not linked to the annual civil service pay adjustment.

According to your LegCo Brief issued on 22 May 2002, "[a]n appointee recruited in a particular year on the delinked starting salary will remain on that salary until he qualifies for an increment after which he will join the respective pay scale and move along the adjusted scale in subsequent years. As a result of this delinking arrangement, any adjustment to the civil service pay scales, whether positive or negative, will not apply to the starting salaries. When these officers eventually join the adjusted pay scale, their pay level will thereupon reflect the effect of the pay reduction." (para. 17, p.6)

Is it then correct to say that public officers who are recruited on a delinked starting salary will not be affected by any adjustment of pay provided by the present Bill in any event until they qualify for an increment? Please explain the purpose for which such specific exemption is made in the Bill for these public officers.

(d) Clauses 8 and 11

Clause 8 provides that the adjustments made by the Bill do not prohibit or affect any adjustment made after 1 October 2002.

How would this apply in the case where subsequently the Chief Executive in Council amends Schedule 3, thereby bringing any exempted person within the proposed adjustment? Would such an adjustment by way of removal of the exemption be regarded as an adjustment now proposed by the Bill or as an adjustment made after 1 October 2002? Would the power of the Chief Executive in Council under clause 11 be subject to any expiry date?

Please let me have a reply in both languages as soon as possible.

Yours sincerely,

(Kitty CHENG)
Assistant Legal Adviser

Encl.

c.c. LA
CAS(1)5

Chapter: 7	Title: LANDLORD AND TENANT (CONSOLIDATION) ORDINANCE	Gazette Number: 29 of 1998; 44 of 2000
Section: 50	Heading: Application	Version Date: 01/07/1997

Remarks:

Adaptation amendments retroactively made - see 29 of 1998 s. 105; 44 of 2000 s. 3

(1) Subject to subsection (6), this Part applies to every domestic tenancy and domestic sub-tenancy of post-war premises, whether the same was effected orally or in writing and notwithstanding any provision in such tenancy or sub-tenancy, including any provision purporting generally or specifically to exclude this Part. (Amended 29 of 1983 s. 11)

(2) For the purposes of this section, "post-war premises" (戦後處所) means premises to which Part I does not apply by virtue of section 3(1)(a). (Replaced 29 of 1983 s. 11)

(3) The burden of proving that premises in a building are not post-war premises shall lie on the person so asserting; and a copy of a written permit of the Building Authority to occupy a building shall be prima facie evidence that premises in that building are not post-war if the permit purports to have been issued prior to 17 August 1945. (Amended 29 of 1983 s. 11)

(4) (a) The benefits and protection afforded by this Part shall, in any tenancy or sub-tenancy to which it applies, be available to the widow, widower, mother, father or any daughter or son over the age of 18 years of the tenant or sub-tenant, as the case may be, where she or he was residing with the tenant or sub-tenant at the time of his or her death, and for the purposes of this Part references to tenant or sub-tenant shall, except in this subsection, be deemed to include a reference to such widow, widower, mother, father, daughter or son. (Amended 29 of 1983 s. 11; 40 of 1984 s. 14)

(b) Only one person mentioned in paragraph (a) shall be entitled to the benefits and protection of this Part at one time and, in default of agreement by those persons, the Tribunal shall nominate that person on such grounds as appears to it to be just and equitable. (Added 29 of 1983 s. 11)

(c) The benefits and protection afforded by this Part shall not be available to a personal representative of a deceased tenant or sub-tenant or, notwithstanding any will or the law of succession on intestacy, any other person who is not a person mentioned in paragraph (a) as entitled to those benefits or that protection. (Added 40 of 1984 s. 14)

(5) (Repealed 6 of 1980 s. 3)

(6) This Part shall not apply to the following-

(a) a tenancy or sub-tenancy-

(i) of premises to which Part I applies; or

(ii) of premises in respect of which there is in existence an order under section 4; (Replaced 24 of 1980 s. 2. Amended 29 of 1983 s. 11)

(b) a tenancy or sub-tenancy of land unbuilt on;

(c) a tenancy or sub-tenancy of agricultural land, which expression shall have the meaning assigned to it by section 36 of the Rating Ordinance (Cap 116), including such a tenancy or sub-tenancy

where there is on the land a dwelling house occupied by persons working the land;

(d) a tenancy or sub-tenancy where the landlord or principal tenant is the employer and the tenant or sub-tenant is the employee in possession of the premises in accordance with the terms and conditions of his employment, being terms and conditions which require him to vacate the accommodation on ceasing to be so employed;

(e) a tenancy held from the Government, the Hong Kong Housing Authority, the Hong Kong Housing Society or the Hong Kong Settlers Housing Corporation Limited, or a sub-tenancy created out of such a tenancy; (Amended 52 of 1981 s. 2; 53 of 1993 s. 19; 29 of 1998 s. 105)

(f)-(g) (Repealed 76 of 1981 s. 32)

(h) (Repealed 29 of 1983 s. 11)

(i)-(k) (Repealed 6 of 1980 s. 3)

(l) a tenancy or sub-tenancy of any premises in a building in respect of which an appropriate certificate was first issued or which premises were completed or substantially rebuilt on or after 19 June 1981; and, for the purposes of this paragraph, "appropriate certificate" (適當證明書) means-

(i) an occupation permit, including a temporary occupation permit, issued by the Building Authority under section 21 (2) of the Buildings Ordinance (Cap 123); or

(ii) where section 21 of the Buildings Ordinance (Cap 123) does not apply to the premises by virtue of the Buildings Ordinance (Application to the New Territories) Ordinance (Cap 322 1964 Ed.) or the Buildings Ordinance (Application to the New Territories) Ordinance (Cap 121), a certificate issued by the Director of Lands, or any person authorized by him, certifying that the premises are complete; or (Amended L.N. 370 of 1981; L.N. 76 of 1982; L.N. 94 of 1986; 60 of 1987 s. 14; L.N. 291 of 1993)

(iii) where section 21 of the Buildings Ordinance (Cap 123) does not apply to the premises by virtue of section 18 of the Housing Ordinance (Cap 283), a certificate issued by the Director of Housing, or any person authorized by him, certifying that the premises are complete; (Added 52 of 1981 s. 2. Amended 29 of 1983 s. 11)

(m) a tenancy or sub-tenancy of premises the rateable value of which is not less than \$30000 or such other sum as the Legislative Council by resolution determines; (Replaced 52 of 1981 s. 3. Amended 29 of 1983 s. 11; 40 of 1984 s. 14; 32 of 1985 s. 8)

(n) a tenancy or sub-tenancy in writing created after 18 December 1981 for a fixed term of 5 years or longer which contains no provision-

(i) for earlier determination by the landlord otherwise than by forfeiture; and

(ii) for any premium or fine or for any increase in the rent during the fixed term; (Added 76 of 1981 s. 32)

(o) a tenancy or sub-tenancy created on or after 10 June 1983 of premises of which, or of part of which, the tenant or sub-tenant under that tenancy or sub-tenancy is not already in possession under another tenancy or sub-tenancy. (Added 29 of 1983 s. 11)

(7)-(8) (Repealed 29 of 1983 s. 11)

(9) The Chief Executive may by order exclude from the further application this Part any class of

tenancy or sub-tenancy, any class of premises or any particular tenancy or sub-tenancy or premises.
(Amended 44 of 2000 s. 3)

(10) Subject to subsection (12), for the purposes of this section, the rateable value of any premises shall be-

(a) in the case of premises being a tenement included in the valuation list declared in March 1977 under section 13 of the Rating Ordinance (Cap 116) as amended or altered from time to time up to and including 10 June 1983, the rateable value contained in that list on 10 June 1983; and

(b) in any other case, the rateable value which would have been contained in the list referred to in paragraph (a) on 10 June 1983 had the premises been included in that list and which is certified by the Commissioner as regards the premises for the purposes of this section and that certificate shall be final and binding. (Replaced 29 of 1983 s. 11. Amended 77 of 1988 s. 3)

(11) The dates mentioned in subsection (10) may be amended by resolution of the Legislative Council. (Added 29 of 1983 s. 11. Amended 77 of 1988 s. 3)

(12) Any tenancy or sub-tenancy of premises excluded from this Part at any time by virtue of the operation of subsection (6)(m) shall continue to be so excluded notwithstanding any amendment of subsection (10). (Added 29 of 1983 s. 11. Amended 77 of 1988 s. 3)

Chapter: 7 Title: LANDLORD AND TENANT Gazette Number: 29 of 1998 s. 105
(CONSOLIDATION)
ORDINANCE
Section: 115A Heading: Determining the nature of a Version Date: 01/07/1997
tenancy

Remarks:

Amendments retroactively made - see 29 of 1998 s. 105

(1) Notwithstanding the purpose for which premises were let, in determining the nature of a tenancy for the purposes of this Part the following provisions shall apply-

(a) in any agreement in writing between a landlord and tenant, a term that the premises shall be used for a specified purpose shall be prima facie evidence that the premises are being used for such purpose;

(b) notwithstanding any evidence as to whether premises were originally let as a dwelling or not let as a dwelling, premises which are being used primarily for another purpose shall be deemed to have been let for such other purpose; but where such primary user is user as a dwelling and in breach of any term in the agreement with the landlord, the onus is on the tenant to establish that such user has been agreed to by the landlord, expressly or by implication, or acquiesced in by him;

(c) subject to paragraph (d), where there exists insufficient evidence as to whether premises were let as a dwelling or not let as a dwelling, the nature of the tenancy shall be determined by the primary user of the premises;

(d) where there is evidence that premises were let otherwise than as a dwelling, or that they were being used otherwise than as a dwelling at the commencement of a sub-tenancy created out of the original tenancy, any premises the subject of such sub-tenancy shall themselves be deemed to be used otherwise than as a dwelling until the sub-tenant satisfies the Tribunal to the contrary;

(e) the use of premises as a boarding or lodging house is a use other than as a dwelling.

(2) In determining whether premises were let, or are being used, as a dwelling, the following may be taken into account-

(a) the covenants, terms and conditions in any Government lease or tenancy; (Amended 29 of 1998 s. 105)

(b) any occupation permit given by the Building Authority under section 21 of the Buildings Ordinance (Cap 123), or under any Ordinance replaced thereby, in relation to the premises;

(c) normal additional uses of premises consistent with the domestic nature of a tenancy having regard to the following-

(i) floor area in occupation part or full-time for such uses;

(ii) the number of people engaged in such uses but not dwelling on the premises;

(iii) the furnishings, fittings and contents of the premises; and

(iv) the gross profits resulting from such uses relative to the rent or proportion thereof paid by the

person making such profits.

(3) Where a dispute arises as to whether a tenancy is domestic, the landlord or tenant may, if primary user is relevant to the dispute, apply in the specified form to the Commissioner for his certificate as to the primary user of the premises and shall specify in the form the nature of the dispute.

(4) Whether or not a dispute arises as to whether a tenancy is domestic, a landlord or tenant may apply in the specified form to the Commissioner for his certificate as to the primary user of the premises.

(5) Where a person applies to the Commissioner under subsection (4) he shall-

(a) specify in the application form a day, other than a public holiday, on which he would like the inspection to be carried out;

(b) at the time when he lodges the application, pay such fee as may be determined by the Financial Secretary; and

(c) lodge the application form with the Commissioner not less than 10 days before the day specified in the form.

(6) The Commissioner shall, where practicable, carry out the inspection under subsection (7) on the day specified in the application or, if the inspection cannot be carried out on that day, as soon thereafter as is reasonably possible.

(7) Subject to subsection (8), where an application under subsection (3) or (4) is made to the Commissioner, he shall inspect the premises, and may-

(a) where he is satisfied on the evidence available as to the primary user, issue free of charge in the case of an application under subsection (3) and serve on the landlord and tenant a certificate in the specified form as to the primary user of the premises on the day of his inspection;

(b) where he is not so satisfied, issue free of charge in the case of an application under subsection (3) and serve on the landlord and tenant a notice in the specified form declining to express an opinion as to the primary user of the premises.

(8) Where the Commissioner issues a certificate under subsection (7)(a), no further application may be made under subsection (3) or (4) before the expiry of 1 year from the date on which that certificate is issued.

(9) A certificate issued by the Commissioner under subsection (7)(a) shall, for all purposes, including an application under subsection (10), be prima facie evidence of the facts set out therein and of the primary user of the premises on the day on which they were inspected.

(10) A party to any tenancy may apply to the Tribunal to determine whether or not a tenancy is domestic and the Tribunal may determine that question for the purposes of this Part.

(Added 53 of 1993 s. 27)

Chapter: 7 Title: LANDLORD AND TENANT (CONSOLIDATION) Ordinance Gazette Number: 29 of 1998
Section: 51 Heading: Meaning of "domestic tenancy" (住宅租賃) Version Date: 01/07/1997

Remarks:

Adaptation amendments retroactively made - see 29 of 1998 s. 105

(1) For the purposes of section 50, "domestic tenancy" (住宅租賃) and "domestic sub-tenancy" (住宅分租租賃) mean a tenancy or sub-tenancy of premises let as a dwelling.

(2) Notwithstanding the purpose for which premises were let, in determining the nature of a tenancy for the purposes of this Part, the following provisions shall apply-

(a) in any agreement in writing between a landlord and tenant, or between a principal tenant and sub-tenant, a term that the premises shall be used for a specified purpose shall be prima facie evidence that the premises are being used for such purpose;

(b) notwithstanding any evidence as to whether premises were originally let as a dwelling or not let as a dwelling, premises which are being used primarily for another purpose shall be deemed to have been let for such other purpose:

Provided that where such primary user is user as a dwelling and in breach of any term in the agreement with the landlord or principal tenant, as the case may be, then the tenant or sub-tenant shall be required to establish that such user has been agreed to by the landlord or principal tenant, expressly or by implication, or acquiesced in by him;

(c) subject to paragraph (d), where there exists insufficient evidence as to whether premises were let as a dwelling or not let as a dwelling, the nature of the tenancy or sub-tenancy shall be determined by the primary user of the premises;

(d) where there is evidence that premises were let otherwise than as a dwelling, or that they were being used otherwise than as a dwelling at the commencement of a sub-tenancy created out of the original tenancy, any premises the subject of such sub-tenancy shall themselves be deemed to be used otherwise than as a dwelling until the sub-tenant satisfies the Tribunal to the contrary;

(Amended 76 of 1981 s. 34)

(e) the use of premises as a boarding or lodging house is a use other than as a dwelling.

(3) In determining whether premises were let, or are being used, as a dwelling, the following may be taken into account-

(a) the covenants, terms and conditions in any Government lease, tenancy or sub-tenancy; (Amended 29 of 1998 s. 105)

(b) any occupation permit given by the Building Authority under section 21 of the Buildings Ordinance (Cap 123), or under any Ordinance replaced thereby, in relation to the premises;

(c) normal additional uses of premises consistent with the domestic nature of a tenancy or sub-tenancy having regard to the following-

- (i) floor area in occupation part or full-time for such uses;
 - (ii) the number of people engaged in such uses but not dwelling on the premises;
 - (iii) the furnishings, fittings and contents of the premises; and
 - (iv) the gross profits resulting from such uses relative to the rent or proportion thereof paid by the person making such profits.
- (4) Where a dispute arises as to whether a tenancy or sub-tenancy is domestic, the landlord, tenant, principal tenant or sub-tenant may, if primary user is relevant to the dispute apply in the specified form to the Commissioner for his certificate as to the primary user of the premises and shall specify in the form the nature of the dispute.
- (4A) Whether or not a dispute arises as to whether a tenancy or sub-tenancy is domestic, a landlord, tenant, principal tenant or sub-tenant may apply in the specified form to the Commissioner for his certificate as to the primary user of the premises. (Added 56 of 1976 s. 3)
- (4B) Where a person applies to the Commissioner under subsection (4A) he shall-
- (a) specify in the application form a day, other than a public holiday, on which he would like the inspection to be carried out;
 - (b) at the time when he lodges the application, pay such fee as may be determined by the Financial Secretary; and
 - (c) lodge the application form with the Commissioner not less than 10 days before the day specified in the form. (Added 56 of 1976 s. 3)
- (4C) (Repealed 32 of 1985 s. 9)
- (4D) The Commissioner shall, where practicable, carry out the inspection under subsection (5) on the day specified in the application or, if the inspection cannot be carried out on that day, as soon thereafter as is reasonably possible. (Added 56 of 1976 s. 3)
- (5) Subject to subsection (5A), where an application under subsection (4) or (4A) is made to the Commissioner, he shall inspect the premises, and may-
- (a) where he is satisfied on the evidence available as to the primary user, issue free of charge in the case of an application under subsection (4) and serve on the landlord and tenant or principal tenant and sub-tenant, as the case may be, a certificate in the specified form as to the primary user of the premises on the day of his inspection;
 - (b) where he is not so satisfied, issue free of charge in the case of an application under subsection (4) and serve on the landlord and tenant or principal tenant and sub-tenant, as the case may be, a notice in the specified form declining to express an opinion as to the primary user of the premises.
- (Amended 56 of 1976 s. 3; 29 of 1983 s. 12)
- (5A) Where the Commissioner issues a certificate under subsection (5)(a), no further application may be made under subsection (4) or (4A) before the expiry of 1 year from the date on which that certificate is issued. (Added 29 of 1983 s. 12)
- (6) A certificate issued by the Commissioner under subsection (5)(a) shall, for all purposes, including an application under subsection (8), be prima facie evidence of the facts set out therein and of the primary user of the premises on the day on which they were inspected. (Amended 76 of 1981 s. 34)

(7) (Repealed 29 of 1983 s. 12)

(8) A party to any tenancy or sub-tenancy may apply to the Tribunal to determine whether or not a tenancy or sub-tenancy is domestic and the Tribunal may determine that question for the purposes of this Part. (Replaced 29 of 1983 s. 12)

