

立法會

Legislative Council

LC Paper No. LS50/14-15

Finance Committee

Special meeting on 16 March 2015

Information note prepared by Legal Service Division on the legal and constitutional framework relating to the control and management of the public finances of Hong Kong and related issues

Purpose

This note provides information on the legal and constitutional framework relating to the control and management of the public finances of Hong Kong in order to assist members in their consideration at the special meeting on 16 March 2015 of the relevant issues arising from the Administration's proposal to include items of expenditure in the Appropriation Bill 2015 instead of seeking the Finance Committee's approval.

Previous note issued by Legal Service Division

2. In the note prepared by the Legal Service Division (LC Paper No. LS41/10-11) (the Note) and circulated to members of the Finance Committee on 17 March 2011 vide LC Paper No. FC48/10-11, we have set out the relevant legal provisions on changes to the Appropriation Bill and analyzed whether Members of the Legislative Council (LegCo) can propose changes to the Appropriation Bill and the Estimates. As there have not been changes to the legal framework relating to the control and management of the public finances of Hong Kong since the issue of the Note, what is stated in the Note remains to be valid. For the purposes of the special meeting on 16 March 2015, the following is extracted from the Note for members' information:

" 2. Article 64 of the Basic Law (BL) provides that the Government of the Hong Kong Special Administrative Region must abide by the law and be accountable to LegCo: it shall implement laws passed by LegCo and already in force; it shall present regular policy addresses to LegCo; it shall answer questions raised by members of LegCo; and it shall obtain approval from LegCo for taxation and public expenditure.

3. Article 73(1) of BL provides that LegCo shall exercise the power and function to enact, amend or repeal laws in accordance with the provisions of BL and legal procedures. Furthermore, under Article 73(2) and (3), LegCo has the powers and functions to examine and approve budgets introduced by the government, and to approve taxation and public expenditure.

4. Based on BL, the Government is accountable to LegCo through the requirement, among other things, that public expenditure has to be approved by LegCo. In practice, approval of the annual Budget by LegCo is through the enactment of an Appropriation Ordinance. For the enactment of Ordinance, the relevant Rules of Procedure apply.

5. The Public Finance Ordinance (Cap. 2) (PFO) provides for the control and management of the public finances of Hong Kong. Under section 5(1) of PFO, the Financial Secretary (FS) shall cause to be prepared in each financial year estimates of the revenue and expenditure of the Government for the next following financial year, and shall cause such estimates to be laid before LegCo before or as soon as practicable after the commencement of the financial year to which they relate. Under section 5(3) of PFO, the estimates of expenditure shall classify expenditure under heads and subheads with the ambit of each head described. In respect of each head, the estimates of expenditure shall show the estimated total expenditure, the provision sought in respect of each subhead, the establishment of posts (if any), and the limit (if any) to the commitments which may be entered into in respect of expenditure which is not annually recurrent.

6. Under section 6(1) of PFO, the heads contained in the estimates of expenditure for a financial year shall be included in an Appropriation Bill which shall be introduced into LegCo at the same time as the estimates. Section 6(2) specifies that upon the enactment of the Appropriation Ordinance, the estimates of expenditure for the financial year to which the Ordinance relates shall be deemed to be approved to the extent that they are provided for in the Ordinance and shall have effect from the first day of such financial year. Under section 6(3), expenditure for the financial year on the services of the Government shall be arranged in accordance with the heads and

subheads and be limited by the provision in each subhead shown in the estimates of expenditure as approved or as may subsequently be changed from time to time in accordance with section 8. Section 8(1) provides that subject to section 8, no changes shall be made to the approved estimates of expenditure except with the approval of the Finance Committee (FC) upon a proposal of FS."

Respective powers and functions of LegCo and executive authorities under Basic Law

3. The respective powers and functions of LegCo and executive authorities under the Basic Law have been considered by the Court of First Instance in *Leung Kwok Hung v President of Legislative Council*¹. In that case, Hartman J, as he then was, considered that the principle of separation of powers is enshrined in the Basic Law and a reading of the Law makes it evident that the executive, the administration and the legislature are each to perform their constitutionally designated roles in a co-ordinated and co-operative manner for the good governance of Hong Kong.² According to the Judge, what the Basic Law defines is the method of inter-action; that is, the nexus, both introductory and consequential, which connects the executive and administration on the one part with the legislature on the other. To put in another way, who carries responsibility for this inter-action, the manner in which it is to be executed and how the consequences are to be managed are fundamental matters defined in the Basic Law.³ In the context of financial proposals, Hartman J's view was that the function of the executive and administration under the Basic Law is to formulate policy, expressing it in terms of legislation and financial proposals, while it is for LegCo to enact that legislation and to approve those financial proposals. LegCo does not draw up and introduce budgets⁴; it does not run any "mirror" Ministry of Finance. Instead, the function of LegCo is to examine and approve budgets introduced by the executive authorities and to approve (not create or decide upon) taxation and public expenditure.⁵

¹ [2007] 1 HKLRD 387.

² Ibid, para. 66.

³ Ibid, para. 68.

⁴ The function of drawing up and introducing budgets is vested in the Government: Article 62(4) of Basic Law.

⁵ Article 73(2) and (3) of Basic Law; *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387, paras. 67 and 68.

Whether it is legally permissible to include funding proposals in the context of the Appropriation Bill

4. In the light of sections 5 and 6 of PFO, it seems that it would be open to the Financial Secretary to include an item of expenditure under the relevant head or subhead to be included in an Appropriation Bill, if at the time of preparation of the estimates of the expenditure of the Government for a financial year, it is known to the Government that the relevant expenditure has to be incurred in that financial year. In cases where provisions have not been made in the estimates of expenditure but the Government considers it necessary to incur expenditure for a proposal during the financial year after the Appropriation Ordinance for that financial year is enacted, section 8 of PFO is applicable as in such case, the Government needs to make changes to the approved estimates and this requires the approval of the Finance Committee under section 8 of PFO.

Procedures relating to scrutiny of heads of estimates

5. The rules and procedures relating to the Appropriation Bill are set out in Rules 67 to 70 of the Rules of procedure (RoP). Under Rule 67(1), estimates containing the details of the financial requirements for expenditure on all the services of the Government (the Estimates) shall be presented to the Council not later than the commencement of the meeting at which the first reading of the Appropriation Bill (containing the estimated financial requirements for expenditure) takes place. Rule 67(2) provides that after the motion for the second reading of the bill has been proposed, the debate thereon shall be adjourned and shall be resumed not earlier than the seventh day thereafter. Rule 67(3) further provides that, subject to Rule 71(11), the Estimates shall upon presentation to the Council, stand referred to a committee of the whole Council, and the Appropriation Bill upon being read a second time shall stand committed to that committee. Rule 71(11) of RoP provides that the Estimates presented in accordance with the provisions of Rule 67 may be referred by the President to the Finance Committee for their examination before consideration of the Appropriation Bill in committee of the whole Council. The procedures of the Finance Committee to examine the Estimates are set out in paragraphs 49 to 53 of the Finance Committee Procedure (FCP).

6. The procedures relating to making amendments to heads of estimates in committee of the whole Council are also set out in the Note. The relevant parts are extracted below:

" 9. There is no provision in PFO which prohibits or limits amendments to the Appropriation Bill. However, Rule 69 of RoP sets out the rules and procedures in respect of amendments to the Appropriation Bill. Rule 69(1) provides that an amendment which, in the opinion of the Chairman, would increase the sum allotted to any head of expenditure whether in respect of any item or subhead or of the head itself shall only be moved by a designated public officer. Rule 69(2) further provides that an amendment to increase a head shall take precedence over an amendment to reduce the head in the same respect, and if it is carried no amendment to reduce the head in that respect shall be called.

10. Rule 69(3) of RoP provides that an amendment to any head of expenditure to reduce the sum allotted thereto in respect of any item therein may be moved by any Member, and shall take the form of a motion "That head be reduced by \$..... in respect of (or by leaving out) subhead item".

11. Rule 69(4) to (6) provides further limitations on and conditions of proposed amendments to the Appropriation Bill:

- (a) an amendment to reduce a head in respect of any subhead or by leaving out a subhead shall only be in order if the subhead is not itemized;
- (b) an amendment to reduce a head without reference to a subhead therein shall only be in order if the head is not divided into subheads; and
- (c) an amendment to leave out a head shall not be in order."

7. It is noted that the above Rules refer to "consideration" and "examination" of an Appropriation Bill and the Estimates that are presented to LegCo together with the Appropriation Bill. This in fact reflects the process of scrutiny by the Council, the committee of the whole Council and the Finance Committee on the Appropriation Bill and its Estimates. Whilst proceedings on the Appropriation Bill in the Council and the committee of the whole Council are by way of debates followed by voting on motions, including motions to

amend, the Finance Committee has devised procedures and practices for the holding of Special Finance Committee meetings which enable members of the Finance Committee to scrutinize the details of the Estimates. According to paragraph 50 of FCP, prior to these special meetings, members may raise questions on the Estimates for written replies from Controlling Officers and Members may ask supplementary questions arising from the written replies either orally at the special meetings or in writing afterwards.

Practices for examining and approving funding proposals

8. The financial procedures provided in RoP and FCP are underpinned by practices developed and established over time. Information on these practices will be provided by the Clerk to the Finance Committee and the Legal Service Division will assist members in their consideration of the legal aspects of these practices if necessary.

Prepared by
Legal Service Division
Legislative Council Secretariat
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