

**LegCo Panel on Public Service
2002 Civil Service Pay Adjustment
Follow-up to the meeting on 23 May 2002**

Purpose

1. At the Panel meeting held on 23 May 2002, in discussing LC Paper No. CB(1)1769/01-02, Members asked for supplementary information on the Administration's proposal to implement a civil service pay reduction, if finally decided, by legislation. The requested information is set out in this paper.

Requested information

Item 1. Justifications to implement civil service pay reduction by legislation

Please provide the legal advice on the full justifications for the Administration's proposal to implement civil service pay reduction by legislation.

2. At common law the terms of a contract cannot be unilaterally varied by one party so that, without the agreement of an employee, or the reservation of an express power in the contract, an employer cannot reduce an employee's pay.

3. In civil service contracts, the Government reserves the right to alter any of the terms of appointment or conditions of service should the Government at any time consider this to be necessary. On the basis of decided cases, the courts are unlikely to accept that this general power of variation applies to such a fundamental term as a civil servant's salary. The contracts of officers engaged since June 2000 have included the following clause –

“Subject to Civil Service Regulations 451 and 452 [which refer to satisfactory service] the officer will move to the appropriate pay scale on completion of one year's service. The pay scale will be subject to review in accordance with the annual pay adjustment exercise. Such adjustment may take the form of pay increase, pay freeze or pay reduction (see Appendix 3).”

Appendix 3 summarizes the annual salary adjustment mechanism. There is, however, no such clause in the contracts of officers appointed before June 2000.

4. While at common law an employer could terminate employees' contracts by notice and offer them re-employment on a lower salary, the majority of civil servants have permanent contracts that cannot be terminated by notice and under which, subject to good conduct, they are entitled to remain in office until they reach the retirement age prescribed by the Pensions Ordinances.

5. While it might be possible for the Administration to reach such agreement with Civil Service Central Consultative Councils on a civil service pay reduction, such an agreement would not prevent individual civil servants from challenging any agreed pay reduction. In the circumstances, the only safe way to achieve a lawful reduction in civil service pay is through legislation.

6. For details on the need for legislation to implement a civil service reduction, please refer to the article prepared by Law Officer (Civil Law) at Annex A. The article, which also addresses the question of consistency of the proposed legislative approach with the Basic Law, was published in a number of newspapers on 24 May 2002.

Item 2. Memorandum on Conditions of Service (MOCS)

(a) Please provide various versions of MOCS applicable to civil servants and highlight the differences in their provisions. In particular, please set out whether the following clauses are included in each of the versions:

- ***General clause (Clause 1.1 in MOCS (June 2000 version))***
"The officer is subject to Executive Orders issued from time to time by the Chief Executive for the administration of the public service and to regulations and directions made under these Orders."
- ***Clause relating to salary and increments (Clause 4.7 in MOCS (June 2000 version))***
"Subject to Civil Service Regulations 451 and 452, the officer will move to the appropriate pay scale on completion of one year's service. The pay scale will be subject to review in accordance with the annual pay adjustment exercise. Such adjustment may take the form of pay increase, pay freeze or pay reduction."
- ***Variation clause (Clause 23 in MOCS (June 2000 version))***
"Notwithstanding anything contained in this Memorandum or in the covering letter of offer of appointment, the Government reserves the right to alter any of the officer's terms of appointment, and/or conditions of service set out in this

Memorandum or the said covering letter should the Government at any time consider this to be necessary."

7. The employment arrangements for a civil servant are governed by the provisions set out in a letter of appointment and the Memorandum on Conditions of Service (MOCS) attached to the letter. At present, there are a total of 11 sets of sample letter of appointment and 25 sets of standard MOCS (including those for retired and re-employed but excluding those tailored made by individual departments for their own staff, e.g. the Hong Kong Police Force) in the civil service to cater for the different types of terms of appointment for new recruits and serving officers on transfer or further appointment (a list of these sample appointment letters and MOCSs is at Annex B and a full set of these documents is deposited at the LegCo Secretariat for Members' reference). By and large, these MOCSs contain very similar provisions. Those clauses with a greater degree of variation concern the fringe benefits to which officers are entitled under different terms of appointment.

8. The various sets of MOCS are updated from time to time to reflect the changes to the Civil Service Regulations and other Government rules and regulations relating to the management of the civil service. For serving officers in the civil service, therefore, the MOCSs applicable to them differ from individual to individual depending on the date of their offer of appointment and the particular terms of their appointment. There are altogether over 200 sets of MOCSs introduced over the years which are currently still in force. Broadly speaking, the general clause (similar to clause 1.1 of the June 2000 version of the MOCS) and the variation clause (similar to clause 23 of GF 608 of the June 2000 version of the MOCS) (with very minor differences in drafting) have been included in most MOCSs for decades. In other words, these two provisions apply to most civil servants now serving in the Government. For the salary and increments clause, however, in all the MOCSs preceding the June 2000 version, it does not expressly stipulate that "the pay scale will be subject to review in accordance with the annual pay adjustment exercises and such adjustment may take the form of pay increase, pay freeze or pay reduction" as in clause 4.7 of the June 2000 version of GF 608.

9. We estimate that about 2 700 officers have joined the Government since the June 2000 version of the MOCS came into force and another 2 700 officers on agreement or retired and re-employment on agreement terms may have been issued with the June 2000 version of MOCS. But the employment contracts of the great majority of serving civil servants totally over 160 000 do not contain an express power to reduce pay.

(b) Please provide the details of the legal advice on the reasons why the variation clause in MOCS is not sufficient for enabling the

Government to reduce the pay of civil servants. In this connection, please also provide details of the relevant court decisions mentioned by the Law Officer (Civil Law) of the Department of Justice at the Panel meeting.

10. As mentioned in the reply to 2(a) above, the MOCS applicable to officers appointed before June 2000 does not reserve an express power for the Government to reduce the appointee's pay. Despite the decision of the Hong Kong Court of Appeal in *Lam Yuk-ming v Attorney General* [1980] HKLR 815 in which the Court upheld the enforceability of the unilateral variation clause, a subsequent decision of the Hong Kong High Court in *Fynn v Attorney General* [1991] 1 HKLR 315 at 318 stated that –

“There seems to be little doubt that there is nothing to prevent the Government from effecting changes and modifications to the various regulations relating to the employment. However, it is doubtful whether a basic alteration could be made by the Government unilaterally such as changing the basis upon which the employee is to be remunerated.”

11. That approach is supported by decisions in the U.K. such as *United Associations for Protection of Trade Ltd. v Kilburn* (17 September 1985, unreported) and the Court of Appeal's decision in *Wandsworth London Borough Council v D'Silva* [1998] IRLR 193.

(c) In connection with item (b) above, if the variation clause in MOCS is not sufficient for enabling the Government to reduce the pay of civil servants, please advise 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.

12. In view of the absence of an express power for the Government to reduce the pay of civil servants in most MOCSs currently in force, based on decided court cases there is a serious risk that a decision to reduce civil service pay without legislation would be subject to a successful legal challenge.

13. The current proposal to reduce civil service pay is based on careful consideration of all relevant factors under the established civil service pay adjustment mechanism including: the net pay trend indicators derived from the independent Pay Trend Survey, the state of the economy, budgetary considerations, changes in the cost of living, the staff sides' pay claims and civil service morale. This mechanism is flexible enough to allow for reductions as well as increases since some of these factors are capable of upward and downward movements. The Government is committed, and the staff sides of the central consultative councils have also hitherto urged the Government, to

follow the established mechanism in deciding the size of this year's pay adjustment. The proposed legislation is a means to ensure that a justified decision made under the established mechanism can be implemented fairly and with certainty.

14. Article 100 of the Basic Law provides that public servants serving in all Hong Kong Government departments before the establishment of the Hong Kong SAR "may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before." Assuming that any pay reduction does not reduce the salaries of civil servants who were serving immediately before 1 July 1997 to a level below that which they were receiving on that date, there would be no breach of that article.

Item 3. Basic Law implications

Please provide the legal advice on the interpretation of "no less favourable than before" under Article 100 of the Basic Law.

15. While it is arguable that "no less favourable than before" in Article 100 of the Basic Law could be construed to take account of changes in the cost of living, that issue does not arise in the context of the present proposed reduction since even after the reduction, the pay of civil servants would still be at or above the level in cash terms that they were receiving on 30 June 1997.

Item 4. Independent Committee of Inquiry

(a) Please consider other alternatives to implement the pay reduction, e.g. by using the existing mechanism provided under the 1968 Agreement between the Hong Kong Government and the Main Staff Associations (the 1968 Agreement) to appoint an independent Committee of Inquiry to deal with the issue.

16. There is no other alternative to legislation which will enable the Government to implement the pay reduction, which is a reasonable decision made under the established pay adjustment mechanism, with certainty. The 1968 Agreement between the Hong Kong Government and certain staff associations does not form part of the existing civil service pay adjustment mechanism. Any request for the appointment of a Committee of Inquiry under the 1968 Agreement will have to be justified on merit and is subject to the decision of the Chief Executive.

(b) If the Chief Executive so decides or the main staff associations so request to appoint an independent Committee of Inquiry to deal with the issue, please confirm whether the Government would defer the introduction of the proposed Public Officers Pay Adjustment Bill into LegCo.

17. Since the 1968 Agreement is not part of the pay adjustment mechanism, there would be no necessary connection between a decision to appoint an independent Committee of Inquiry and the decision to introduce the proposed Bill into LegCo.

(c) Please confirm whether the recommendations of a Committee of Inquiry are binding on the Government and all civil servants.

18. The recommendations of a Committee of Inquiry are not binding on either the Government or the staff associations who are parties to the agreement unless they are accepted by both the Government and the associations. Even if they were accepted by both the Government and the associations, they would not bind associations who are not parties to the 1968 Agreement nor would they bind individual civil servants, even if they are members of the relevant associations.

Item 5. Draft Public Officers Pay Adjustment Bill

(a) Please explain the intent and effect of clause 9 (Compensation, remedies etc.) of the Draft Bill.

19. Clause 9 of the Bill as presently drafted is intended to expressly authorize the adjustments to pay and allowances made by the ordinance when enacted and to clarify that following enactment a public officer will not directly or indirectly be able to recover the amount of the reduction by way of compensation or damages.

(b) Please provide the justifications for not allowing amendments to the Bill.

20. Amendments to a Bill under consideration by the Legislative Council may be moved subject to compliance with the procedural rules on the form and contents of such amendments as set out in Rule 54 of the Rules of Procedures of the Legislative Council.

Annex A

Civil Service Pay : the legal issues

1. The current debate concerning a possible reduction in civil service pay has thrown up important legal issues. Would a pay reduction be lawful and consistent with the Basic Law?

2. The Department of Justice is confident that a limited pay reduction, achieved through legislation, would be both lawful and consistent with the Basic Law.

Pay adjustment mechanism

3. The current pay adjustment mechanism takes into account the net pay trend indicators derived from the pay trend survey, the state of the economy, budgetary considerations, movements in the cost of living, the Staff Sides' pay claims and civil service morale. It is flexible enough to take account of reductions as well as increases, since some of these factors are capable of upward and downward movements. But if the result of applying these factors suggests that there should be a reduction of pay, the question now is how best we could achieve it.

The need for legislation

4. As a general rule, the terms of a contract cannot be unilaterally varied by one party. And so, without the agreement of the employee, an employer cannot generally reduce an employee's pay.

5. In civil servants' contracts, the Government reserves the right (normally in clause 20) to alter any of the terms of appointment or conditions of service should the Government at any time consider this to be necessary. This might appear to give the Government the right to reduce salaries unilaterally. But decided cases indicate that the courts are unlikely to accept that this general power of variation applies to such a fundamental term as the salary. It would therefore not be safe to regard that provision as authorising a unilateral pay reduction.

6. There is another route that is open to some employers. They may be able to terminate employees' contracts by notice and offer them re-

employment on a lower salary. However, a large proportion of civil servants have permanent contracts that cannot be terminated by notice. For those without permanent contracts, the termination route is theoretically possible. But the prospect of dismissing civil servants en masse, with no guarantee that they would accept re-employment on lower salaries, would raise serious concerns about the smooth operation of the Government, and of deliveries of services to the public.

7. It has been suggested that there is a further route open to the government, namely to reach an agreement with the civil service. However, even if such an agreement were reached with civil service central consultative councils, it would not prevent individual civil servants from challenging any agreed pay reduction.

8. Faced with these difficulties, the only safe way to achieve a lawful reduction in civil service pay is through legislation. If legislation to reduce pay is enacted the risk of a successful legal challenge would be significantly reduced.

Basic Law issues

9. But if there is to be a civil service pay reduction, would it be lawful and consistent with the Basic Law? And if so, would any legislation to give effect to such pay reduction be consistent with the Basic Law?

10. Article 100 provides that public servants serving in all Hong Kong government departments before the establishment of the Hong Kong SAR “may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.” Assuming that the pay reduction does not make the salaries of civil servants lower than they were on 30 June 1997, there would be no breach of that Article.

11. Moreover, in a case decided in 1998, the court held that Article 100 was intended to ensure continuity of employment so that no public servant suffers as a consequence of the transition itself, but was not intended to inhibit the introduction of new measures for the good governance of Hong Kong. The Association of Expatriate Civil Servants had challenged the introduction, after Reunification, of a Chinese language proficiency requirement for those civil servants who wished to transfer to permanent terms of service. After explaining the purpose of Article 100, the court held that it had not been breached by the introduction of this new requirement.

12. Article 103 of the Basic Law provides that Hong Kong’s previous system of management for the public service, including special bodies for

advising on their pay and conditions, shall be maintained. The emphasis here is on the system, rather than on the pay and conditions themselves.

13. The system for pay adjustments, which has been in place since 1974, has been described earlier. The application of that system this year reflects the downward trend of relevant factors and, in particular, the downturn in the economy and our deficit budget. If the revised pay levels give full effect to the established system, there would therefore be no breach of Article 103.

14. Article 160 of the Basic Law provides that contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong SAR, provided that they do not contravene the Basic Law. The contractual rights of civil servants who were employed on 30 June 1997 are within this provision. But the pay of those who remain in Government employment has been increased since that date by between 4.99% (for directorate officers at D3 and above) and 11.32%.

15. Assuming that the proposed pay reductions would not bring salaries to a level below that on 30 June 1997, the right to the salary as at that date would be fully recognized and protected.

16. Can it be argued that the rights protected by Article 160 include a right not to have any legislative interference with a subsisting contract? Given that laws previously in force can be amended by legislation, provided that the amendments are consistent with the Basic Law, it would be extraordinary if contractual rights could not be modified by legislation. Article 160 cannot have been intended to have that effect. It is primarily a savings provision, to ensure that contractual rights did not fall away as a result of Reunification.

17. The proposed pay reduction has taken full account of all relevant factors under the established civil service pay adjustment mechanism, which is itself consistent with Article 103 of the Basic Law. The legislative approach now proposed would simply be a new measure to give effect to a justified decision made under the established mechanism. Applying the reasoning that governs Article 100, it would also be a measure for the good governance of Hong Kong. Thus, the proposed legislative pay reduction is consistent with the Basic Law. The argument that Article 160 prohibits such a reduction cannot therefore be accepted.

Conclusion

18. The proposed pay reduction is controversial. But the legal issues should be put on one side. It is clear that, if there is to be a reduction, legislation is needed. And it is clear that a limited pay reduction would be consistent with the Basic Law.

**List of Letters of Appointment and Memorandum on Conditions of Service
Within the Civil Service**

I. List of appointment letters

Specimen Letter No.	Title
AL1 (August 2001)	Specimen Letter of Appointment on Probationary/Month-to-Month Terms
AL2 (August 2001)	Specimen Letter of Appointment on Agreement Terms
AL3 (August 2001)	Specimen Letter of Appointment on Day-to-Day Terms
AL4 (August 2001)	Specimen Letter of Appointment on Trial Terms
AL5 (August 2001)	Specimen Letter of Confirmation/Withdrawal of Offer of Appointment after Pre-employment Medical Examination (if required)
AL6 (April 2002)	Specimen letter to an overseas agreement officer offering transfer to locally modelled conditions
AL7 (April 2002)	Specimen letter to a transferee offering a further agreement on locally modelled conditions
AL8 (April 2002)	Specimen letter of offer of re-employment to officers who retire from the service and are re-employed on month-to-month terms without a break in service under the new pension scheme
AL9 (April 2002)	Specimen letter of offer of re-employment to officers who retire from the service and are re-employed in the same rank on agreement terms without a break in service under the new pension scheme
AL10 (April 2002)	Specimen letter of offer of re-employment to officers who retire from the service and are re-employed on agreement terms without a break in service under the old pension scheme (CSR 270(1))
AL11 (April 2002)	Specimen letter of offer of re-employment to officers who retire from the service and are re-employed on month-to-month terms without a break in service under the old pension scheme (CSR 270(2))

II. List of Memorandum on Conditions of Service

Form No.	Title
GF 301 (revised August 2001)	Memorandum on Conditions of Service for officers on local probationary/trial terms <i>(with pay points at D3 or below or equivalent)</i>
GF 305 (revised August 2001)	Memorandum on Conditions of Service for officers on month-to-month terms
GF 306 (revised August 2001)	Memorandum on Conditions of Service for officers on Model Salary Scale I
GF 306A FVL(NRS) (revised August 2001)	Memorandum on Conditions of Service for officers who retire and are re-employed without a break in service on month-to-month terms
GF 341 (revised August 2001)	Memorandum on Conditions of Service for <i>(a) overseas agreement officers on MPS 34-44 or equivalent appointed before 1.8.1987 who opt to remain on vacation leave terms under CSR 1265; or</i> <i>(b) overseas agreement officers on MPS 33 and below or equivalent who are appointed before 15.6.1988 and remain on vacation leave terms under CSR 1266.</i>
GF 341A (revised August 2001)	Memorandum on Conditions of Service for officers on overseas agreement terms <i>(with pay points at MPS 34 or above or equivalent on annual leave terms)</i>
GF 341BAP (revised August 2001)	Memorandum on Conditions of Service for officers on local agreement terms <i>(with pay points at D4 or above or equivalent)</i>
GF 341BAP2 (August 2001)	Memorandum on Conditions of Service for officers on local agreement terms <i>(with pay points at D4 or above or equivalent)</i> <i>(Note : This Memorandum is for Directorate officers at D4 or above or equivalent who (a) have opted to transfer to</i>

	<i>revised leave and passage arrangements in accordance with CSB Circular No. 7/98 or (b) were promoted to D4 or above or equivalent on or after 1 April 1998.)</i>
GF 341BAP OL2 (revised August 2001)	Memorandum on Conditions of Service for officers on locally modelled agreement terms <i>(with pay points at D4 or above or equivalent)</i>
GF 341D (NRS) (revised October 2001)	Memorandum on Conditions of Service for officers who retire and are re-employed without a break in service on overseas agreement terms <i>(with pay points at MPS 34 or above or equivalent on annual leave terms)</i>
GF 341D (NRS)2 (revised August 2001)	Memorandum on Conditions of Service for officers who retire and are re-employed without a break in service on overseas agreement terms <i>(with pay points at D4 or above or equivalent)</i> <i>(Note: This Memorandum is for directorate officers on overseas terms with pay points at D4 or above or equivalent who have opted to transfer to revised leave and passage arrangements in accordance with CSB Circular No. 7/98)</i>
GF 341F (revised August 2001)	Memorandum on Conditions of Service for officers on overseas agreement terms <i>(with pay points at D4 or above or equivalent)</i> <i>(Note : This Memorandum is for directorate officers on overseas terms with pay points at D4 or above or equivalent who have opted to transfer to revised leave and passage arrangements in accordance with CSB Circular No. 7/98.)</i>
GF 341FVL (revised August 2001)	Memorandum on Conditions of Service for officers on overseas agreement terms

	<i>(with pay points at MPS 33 or below or equivalent on flexible vacation leave terms)</i>
GF 341T (revised August 2001)	Memorandum on Conditions of Service for officers on overseas trial terms <i>(with pay points at D3 or below or equivalent)</i>
GF 392BAP(NRS) (revised August 2001)	Memorandum on Conditions of Service for officers who retire and are re-employed without a break in service on local agreement terms <i>(with pay points at D4 or above or equivalent)</i>
GF 392BAP(NRS)2 (revised August 2001)	Memorandum on Conditions of Service for officers who retire and are re-employed without a break in service on local agreement terms <i>(with pay points at D4 or above or equivalent)</i> <i>(Note: This Memorandum is for Directorate officers at D4 or above or equivalent who (a) have opted to transfer to revised leave and passage arrangements in accordance with CSB Circular No. 7/98 or (b) were promoted to D4 or above or equivalent on or after 1 April 1998)</i>
GF 392FVL (revised August 2001)	Memorandum on Conditions of Service for officers on local agreement terms <i>(with pay points at D3 or below or equivalent)</i>
GF 392FVL OL2 (revised August 2001)	Memorandum on Conditions of Service for officers on locally modelled agreement terms <i>(with pay points at D3 or below or equivalent)</i>
GF 392FVL (NRS) (revised August 2001)	Memorandum on Conditions of Service for officers who retire and are re-employed without a break in service on local agreement terms <i>(with pay points at D3 or below or equivalent)</i>
GF 307 (Revised August 2001)	Memorandum on Conditions of Service for Officers Appointed on Common Probationary/Trial Terms

GF 308 (Revised August 2001)	Memorandum on Conditions of Service for Officers Appointed on Common Month-to-Month Terms
GF 309 (Revised August 2001)	Memorandum on Conditions of Service for Model Salary Scale I officers Appointed on Common Month-to-Month Terms
GF 310 (Revised August 2001)	Memorandum on Conditions of Service for Officers Appointed on Common Agreement Terms
GF 607 (June 2000)	<p>Memorandum on Conditions of Service for Officers Appointed on New Probationary Terms</p> <p><i>Note : This Memorandum on Conditions of Service is applied to -</i></p> <p>(a) <i>new recruits who are first offered appointment on or after 1 June 2000; or</i></p> <p>(b) <i>officers who are offered re-appointment to the civil service with a break in service on or after 1 June 2000</i></p>
GF 608 (June 2000)	<p>Memorandum on Conditions of Service for Officers Appointed on New Agreement Terms</p> <p><i>Note : This Memorandum on Conditions of Service is applied to -</i></p> <p>(a) <i>new recruits who are first offered appointment on or after 1 June 2000; or</i></p> <p>(b) <i>officers who are offered re-appointment to the civil service with a break in service on or after 1 June 2000</i></p>