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Panel on Security

Background brief prepared by the Legislative Council Secretariat

Public Service (Administration) Order 1997

Purpose

This paper gives a summary of past discussions held by Members on the Public Service (Administration) Order 1997 (the Order) made under Article 48(4) of the Basic Law (BL48(4)).

Consultation with the Panel on Public Service on the continuation of the legal authority for the administration of the civil service after 1997

2. At the meeting of the Panel on Public Service on 27 January 1997, the Administration advised the Panel that it was considering how best to provide for the continuation of the legal authority for the administration of the civil service, which was provided for in the Letters Patent (LP) and Colonial Regulations (CRs), after reunification. While enactment of legislation was a possible way to provide for the continuation of the authority under LP and CRs, other options would also be explored.

3. At the meeting of the Panel on Public Service on 24 February 1997, the Administration advised the Panel that the Administration had identified the options of enacting public service legislation and issuing an executive order under BL48(4) as possible means of providing for the continuation of the arrangements for the administration of the civil service after 1 July 1997. Among the two options, the Administration proposed to pursue the option of issuing an executive order under BL48(4).

4. Some members considered that the enactment of public service legislation was preferable to an executive order made by the Chief Executive (CE) of the Hong Kong Special Administrative Region (HKSAR) under BL48(4), as it provided more open and democratic consultation with the public on the issue. The Administration responded that it was important to have minimum changes to the existing system in order to preserve continuity in the administration of the public service after the transfer of sovereignty. Legal advice indicated that an executive order made by CE under BL48(4) would be an appropriate instrument to replace the source of authorities in LP and CRs.

Public Service (Administration) Order 1997

5. On 9 July 1997, CE issued the Order under BL48(4). The Order sought to adapt articles in LP on the appointments, concurrent appointments, dismissal, suspension and discipline of public servants. It also sought to adapt regulations in CRs relating to disciplinary procedures and the appeal mechanism. In addition, the Order provided CE with the authority to make regulations and give written directions, subject to the advice of the Executive Council in certain cases. The Order took retrospective effect from 1 July 1997.

6. In its Provisional Legislative Council Brief on the Order, the Administration explained that LP and CRs were imperial legislation made under Royal Prerogative which provided the Governor of Hong Kong with the authority to administer the public service. Over the years, many provisions in CRs pertaining to administrative details of the management of the public service were translated into Civil Service Regulations (CSRs), which remained in force after 30 June 1997. Provisions in LP and CRs which had not been translated into CSRs were related to the authority to appoint, dismiss and discipline public servants; to act on representations made by public servants; and to make related disciplinary regulations. The Administration advised that its objective was to replace and localise the relevant provisions with an instrument which approximated as closely as possible to LP and CRs, both in nature and legal status.

7. The Administration further explained that as LP and CRs were imperial legislation, it was not possible to replace them with mirror arrangements. Enactment of law by the Legislative Council (LegCo) was not appropriate as it would constitute a major departure from the then system in which the Administration retained full executive authority to administer the public service. According to legal advice, an executive order issued by CE under BL48(4) would provide the legal backing to enable the HKSAR Government to preserve its executive authority for the continued administration of the public service.

8. A copy of the Provisional Legislative Council Brief together with the Order is in **Appendix I**.

Judicial review on the Public Service (Administration) Order 1997

9. The legal status and constitutionality of the Order and its retrospectivity were challenged in February 1998 in an application for review by the Association of Expatriate Civil Servants of Hong Kong on the legality of the Order. The judgment delivered by the Court of First Instance (CFI) on 3 April 1998 ruled in favour of the Government in respect of the constitutionality and lawfulness of the Order and of its retrospectivity. The Judge also confirmed that the Order was not in breach of BL48(7) and BL103.

Deliberations of the Bills Committee on Adaptation of Laws Bill 1998 on the Public Service (Administration) Order 1997

10. At the Council meeting on 14 October 1998, the Administration introduced the Adaptation of Laws Bill 1998. The Bill sought to adapt references in 15 ordinances and their subsidiary legislation to bring them into conformity with the status of Hong Kong as a Special Administrative Region of the People's Republic of China and with the Basic Law. A Bills Committee was formed at the House Committee meeting on 23 October 1998 to study the Bill. The Order was discussed when the Bills Committee deliberated on the adaptation of "Colonial Regulations" to "relevant executive order".

11. Some members queried whether an executive order issued by CE under BL48(4) provided the legal backing to enable the HKSAR Government to preserve its executive authority for the continued administration of the public service. These members were of the view that should executive orders have legal status, the making of the Order by CE was tantamount to conferring a legislative power on CE. Members were also concerned that there might be an increasing number of executive orders issued by CE in the future. In the event that CE promulgated executive orders in relation to other government policies, such promulgation would have far-reaching repercussions from the constitutional point of view.

12. The Administration responded that the Order was, at that time, the only executive order issued by CE. The constitutionality and lawfulness of the Order and its retrospectivity were confirmed by CFI in its judgment on an application for judicial review by the Association of Expatriate Civil Servants of Hong Kong. The Court also ruled that the Order was not in breach of BL48(7) and BL103. An executive order issued by CE did not constitute a departure from the previous system adopted by the Administration prior to reunification in which any administrative order made by the then Governor was not subject to approval by LegCo.

13. A relevant extract from the report of the Bills Committee is in **Appendix II** for members' easy reference.

Amendments to the Public Service (Administration) Order 1997

14. The Administration published in the Gazette on 8 March 2000 the Public Service (Administration) Order 1997 (Amendment) Order 2000, which sought to streamline the disciplinary procedures under the Order. The amendments sought to reduce the period of unauthorised absence for which summary dismissal might be taken, to repeal a section of the Order to ensure consistency with the Hong Kong Bill of Rights Ordinance and to replace all references to “investigation” in the Order with “inquiry”. The Amendment Order came into operation on 17 April 2000.

Further deliberations of the Panel on Public Service on the Order

15. At the meeting of the Panel on Public Service held on 30 October 2000 to discuss the main tasks of the Civil Service Bureau in the year ahead, a member expressed concern that prior to reunification, the administration of the civil service, including the appointment, removal and discipline of civil servants, had been provided for in LP, CRs and CSRs. The member pointed out that the Administration had consulted the Panel on Public Service in early 1997 the two options of providing for the continuation of the then existing arrangements after the transfer of sovereignty. The member had expressed the view that the enactment of public service legislation was preferable to the issuance of an executive order by CE under BL48(4). However, the Administration had not accepted his view and instead, arranged the issuance of the Order. The member asked whether the Administration would reconsider the matter.

16. The Administration responded that before making the decision to pursue the option of issuing the Order, it had taken into account the historical factors and legal advice obtained on the matter. The Administration reiterated that with the lapsing of LP and CRs upon reunification, it was necessary to replace and localise those provisions relating to the administration of the public service to maintain continuity. As LP and CRs were imperial instruments, it was not possible to replace them with mirror arrangements. Enactment of law by LegCo would not have been appropriate as it would have constituted a major departure from the previous system in which the Administration retained full executive authority to administer the public service. An executive order issued by CE under BL48(4) provided the legal backing to enable the HKSAR Government to preserve its executive authority for the continued administration of the public service. This was in line with BL103 which provided for continuity in the administration of the public service.

Relevant papers

17. Members may wish to refer to the following minutes and papers for further details of the discussions -

Minutes

- (a) minutes of the meeting of the Panel on Public Service held on 27 January 1997 (LegCo Paper No. CB(2)2293/96-97) ;
- (b) minutes of the meeting of the Panel on Public Service held on 24 February 1997 (PLC Paper No. CB(2)272);
- (c) minutes of the meeting of the Panel on Public Service held on 20 March 2000 (LC Paper No. CB(1)1348/99-00);

Papers

- (d) Administration's paper for the meeting of the Panel on Public Service on 27 January 1997 (LegCo Paper No. CB(2)1027/96-97(02));
- (e) Administration's paper for the meeting of the Panel on Public Service on 24 February 1997 (LegCo Paper No. CB(2)1269/96-97(02));
- (f) Provisional Legislative Council Brief on the Public Service (Administration) Order 1997 issued on 10 July 1997 (File Ref : CSBCR/AP/1-010-004/3 Pt 7/97C);
- (g) Administration's paper for the meeting of the Bills Committee on Adaptation of Laws Bill 1998 on 27 November 1998 (LC Paper No. CB(2)739/98-99(03));
- (h) Report of the Bills Committee on Adaptation of Laws Bill 1998 (LC Paper No. CB(2)1762/98-99); and
- (i) paper for the Panel on Public Service provided by the Administration in response to member's request at the meeting on 30 October 2000 (LC Paper No. CB(1)195/00-01(01)).

18. The above minutes and papers are also available on the website of LegCo (<http://www.legco.gov.hk>).

File Ref: CSBCR/AP/1-010-004/3 Pt.7/97C

PROVISIONAL LEGISLATIVE COUNCIL BRIEF

Basic Law Article 48(4)

PUBLIC SERVICE (ADMINISTRATION) ORDER 1997

INTRODUCTION

With the lapsing of the Letters Patent (LP) and Colonial Regulations (CRs) on 1 July 1997 it is necessary to replace and localise those provisions relating to the administration of the public service to maintain continuity.

2. At the meeting of the Executive Council on 8 July 1997, the Executive Council ADVISED and the Chief Executive ORDERED that -

- (a) the Public Service (Administration) Order 1997 (the Executive Order), at Annex A, should be made under Article 48(4) of the Basic Law; and
- (b) Parts I and II of the Public Service (Disciplinary) Regulation, at Annex B, should be made under the Executive Order.

3. The Executive Council also noted that the Chief Executive would make Part III and the Schedule of the Public Service (Disciplinary) Regulation under section 21(1) of the Executive Order.

BACKGROUND AND ARGUMENT

General Background

4. The Letters Patent (LP) and the Colonial Regulations (CRs) were imperial legislation made under Royal Prerogative which provided the Governor of Hong Kong with the authority to administer the public service. Over the years, many provisions in the CRs pertaining to administrative details of the management of the public

service were translated into Civil Service Regulations (CSRs), which remain in force after 30 June 1997.

5. Provisions in the LP and CRs which have not been translated into CSRs 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. The view has been that such authority should have stronger legislative backing because it involves important decisions affecting officers' careers. A list of these provisions is at Annex C. The text of the relevant LP, CRs and disciplinary regulations/directions which are proposed to be replaced are enclosed at Annexes D, E and F respectively.

6. Our objective is to replace and localise the relevant provisions with an instrument which approximates as closely as possible to the LP and CRs, both in nature and legal status.

Legal Status of the Executive Order

7. As the LP and CRs are imperial legislation, it would not be possible to replace them with mirror arrangements. Enactment of law by the Legislative Council is not appropriate as it would constitute a major departure from the present system in which the Administration retains full executive authority to administer the public service.

8. According to legal advice, an Executive Order issued by the Chief Executive under Article 48(4)¹ of the Basic Law will provide the legal backing to enable the HKSAR Government to preserve its executive authority for the continued administration of the public service, in line with Article 103² of the Basic Law which provides for continuity in the management of the public service. The Executive Order should be made by the Chief Executive in Council to reflect its

1 Article 48(4) of the Basic Law -
"The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions:(4)
To decide on government policies and to issue executive orders;"

2 Article 103 of Basic Law -
".....Hong Kong's previous system of recruitment, employment, assessment, discipline, training and management for the public service.....shall be maintained, except for any provisions for privileged treatment of foreign nationals."

importance and to ensure the validity of the Order under Article 56³ of the Basic Law.

Scope and Contents of the Executive Order

9. In determining the scope and contents of the Executive Order, we have taken into account the following considerations -

- (a) the Executive Order should include provisions which are primarily adapted from those provisions in the LP and CRs requiring localisation. In other words, the contents of the Executive Order should largely mirror the corresponding provisions in the LP and CRs and there should be no change in the substance, save in a few cases where changes are necessary because of considerations under paragraphs (b) to (e) below;
- (b) the authority for the overall administration of the civil service should be based in Hong Kong;
- (c) in relation to those CRs which conferred powers to make Regulations subject to the approval of the Secretary of State of the United Kingdom, the corresponding provisions in the Executive Order should, where appropriate, specify that the Chief Executive's power thereunder is subject to the advice of the Executive Council;
- (d) staff association have requested that public servants should be provided with an alternative appeal channel, upon the lapsing of the CRs which provided for representations to be made to the Secretary of State and the Queen in the United Kingdom;
- (e) it is necessary to include definitions and transitional clauses that would improve the comprehensiveness of the Executive Order; and

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Article 56 of Basic Law -

".....Except for the appointment, removal and disciplining of officials and the adoption of measures in emergencies, the Chief Executive shall consult the Executive Council before making important policy decisions, introducing bills to the Legislative Council, making subordinate legislation, or dissolving the Legislative Council."

- (f) not every provision of the LP and CRs requires to be localised, and, in this regard, no adaptation would be required for a few CR provisions (Annex C) which are no longer relevant to the SAR Government after 1 July 1997 or which are inconsistent with the Basic Law.

Structure of the Executive Order

10. There are three tiers in the Executive Order and the Public Service (Disciplinary) Regulation made under it -

- (a) the Executive Order which adapts relevant provisions in the LP and the CRs;
- (b) Parts I and II of the Regulation which adapt the Disciplinary Proceedings (Colonial Regulations) Regulations made under CRs 56 and CR 57 with the approval of the Secretary of State; and
- (c) Part III and the Schedule of the Regulation which adapts the Civil Service (Disciplinary) Regulations 1988 made under CR 54(2) and directions given under the Disciplinary Proceedings (Colonial Regulations) Regulations by the Governor.

PUBLIC SERVICE (ADMINISTRATION) ORDER 1997

11. The major provisions are -

(a) Section 1: Short title and commencement

The Executive Order and the Regulation made under it are deemed to have come into operation on 1 July 1997. This ensures continuity in the administration of the Civil Service.

(b) Section 2: Interpretation

We have used the term "public servants" in the Executive Order to ensure consistency with the Basic Law.

(c) Section 3: Appointment

This is largely a straightforward adaptation of LP Article XIV(1) and (2), regarding the authority to appoint public

servants and the power to delegate this authority. For consistency with the Basic Law, we have specified that the Chief Executive's authority to appoint under this provision is subject to Article 48(5)⁴ of the Basic Law on the appointment of principal officials.

(d) Section 4: Concurrent appointments

This is a straightforward adaptation of LP Article XIV(A).

(e) Section 5: Dismissal, suspension and discipline

This is largely a straightforward adaptation of LP Article XVI. As with the authority to appoint, the Chief Executive's authority to dismiss under this provision is subject to Article 48(5) of the Basic Law on the removal of principal officials.

(f) Sections 6 - 19: Disciplinary procedures

- (i) These are, again, largely straightforward adaptation of CRs 54, 56 to 65 on disciplinary matters. References to the Governor's power to make regulations for disciplinary matters with the approval of the Secretary of State (in CR 56(1), 57(1) and CR 65) are replaced by references to the Chief Executive's power to make corresponding regulations with the advice of the Executive Council.
- (ii) While it is specified in CR 54(5) that the Governor shall not delegate the power to dismiss an officer or require him to retire in the public interest save with the approval of the Secretary of State, we have not replaced reference to the Secretary of State with a reference to the advice of the Executive Council in

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Article 48(5) of the Basic Law -

"The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions:

(5) To nominate and to report to the Central People's Government for appointment the following principal officials: Secretaries and Deputy Secretaries of Departments, Directors of Bureaux, Commissioner Against Corruption, Director of Audit, Commissioner of Police, Director of Immigration and Commissioner of Customs and Excise; and to recommend to the Central People's Government the removal of the above-mentioned officials."

this particular case. This is because an act of delegation, unlike the making of regulations, does not change the substance of procedures to be followed. It is an administrative arrangement which, from experience, may change from time to time with changes in the establishment. It should not be necessary to bother the Executive Council with such administrative details. Accordingly, the localised version of CR 54(5) provides the Chief Executive with the full authority to delegate his power to dismiss or retire an officer in the public interest.

(g) Section 20: Representations

- (i) Section 20(1) localises CRs 68-70 to provide for the appeal mechanism to end in HKSAR with representations to the Chief Executive.
- (ii) Section 20(2) provides the public service with an alternative appeal channel within HKSAR. The section is only an enabling provision as we need to consult various parties on the detailed arrangements for the proposed review board, including its composition, terms of reference and operation. We intend to promulgate the operational details outside the main body of the Executive Order, possibly in the form of directions made pursuant to the order, as and when they are agreed later in the year.

(h) Section 21: Regulations and directions

This section provides the Chief Executive with the authority to make regulations and give written directions, subject to the advice of the Executive Council in certain cases.

(i) Section 22: Transitional

This section ensures the continuity of action taken before 1 July 1997.

PUBLIC SERVICE (DISCIPLINARY) REGULATION

12. The provisions of the Regulation are -

- (a) **Parts I and II (sections 1 to 10)** are straightforward adaptations of the Disciplinary Proceedings (Colonial Regulations) Regulations, setting out ground rules for investigations conducted for the purposes of sections 9 and 10 of the Executive Order;
- (b) **Part III (sections 11 to 19)** is a straightforward adaptation of the Civil Service (Disciplinary) Regulations 1988; and
- (c) **the Schedule** is a straightforward adaptation of the directions previously given by the Governor, which set out detailed procedures for the conduct of hearings under sections 9 and 10 of the Executive Order.

BILL OF RIGHTS IMPLICATIONS

13. According to legal advice, the Executive Order and the Public Service (Disciplinary) Regulation are not inconsistent with the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong.

FINANCIAL IMPLICATIONS

14. Some additional resources will be required to support the establishment and operation of the review board referred to in section 20(2) of the Executive Order. It would be difficult to come to a realistic estimate pending a decision on detailed arrangements, but the implications should be manageable based on our experience with other appeal boards set up by the Government.

CONSULTATION WITH STAFF SIDE

15. We have consulted the Staff Side of the Senior Civil Service Council on the proposals. Of the three constituent staff associations making up the Staff Side, two (the Senior Non-expatriate Officers Association and the Hong Kong Chinese Civil Servants' Association) support the issue of the Order; the remaining one, the Association of Expatriate Civil Servants (AECS), reiterates their preference for the enactment of a "Public Service Ordinance". We

have not adopted this proposal because it would constitute a major departure from the existing system.

PUBLICITY

16. The Executive Order and the regulation will be gazetted on 11 July 1997. A circular will be issued within the civil service on the same day.

Subject Officer: Principal Assistant Secretary for the Civil Service (Appointments)
Ms Bernadette Linn
Tel: 2810 3063

File Reference: CSBCR/AP/1-010-004/3 Pt.7/97C

Civil Service Bureau
10 July 1997

EXECUTIVE ORDER

No. 1 of 1997

I, TUNG Chee-hwa, Chief Executive of the Hong Kong Special Administrative Region of the People's Republic of China, pursuant to the power vested in me by Article 48(4) of the Basic Law, make the following Order -

PART I
PRELIMINARY

1. Citation and commencement

- (1) This Order may be cited as the Public Service (Administration) Order 1997.
- (2) This Order shall be deemed to have come into operation on 1 July 1997.

2. Interpretation

In this Order, unless the context otherwise requires -

"Basic Law" (《基本法》) means the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China;

"Category A Officer" (甲類人員) means an officer who is appointed to and confirmed in an established office;

"Category B Officer" (乙類人員) means any officer who -

- (a) holds a non-established office;
- (b) holds an established office either on month-to-month terms or probationary terms; or
- (c) holds an office on agreement terms;

"established office" (設定職位) has the meaning assigned to it by section 2 of the Pensions Ordinance (Cap. 89);

"HKSAR" (特區) means the Hong Kong Special Administrative Region of the People's Republic of China;

"non-established office" (非設定職位) means an office which is not an established office;

"public officer" (公職人員) means public officer within the meaning of section 3 of the Interpretation and General Clauses Ordinance (Cap. 1);

"public servant" (公務人員) and "officer" (人員) mean any person holding an office of emolument under the Government of HKSAR, whether the office is permanent or temporary, and serving in a government bureau or department;

"Public Service Commission" (公務員絀用委員會) means the Public Service Commission established under section 3 of the Public Service Commission Ordinance (Cap. 93);

"punishment" (懲罰) -

(a) includes dismissal, compulsory retirement with pension, gratuity or other allowances or, without such benefits or with reduced benefits, fine, reduction in rank, severe reprimand, reprimand, stoppage or deferment of increments and reduction in salary;

(b) does not include retirement in the public interest under section 12;

"regulations" (《規則》) means regulations made by the Chief Executive under section 21.

PART II
APPOINTMENTS

3. Appointments

(1) Subject to Article 48(5) of the Basic Law, the Chief Executive may by virtue of Article 48(7) of the Basic Law appoint and promote public servants in accordance with this Order.

(2) In making his selection of persons for appointment or promotion, the Chief Executive shall take account of any advice tendered by the Public Service Commission under or by virtue of the Public Service Commission Ordinance (Cap. 93).

4. Concurrent appointments

(1) The Chief Executive may, when a public servant is on leave of absence pending relinquishment of his office, appoint substantively another person to the same office.

(2) When 2 or more persons are holding the same office by reason of an appointment made under subsection (1) the person last appointed to the office shall, for the purposes of any function conferred upon the holder of that office, be deemed to be the holder of that office.

PART III
DISMISSAL, SUSPENSION AND DISCIPLINE

5. Dismissal, suspension and discipline

Subject to article 48(5) of the Basic Law, the Chief Executive may by virtue of article 48(7) of the Basic Law, upon sufficient cause to him appearing, dismiss or suspend from the exercise of his office any public servant or take such other

disciplinary action, in accordance with this Order and regulations as may seem to him desirable.

6. Disciplinary procedures not to prejudice any law providing for punishment, etc.

This Order and regulations are without prejudice to any law providing for the punishment of officers by the Chief Executive or any other officer or authority.

7. Disciplinary procedures applicable to Category A Officers

Sections 9 to 18 shall apply only to Category A Officers.

8. Disciplinary procedures applicable to Category B Officers

Disciplinary procedure in relation to Category B Officers shall be carried out in accordance with regulations and any directions given by the Chief Executive under section 21(3).

9. Misconduct not warranting dismissal or compulsory retirement

(1) If it is represented to the Chief Executive that an officer has been guilty of misconduct, and the Chief Executive is of the opinion that the misconduct alleged is not serious enough to warrant proceedings under section 10, he may cause an investigation to be made into the officer's conduct in such manner as may be prescribed by regulations made by the Chief Executive under section 21(2).

(2) If after such investigation the Chief Executive is of the opinion that the officer has been guilty of misconduct, he may inflict such punishment, other than dismissal or compulsory retirement, upon the officer as may seem to him to be just.

10. Misconduct warranting dismissal or compulsory retirement

(1) If it is represented to the Chief Executive that an officer has been guilty of misconduct, and the Chief Executive is of the opinion that the misconduct alleged may be serious enough to warrant the dismissal or compulsory retirement of the officer, he may cause an investigation to be made into the officer's conduct in such manner as may be prescribed by regulations made by the Chief Executive under section 21(2).

(2) If after such investigation the Chief Executive is of the opinion that the officer has been guilty of misconduct, he may inflict such punishment upon the officer as may seem to him to be just.

(3) Where an officer is absent from duty without leave for a period exceeding 21 days and it is represented to the Chief Executive that the officer -

(a) cannot be traced; or

(b) on being required by notice in writing (sent by post to his last known address) to give, within the period specified in the notice, an excuse for his absence, has failed to give any excuse or to give an excuse that is reasonable,

the Chief Executive need not cause an investigation to be made under subsection (1) and may summarily dismiss the officer.

11. Action further to criminal charge

If an officer has been convicted on a criminal charge the Chief Executive may, upon a consideration of the proceedings of the court on such charge, inflict such punishment upon the officer as may seem to him to be just, without any further proceedings.

12. Retirement in the public interest

(1) The Chief Executive may, at any time if it is represented to him that the retirement of an officer is desirable in the public interest, call for a report from the head of any department in which the officer has served. The officer shall be informed of the grounds on which his retirement is contemplated under this section and be given an opportunity to make representations.

(2) The Chief Executive may, upon a consideration of the report and of any representations submitted under subsection (1), require the officer to retire from the service, if he is of the opinion that, having regard to conditions of the public service, the usefulness of the officer thereto and all other circumstances of the case, the termination of the officer's service is desirable in the public interest and the officer's service shall accordingly terminate on such date as the Chief Executive may specify.

(3) If upon consideration of -

- (a) an investigation into the conduct of an officer under section 9 or 10; or
- (b) the proceedings of a court by which an officer has been convicted of a criminal charge,

the Chief Executive is of the opinion that the officer does not deserve to be punished but that the investigation or proceedings disclose grounds for requiring him to retire in the public interest, the Chief Executive may require the officer to retire from the service under this section, and in such a case it shall not be necessary for the Chief Executive to comply with the procedure mentioned in subsections (1) and (2).

(4) Where an officer is required to retire under this section, he may be granted a pension, gratuity or other allowance in accordance with any pensions law for the time being in force.

13. Interdiction from exercise of powers and functions of office

(1) The Chief Executive may interdict an officer from the exercise of powers and functions of his office if -

- (a) proceedings have been, or are to be, taken against him under section 10; or
- (b) criminal proceedings have been, or are likely to be, instituted against him; or
- (c) investigation of his conduct is being undertaken and it is contrary to the public interest for him to continue to exercise the powers and functions of his office.

(2) An officer who has been interdicted under -

- (a) subsection (1)(a) shall be allowed to receive such portion of the emoluments of his office, not being less than one-half, as the Chief Executive shall think fit; or
- (b) subsection (1)(b) shall be allowed to receive such portion of the emoluments of his office, not being less than one-half, as the Chief Executive shall think fit until such time as he may be convicted on a criminal charge serious enough to warrant his dismissal from the service whereupon he shall not receive any such emoluments pending the consideration of his case by the Chief Executive; or
- (c) subsection (1)(c) shall be allowed to receive the full amount of the emoluments of his office.

(3) If the proceedings against any officer do not result in any punishment of the officer, he shall be entitled to the full amount of the emoluments which he would have received if he had not been interdicted.

(4) If a punishment other than dismissal is inflicted, the officer may be paid such proportion of the emoluments withheld as a result of his interdiction as the Chief Executive shall think fit.

14. Disciplinary proceedings to be held over pending determination of charge

If criminal proceedings are instituted against an officer, disciplinary proceedings based upon any grounds involved in the criminal charge shall not be taken pending the determination of the criminal proceedings.

15. Restriction on punishment if acquitted

An officer acquitted of a criminal charge shall not be punished in respect of any charges upon which he has been acquitted, but he may nevertheless be punished on any other charges arising out of his conduct in the matter which do not raise substantially the same issues as those on which he has been acquitted and the appropriate proceedings may be taken for the purpose.

16. Forfeiture of benefits on dismissal

An officer who is dismissed forfeits all claims to any pension, gratuity or other like benefits and to any other benefits or advantages of an officer.

17. Restriction on departure from HKSAR if interdicted

An officer who is under interdiction may not, without the permission of the Chief Executive, leave HKSAR during the interval before he is reinstated or dismissed.

18. Consultation with Public Service Commission on punishment

Except as may be provided by regulations made by the Chief Executive under section 21(2) and except in the case of an officer who is one of the officers designated in section 6(2) of the Public Service Commission Ordinance (Cap. 93), the Chief Executive shall not inflict any punishment upon an officer under sections 9 to 11 or require an officer to retire under section 12 without first consulting the Public Service Commission.

PART IV
MISCELLANEOUS

19. Delegations of power

(1) Subject to subsection (2), the Chief Executive may delegate to any public servant or any other public officer any powers or duties conferred or imposed on him by sections 3 and 9 to 18.

(2) The Chief Executive shall not delegate the power to make regulations under section 21(2).

(3) All delegations to a public servant or other public officer of powers or duties (similar to those referred to in subsection (1)) vested in or exercisable by the Governor which were in force immediately before 1 July 1997 shall on and after that date continue in force and be deemed to have been made by the

Chief Executive to the corresponding public servant or public officer, as the case may be, in the HKSAR.

20. Representations by officers

(1) Every officer who has any representations of a public or private nature to make to the Government of HKSAR should address them to the Chief Executive. The Chief Executive shall consider and act upon each representation as public expediency and justice to the individual may require.

(2) The Chief Executive may appoint a review board to advise him on such representations addressed to him relating to appointment, dismissal and discipline of public servants as he thinks fit.

21. Regulations and directions

(1) Subject to subsection (2), the Chief Executive may make regulations -

- (a) for prescribing anything to be prescribed by regulations; and
- (b) generally for regulating practice and procedure, under this Order.

(2) The Chief Executive may, with the advice of the Executive Council, make regulations referred to in sections 9(1), 10(1) and 18.

(3) The Chief Executive may give written directions regulating matters relating to the conditions of service and terms of appointment for officers as well as conduct and discipline matters, and generally providing for such matters as are contemplated by or necessary for giving full effect to this Order and for the due administration of the public service.

(4) Regulations and directions given under subsection (3) shall be deemed to have come into operation on 1 July 1997 or such other dates as may be specified by the Chief Executive and shall apply to any proceedings instituted under the Colonial Regulations or regulations or directions by the Governor in exercise of the powers conferred by the Letters Patent or the Colonial Regulations before 1 July 1997 pending determination.

(5) Regulations and directions given under subsection (3) shall not be subsidiary legislation within the meaning of that expression in the Interpretation and General Clauses Ordinance (Cap. 1).

22. Transitional

Anything done under -

- (a) the Letters Patent;
- (b) the Colonial Regulations; or
- (c) any other regulations or directions by the Governor in exercise of the powers conferred by the Letters Patent or the Colonial Regulations,

shall, if in force on or immediately prior to the commencement of this Order, continue in force and have effect as if done under the provisions of this Order or regulations.

Made this day of July 1997.

TUNG Chee-hwa
Chief Executive

EXTRACT**立法會**
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**Report of the Bills Committee on
Adaptation of Laws Bill 1998****X X X X X X**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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Legislative Council Secretariat
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