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By Fax – 2869 6794

6 October 2003

Clerk to Bills Committee
(Attn.: Ms. Rosalind Ma)
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Ms Ma,

**Bills Committee on
Public Officers Pay Adjustments (2004/2005) Bill
Follow-up to the second meeting on 17 September 2003**

Thank you for your letter of 23 September 2003. The required information is as follows:-

- (1) Please consider how the drafting of clauses 14 and 15 could be improved to address the concerns of civil service unions on the implications of these two clauses on future pay adjustments.**

A paper setting out our proposed amendments to clauses 14 and 15 is at Annex A. We are consulting the staff sides of the four central consultative councils and the four major service-wide staff unions on the proposed amendments and will report to the Bills Committee the views received in due course.

- (2) **In relation to the judgment handed down by the Court of First Instance on 10 June 2003, which ruled in favor of the Administration by dismissing the two applications for judicial review launched against it in respect of the Public Officers Pay Adjustment Ordinance (Cap.574), please provide a paper to brief the Bills Committee on: (a) the gist of the court judgment including the court's interpretation of the restriction imposed by the Basic Law on civil service pay reduction; (b) the implications of the court judgment on civil service pay reduction; and (c) the implications of the court judgment on civil service adjustments and the need for the current Bill in the light of the court judgment.**

A paper providing the required information is at Annex B. The Chinese version will follow.

- (3) **Please provide information on the number of civil servants who had been serving since before 1 July 1997. The HKCSGU opined that the pay levels of this category of civil servants should not be further reduced after the proposed pay reductions in 2004 and 2005 in view of Article 100 of the Basic Law.**

As at 20 June 2003, there were around 150 700 civil servants who had been serving since before 1 July 1997.

Any future civil service pay adjustments must clearly be consistent with the Basic Law. As far as civil servants who were serving immediately before 1 July 1997 are concerned, it is the current Administration's policy during its term of office not to reduce their pay below the levels as at 30 June 1997 in dollar terms.

Yours sincerely,

(Eddie Mak)
for Secretary for the Civil Service

c.c. Mr. Ian Wingfield, Department of Justice
Mr. David Morris, Department of Justice
Ms. Betty Cheung, Department of Justice

Public Officers Pay Adjustments (2004/2005) Bill

Proposed Committee Stage Amendment to Clause 14 and Clause 15

Purpose

This paper briefs Members on the Administration's preliminary proposal to introduce Committee Stage Amendments to clauses 14 and 15 of the Public Officers Pay Adjustments (2004/2005) Bill (the Bill).

Background

2. At the Bills Committee meeting held on 17 September 2003, the representatives from some civil service staff organisations expressed concern that clauses 14 and 15 of the Bill, as currently drafted, might have the effect of authorizing the Administration to further reduce civil service pay in future after the pay reductions which are to take effect on 1 January 2004 and 1 January 2005 respectively. The Administration clarified at the meeting that clause 14 sought to underline the one-off nature of the legislation. We further clarified that express authority for adjustments sought under clause 15 was confined in its effect to the adjustments to the pay and the amounts of the allowances made by the Ordinance (i.e., the adjustments which are to take effect on 1 January 2004 and 1 January 2005 respectively). However, noting the concern expressed by the staff representatives, the Administration undertook to further consider whether the drafting of the two clauses could be further improved to explain more clearly our policy intention.

Proposed Committee Stage Amendment

Proposed amendment to clause 14

3. Clause 14 of the Bill reads as follows –

“The adjustments made by this Ordinance to the pay and the amounts of any allowances payable to public officers do not prohibit

any adjustment being made to the pay or the amounts of allowances after 1 January 2005.

4. As explained in our letter dated 4 September 2003 to the Legislative Council Secretariat (see LC Paper CB(1)2427/02-03(12)), clause 14 seeks to reflect the following policy intention :

(a) The Bill does not itself authorize adjustments to the pay or the amounts of allowances payable to public officers after 1 January 2005; and

(b) The Bill is not intended to have the effect of changing the present arrangements for implementing future adjustments to the pay or the amounts of allowances payable to public officers after 1 January 2005. Under these present arrangements, legislation is not required for effecting upward pay adjustments. However, in the absence of the clarification as proposed under clause 14, the Bill may be interpreted as specifying levels of pay and allowances payable to public officers that are to prevail until amended by subsequent legislation.

5. In view of the staff concern expressed, we propose to dispel any doubt over “authorizing future adjustments” by adding a new subclause (2) to clause 14 along the lines as follows:

“(2) For the avoidance of doubt, this Ordinance does not authorize any adjustment to the pay or the amount of an allowance payable to a public officer other than an adjustment to the pay or the amount of the allowance made in accordance with any of the provisions of sections 4 to 13.”

Proposed amendment to clause 15

6. Clause 15 of the Bill reads as follows –

“The contracts of employment of public officers are varied so as to expressly authorize the adjustments to the pay and the amounts of the allowances made by this Ordinance.”

7. Clause 15 seeks to vary the contracts of employment of public officers so that the contracts expressly authorize the adjustments made by the Bill. Clause 15 specifically refers to adjustments “made by this Ordinance” and the provision does not itself authorize any future adjustments after 1 January 2005.

8. In view of the staff concern expressed, we propose to spell out more clearly the scope of “adjustments” covered by clause 15 by revising clause 15 as follows:

“The contracts of employment of public officers are varied so as to expressly authorize the adjustments to the pay and the amounts of the allowances made in accordance with the respective provisions of sections 4 to 13.”

9. Members’ comments are invited on the proposed Committee Stage Amendments. We are in parallel consulting the staff sides of the four central consultative councils and the four major service-wide staff unions on the proposed amendments and will report to Members the views received in due course.

Civil Service Bureau
October 2003

Public Officers Pay Adjustments (2004/2005) Bill

**Judicial Reviews on the
Public Officers Pay Adjustment Ordinance (Cap.574)**

Purpose

This paper briefs Members on the gist of the judgment handed down by the Court of First Instance (CFI) on 10 June 2003 on two applications for judicial review against the Public Officers Pay Adjustment Ordinance (Cap.574) (POPA Ordinance).

Background

2. At the Bills Committee meeting held on 17 September 2003, Members requested the Administration to provide a paper to brief the Bills Committee on: (a) the gist of the judgment handed down by the CFI on the two applications for judicial review against the POPA Ordinance, including the court's interpretation of the restriction imposed by the Basic Law on civil service pay reduction; (b) the implications of the court judgment on civil service pay adjustments; and (c) the need for the current Bill in the light of the court judgment.

The court judgment

3. The POPA Ordinance was enacted on 19 July 2002 to implement the civil service pay reduction with effect from 1 October 2002. Two applications for judicial review were heard before the CFI on 6-10 May 2003.

The gist of the court judgment

4. The CFI handed down its judgment on these two cases on 10 June 2003. The CFI has dismissed both applications for judicial review and ruled that the POPA Ordinance has not breached any individual articles of the Basic

Law that were argued before it. A gist of the court judgment, including the court's interpretation of the restriction imposed by the Basic Law on civil service pay reduction is at the Annex.

The implications of the court judgment on civil service pay adjustments

5. The CFI judgment addresses specifically the lawfulness of the POPA Ordinance which concerns the civil service pay reduction that took effect on 1 October 2002. Relevant points made in the judgment are set out below. The judgment, however, does not give any specific guidance on the permissible scope of future civil service pay adjustments or future changes to the civil service pay system, insofar as these changes apply to officers serving in the Government as on 30 June 1997.

- (a) Whether an ordinance or a policy is consistent with the Basic Law is a matter which may only be determined by looking at the ordinance or policy in context: each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation/policy and the situation to which it is directed (see paragraphs 21-23 in the CFI judgment);
- (b) The Basic Law is a living instrument intended to meet changing needs and circumstances. In interpreting the Basic Law, we should adopt a purposive approach and consider the language of the text in the light of the context. On the language of the text, the courts must avoid a literal, technical, narrow or rigid approach (see paragraphs 60-61 in the CFI judgment);
- (c) The Chief Executive and the Executive itself cannot by private contract, fetter in advance their constitutional duty to exercise their powers for the purposes of good governance. The use of legislation has, prior to the transfer of sovereignty, been ruled to be a lawful means by which civil service contracts of employment may be unilaterally varied. That power remains after the transfer (see paragraphs 26 & 75 in the CFI judgment);
- (d) Article 100¹ of the Basic Law is transitional in nature. It serves to ensure continuity of employment so that no public servant suffers as a consequence of the transition itself. It is not intended to inhibit the introduction of new measures for the good governance of Hong

¹ Article 100 of the Basic Law provides: "Public servants serving in all Hong Kong government departments, including the police department, before the establishment of the Hong Kong Special Administrative Region, may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favorable than before."

Kong. As an article of constitution, the court rules that this article is not worded in such rigid terms as to direct that pay, allowances and benefits may not for any reason, in terms of specific figures, fall below those bestowed on 30 June 1997 (see paragraphs 60 & 87 in the CFI judgment);

- (e) Article 103² of the Basic Law is also essentially transitional in nature. It cannot be interpreted in such a narrow way as to inhibit all introduction of new measures for the good governance of the public service and thereby for the good governance of Hong Kong. It is recognized that even prior to the transfer of sovereignty, the public service was in a constant state of adaptation. Article 103 provides that Hong Kong's previous system of recruitment, employment, assessment, discipline, training and management for the public service shall be maintained. The court rules that separate parts of the system may change, or be modified and replaced, but the system may continue as before. Whether the system does continue or is materially changed so that it becomes another system is to be determined by the degree of internal change (see paragraphs 67, 68 & 70 in the CFI judgment);
- (f) Article 107³ of the Basic Law requires the Government to strive to achieve a fiscal balance. Thus, the pay reduction legislation last year, as one instrument in a set of coordinated measures aimed at keeping public finances sustainable, has a legitimate aim (see paragraph 178 in the CFI judgment); and
- (g) The existing pay adjustment mechanism, which attempts to achieve "broad comparability" between civil service pay and private sector pay, always contains the implication that pay adjustments may result in a reduction (see paragraphs 34, 72 & 73 in the CFI judgment).

The need for the current Bill in the light of the court judgment

6. Although it is inherent in the established civil service pay adjustment mechanism that some of the consideration factors for determining the annual civil service pay adjustment may have a positive or negative impact on the size of the pay adjustment, the contractual employment arrangements between the

² Article 103 of the Basic Law provides : "...Hong Kong's previous system of ... employment ... and management for the public service, including special bodies for their appointment, pay and conditions of service, shall be maintained..."

³ Article 107 of the Basic Law provides: "The Hong Kong Special Administrative Region shall follow the principle of keeping the expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product."

Government and the vast majority of serving civil servants do not contain an express provision authorizing the Government to reduce pay. In the context of the 2002 pay adjustment exercise, we considered that legislation was the most appropriate way to implement with certainty a justified decision on a civil service pay reduction. Accordingly, we sought the enactment of the POPA Ordinance to implement the decision to reduce civil service pay from 1 October 2002.

7. The CFI has ruled that the POPA Ordinance has not breached any individual articles of the Basic Law that were argued before it. According to the court ruling, the implementation of civil service pay reduction by legislation is constitutional.

8. The POPA Ordinance is a piece of one-off legislation to implement civil service pay reduction with effect from 1 October 2002. The legislation itself does not authorize any further pay adjustment after 1 October 2002. We consider it necessary to introduce the current Bill to implement with certainty the pay reductions which are to take effect on 1 January 2004 and 1 January 2005 respectively.

Civil Service Bureau
October 2003

Judicial Review of the Public Officers Pay Adjustment Ordinance

**A gist of the judgment handed down by the
Court of First Instance on 10 June 2003**

The Public Officers Pay Adjustment Ordinance (POPA Ordinance) was enacted in 2002 to implement the civil service pay reduction with effect from 1 October 2002. Two applications for judicial review were heard before the Court of First Instance (CFI) on 6-10 May 2003. The CFI handed down its judgment on these two cases on 10 June 2003.

2. The applicants in these two judicial review cases sought declarations that the POPA Ordinance, insofar as it seeks to impose a reduction in civil service pay scales, contravenes individual articles of the Basic Law and violates the principles of the Rule of Law and thereby the integrity of the Basic Law as a whole. A gist of the court judgment is set out below.

Articles 100 and 103

3. The court ruled that the POPA Ordinance does not permanently alter the terms and conditions of the contracts of service but rather it is to achieve an adjustment of civil service pay in a specific year in accordance with a long-established mechanism for calculating annual pay adjustments (paragraph 74), such mechanism being incorporated in the word “system” in Article 103 (paragraph 71). The POPA Ordinance therefore directly maintains a material part of the system (paragraph 73).

4. In respect of Article 100, the court ruled that public officers remain subject to conditions of service which, in respect of pay, remain unchanged in that it is to be determined in accordance with the long established pay adjustment mechanism (paragraphs 86 & 34). This mechanism has always contained the implication that pay adjustment may result in reductions (paragraph 165). Article 100 is therefore not contravened. Further, in terms of specific figures, Article 100 is not to be interpreted as to direct that pay, allowances and benefits may not fall below the 30 June 1997 levels (paragraph 87). In any event, the reductions brought about by the POPA Ordinance have not reduced the pay of public officers below those levels (paragraph 88).

Article 102

5. The court ruled that the POPA Ordinance, which does not in any way vary the terms and conditions of public service pensions, does not of itself offend Article 102. If the reduction of pay of public officers by the POPA Ordinance is lawful, any “knock on” effect on their future pension entitlements will itself be lawful (paragraph 99). Article 102 is therefore not contravened.

Article 35

6. The court ruled that the right of access to the courts is not absolute (paragraph 109). A balance is to be struck between the legitimate aim sought by the POPA Ordinance and the means used (paragraph 106). The court was satisfied that the enactment of the POPA Ordinance was proportionate to the legitimate aim of keeping public finance sustainable as directed by Article 107 (paragraphs 110 & 113). The court was also satisfied that, while the POPA Ordinance has had the result of preventing possible (but not existing) litigation, the purpose of it was to vary the terms of service contracts of public officers as a class of persons in accordance with the long established pay adjustment mechanism (paragraph 123). Article 35 is therefore not contravened.

Article 160

7. The court ruled that, just as was the case prior to the transfer of sovereignty, the Executive has the power to vary the rights and obligations of contracts of civil servants as a class by means of legislation after the transfer. This power to legislate is as much protected as the contracts of public officers (paragraphs 132 and 135). Article 160 is therefore not contravened.

Article 105

8. The court ruled that the POPA Ordinance has no retrospective effect and that it only reduces future pay which the public officers have not yet acquired as property and, as such, is not property capable of being protected by Article 105 (paragraphs 138 & 139). Article 105 is therefore not contravened.

Article 39

9. The court ruled that the possibility of a reduction is inherent in the existing annual pay adjustment mechanism and the use of that mechanism was a matter of settled public policy (paragraph 165) which formed the basis on which the request for the appointment of a Committee of Inquiry was rejected by the Executive.

10. Further, the court ruled that the articles concerned look to procedures for determining terms and conditions and not to how those terms and conditions, once determined, are to be implemented (paragraphs 166, 170 & 171(c)). The court was satisfied that the proposal to employ legislation to give general effect to the pay reduction is a matter of implementation outwith the articles concerned.

The Rule of Law

11. The court ruled that legislation may legitimately be directed at civil servants as a class (paragraphs 32, 175 & 176) and that all persons within the civil service of the same salary grade are treated equally. The POPA Ordinance ensured, amongst other things, both generality and equality of application (paragraph 177) to all within the civil service. Furthermore, the purpose of the POPA Ordinance was for the greater public good by maintaining civil service salaries at a level broadly in line with that of private sector employees (paragraph 178).