

**Paper for the Panel on
Administration of Justice and Legal Services of
the Legislative Council**

**Post-retirement Employment and Pension Benefits
and Acceptance of Advantages by Judges and Judicial Officers**

Purpose

1. The purposes of this paper are :
 - (a) To set out the provisions relating to the continued receipt by retired judges and judicial officers of their pensions while taking up post-retirement employment and appointments, and the approach and criteria adopted by the Judiciary in relation thereto;
 - (b) To inform Members that the Judiciary wishes to consider inviting the Chief Executive to delegate to the Chief Justice his discretion under s.28 of Cap. 401 where retired judges and judicial officers are appointed as deputies (usually for a period of not more than 3 months);
 - (c) To set out the provisions governing acceptance of advantages by judges and judicial officers, and the approach and criteria adopted by the Judiciary in dealing with applications by judges and judicial officers for permission; and
 - (d) To set out s.29(1) and s.31 of Cap. 401 relating to cancellation, reduction or suspension of pensions in relation to judges and judicial officers.

(I) Post-retirement Employment and Pension Benefits

The provisions

2. Pension benefits of retired judges and judicial officers are governed by the Pension Benefits (Judicial Officers) Ordinance, Cap. 401^(Note 1). Two sections of Cap. 401 may be applicable in cases where retired judges and judicial officers take up employment or an appointment after retirement.

(a) The first is s.34 (1) which provides:

“The Chief Executive may direct that a pension granted to a person shall be suspended as from a date the Chief Executive shall specify if the person has, within 2 years after his retirement and without the prior permission in writing of the Chief Executive-

- (a) entered business on his own account;
- (b) become a partner in a partnership;
- (c) become a director of a company; or
- (d) become an employee,

if the principal part of the business or the business of the partnership or company or of his employment is, in the opinion of the Chief Executive, carried on in Hong Kong, and the Chief Justice shall forthwith notify in writing the person concerned of the direction.”

(b) The second is s.28(1) which provides:

“If an officer who is eligible for a pension or to whom a pension has been granted is re-appointed to the public service, or appointed to service in any subvented organization which is determined to be public service for the purposes of this section by the Chief Executive by notice in the Gazette, the payment of the pension may be suspended during the period of his service after his re-appointment or appointment, as the case may be.”

No subvented organization has so far been gazetted by the Chief Executive.

^(Note 1) Where the retired judges and judicial officers were/are under the old pension scheme, their pension benefits are governed by the Pensions Ordinance, Cap. 89. In practice, pension benefits of most serving judges and judicial officers are not under the old pension scheme and are governed by Cap. 401.

3. Comparing the two provisions, the position is as follows:

S.34(1)

- (a) Applies to employment in HK in both the private sector and the public service.
- (b) Applies to employment within 2 years of retirement.
- (c) Discretion to suspend under the section if the person is employed without the prior permission of the Chief Executive.

See para 4 below.

- (d) The Chief Executive is expressly specified as the authority vested with the discretion to suspend.

See paras 5 and 6 below.

S.28(1)

- (a) Applies only to re-appointment to the public service and appointment to any gazetted subvented organization.
- (b) Applies after retirement with no limitation in time.
- (c) Discretion to suspend under the section if the person is re-appointed to the public service.

- (d) The section does not expressly identify the authority vested with the discretion to suspend.

The question of prior permission

4. It should be noted that:

- (a) Section 34(1) provides for the obtaining of the Chief Executive's prior permission in writing. If it is not obtained, the Chief Executive may direct suspension of the pension.
- (b) Under s.28(1):
 - (i) Where the person is re-appointed to the public service, the pension may or may not be suspended.

- (ii) The criteria the civil service has adopted for similar statutory provisions is that the pension would not be suspended if employment in the public service or a gazetted subvented organization is (1) for a full time job for a period of not more than 3 months or (2) for a part time job involving not more than 24 hours a week. In accordance with such criteria, the pension was not suspended in over 400 cases of retired civil servants in the past 3 years. (See the Administration's reply to a LegCo question on 12 November 2003).
- (iii) Although prior permission is not mentioned in s.28(1), in practice, the person concerned will usually wish to seek such permission and where it is obtained, would know for certain that the discretion to suspend will not be exercised.

The authority

5. S.34(1) of the Ordinance vests the authority to give permission for continuation of the pension in the Chief Executive. In April 1995, this authority was delegated by the Governor to the Chief Justice and such delegation continues to be effective. (See s.28 of the Hong Kong Reunification Ordinance, Cap. 2601). Although the power under s.34(1) has been delegated to the Chief Justice, the Chief Executive as the delegator retains the power, notwithstanding the delegation.

6. Section 28(1) is ambiguous as to who should in law be regarded as the authority. On the one hand, the view could be taken that it is the Chief Executive as he is mentioned in s.28(1) itself and he is specified as the authority in s.34(1). On the other hand, it could be argued to be the Chief Justice. After review in June 2003, the Judiciary has concluded that the better view is that the discretion under s.28(1) is vested in the Chief Executive. Such discretion has not been delegated to the Chief Justice. It is noted that this view is consistent with the Administration's view that the discretion under equivalent statutory provisions for the civil service is vested in the Chief Executive. (See the Administration's reply to a LegCo question on 12 November 2003). The history of the matter is as follows:

- (a) In 1994, as the authority is not expressly identified, the Judiciary took the view that the Chief Justice could exercise it. On this basis, in order to have flexibility to meet the

operational needs of the courts, the Chief Justice granted general permission for retired judges and judicial officers to be appointed as deputies without suspension of pension. (At about the same time, such general permission was also given by the Secretary for the Civil Service in relation to retired judges and judicial officers under the old pension scheme subject to the Pensions Ordinance, Cap. 89).

- (b) Pursuant to this general permission in 1994, one retired judge and three retired judicial officers were appointed as deputies without suspension of pension.
- (c) Consistent with such approach, permission was granted by the Chief Justice after 1997 for a retired High Court judge to act as Deputy Judge of the Court of First Instance for a period of 3 months without suspension of his pension. (See Case 3 in Annex A).
- (d) In June 2003, on reviewing the matter in connection with Mr Michael Wong's application for permission to take up appointment as Chairperson of the Equal Opportunities Commission without suspension of his pension, whilst the point was considered debateable, the Judiciary considered that the better view as indicated above is that s.28 by implication vests the discretion in the Chief Executive. Since both s.34(1) and s.28(1) appeared to be applicable, Mr Wong was advised that the Chief Executive is the proper approving authority.

The approach

Under s.34(1)

7. In exercising the discretion delegated to the Chief Justice in relation to whether a pension should be suspended or continued under s.34(1), the relevant considerations include whether judicial independence, or the perception of such independence, may be compromised and whether the proposed employment may involve any conflict of interest or perception of conflict. The time that has elapsed between the proposed employment and the cessation of active service is also relevant.

8. In considering applications under s.34(1), the Judiciary has referred to and taken into account the approach adopted by the Administration in dealing with applications by retired civil servants under statutory provisions similar to s.34(1) and s.28(1). The Administration's approach includes:

- (a) Considering whether the proposed employment would involve any conflict with the public interest;
- (b) Within the 2-year period, normally imposing a sanitisation period of 6 months from the cessation of active service for directorate civil servants; and
- (c) Where the employment is in the public service or a gazetted subvented organization, not suspending the pension if such employment is (i) for a full time job for a period of not more than 3 months; or (ii) for a part-time job involving not more than 24 hours a week. (See para 4(b)).

Under s.28(1)

9. In relation to the discretion conferred by s.28(1), the Judiciary's view is that the considerations referred to in paras 7 and 8 above are similarly relevant.

The cases since 1 July 1997

10. Since 1 July 1997, there have been 5 cases where retired judges and 1 case where a retired judicial officer were given permission under Cap. 401 by the Chief Justice to continue to receive their pension while taking up other employment or appointments after their retirement. It is not appropriate to provide the names of the judges or the judicial officer concerned. A summary of the 6 cases is at Annex A. (References to cases below are to the cases in Annex A).

Annex A

11. In relation to the 6 cases, it should be noted that:

Case 3

- (a) 5 of the 6 cases involved part time work. The remaining case of the deputy judge was an ad hoc temporary appointment for 3 months.
- (b) In each case, the Chief Justice, taking into account the relevant considerations referred to above (paras 7 and 8),

was of the view that judicial independence and its perception would not be compromised and that there would be no conflict of interest and no perception of any such conflict.

Cases 1 and 3 (c) In relation to a judicial officer becoming a consultant in a solicitor's firm and the appointment of the deputy judge for 3 months, precedents before 1997 were examined and taken into account, bearing in mind that generally, there should be broad consistency in the exercise of a discretion.

12. Further, it should be noted that:

(a) In each of the 6 cases, the Chief Justice granted permission under s.34(1).

Case 3 (b) Further, in the case of the appointment of the deputy judge, in accordance with the view then held by the Judiciary (see para 6), the Chief Justice proceeded on the basis that the discretion under s.28(1) was vested in him. The Judiciary's view is that there is no question of exercising the discretion to suspend the pension because the appointment as a deputy judge, being for a period of 3 months, met the criterion mentioned above. (Para 8(c)).

Possible delegation under s.28 to the Chief Justice in relation to temporary judicial appointments

13. As explained above, the Judiciary considers that the better view is that s.28 vests the discretion in the Chief Executive by implication (para 6). Since it is desirable for the Judiciary to have the flexibility of appointing retired judges and judicial officers to act as deputies for a period of say 3 months without suspension of pension in order to meet its operational needs, the Judiciary wishes to consider inviting the Chief Executive to delegate his discretion under s.28 to the Chief Justice solely for the purpose of making such appointments. As such appointments would not exceed a period of 3 months, they would meet the criterion mentioned above (para 8(c)). These are considered matters relating to the Judiciary's operations which should be dealt with by the Chief Justice.

Court of Final Appeal

14. The question has been raised whether non-permanent Hong Kong judges of the Court of Final Appeal are subject to s.28(1). Such judges are invited to sit usually for a short period of about a month a year. Prior to July 1997, when the court was being established, the Administration and the Judiciary agreed that their pensions would not be suspended as their sitting as a non-permanent judge, being usually for a period of less than 3 months, would meet the criterion mentioned above. (Para 8 (c)).

(II) Acceptance of Advantages by Judges and Judicial Officers

Prevention of Bribery Ordinance, Cap. 201

15. The acceptance of advantages by judges and judicial officers is governed by the Prevention of Bribery Ordinance, Cap. 201 (“POBO”). In particular:

- (a) Section 3 provides that any prescribed officer ^(Note 2) who, without the general or special permission of the Chief Executive, solicit or accepts any advantage shall be guilty of an offence.
- (b) Section 4(2) provides that it is an offence for a public servant^(Note 3) to solicit or accept any advantage as an inducement to or reward for or otherwise on account of, among other things, his performing or abstaining from performing any act in his capacity as a public servant.

Acceptance of Advantages Notice 1992

16. The Acceptance of Advantages (Governor’s ^(Note 4) Permission) Notice 1992 (“the Notice”) is given for the purposes of section 3 of the POBO.

^(Note 2) Under s.2 of POBO, “prescribed officers” include judges and judicial officers.

^(Note 3) Public servants are also defined under s.2 of the POBO to include any “prescribed officer”.

^(Note 4) Construed as the Chief Executive in accordance with the provisions of the Hong Kong Reunification Ordinance, Cap. 2601.

Contractual Obligation

17. In the Memoranda on Conditions of Service governing employment of judges and judicial officers, a standard clause is included which states that a judge or judicial officer “must not solicit or accept advantages such as gifts, loans of money, discounts and passages except those for which general or special permission has been given under Section 3 of the POBO.”

Procedure and Criteria

18. By the Notice (clauses 3 to 7), general permission is given for certain advantages to be solicited or accepted in certain circumstances, such as advantages from relations (clause 3), from tradesmen (clause 4), from close personal friends (clause 5), from other persons (clause 6), and from Government (clause 7). Where general permission is not given by the Notice, the Notice requires special permission to be obtained from the approving authority (clauses 8 and 9).

19. Where permission from the approving authority is required, judges and judicial officers are required to apply in writing, providing adequate information including the nature of advantage(s), the estimated value(s), relationship between the judge/judicial officer and the offeror of the advantage(s), whether the offeror of the advantage(s) has any official dealings with the judges and judicial officers or with the Judiciary, etc.

20. In considering applications for permission to accept an advantage by judges and judicial officers, the relevant considerations include whether judicial independence, or perception of such independence, may be compromised; and whether this may give rise to any conflict of interest, or perception of such conflict.

21. Further, in processing such applications from judges and judicial officers, reference may be made by the Judiciary to the criteria laid down by the Administration for similar applications.

Approving Authority

22. The approving authority is the Chief Justice as Head of the Judiciary responsible for its administration as provided for by s.6(2) of the Hong Kong Court of Final Appeal Ordinance, Cap. 484, and the Judiciary Administrator who is accountable to the Chief Justice.

23. In the case of the Chief Justice, the approving authority is the Chief Executive. Where gifts to the Chief Justice are disposed of by established methods such as donating the gifts to a charitable organization, the approving authority has been delegated from the Chief Executive to the Judiciary Administrator.

(III) Sections 29(1) and 31 relating to cancellation, reduction or suspension of pensions

24. The entitlement of judges and judicial officers to a pension is governed by the Pension Benefits (Judicial Officers) Ordinance. Where the statutory conditions are satisfied, that Ordinance makes entitlement to pension benefits a legal right. Accordingly, a judge or judicial officer who is otherwise qualified to receive a pension, can only be refused his pension or have it cancelled, reduced or suspended in the circumstances provided for by that Ordinance. Apart from s.34(1) and s.28(1) discussed above, there are two relevant provisions.

25. The first is s.29(1). In each case after considering the advice of the Judicial Officers Recommendation Commission (“JORC”) and subject to following the procedures set out in s.32, a designated officer^(Note 5) (appointed by the Chief Executive) :

- (a) can refuse to grant a judge or judicial officer a pension “if it is shown to the designated officer that the officer wilfully suppressed facts that are material to the grant of a pension;” or
- (b) can cancel or reduce a pension granted to an officer “if it is shown to the designated officer that the pension was obtained by the wilful suppression by the officer of facts, or that it was granted in ignorance of facts, which were such that had they been known before the retirement of the officer the pension would not have been granted in full or in part.”

26. Section 29(2) also provides for the possible refusal to grant a pension and the cancellation or reduction of a pension granted in certain situations involving retirements during or when threatened by disciplinary proceedings.

^(Note 5) A designated officer must be an officer holding judicial office (s.2 of Cap. 401).

27. The other relevant section is s. 31 which applies to officers who have been granted a pension and provides that the pension may be cancelled, suspended or reduced where such officer is convicted of an offence falling within any of three specified categories, namely :

- (a) an offence in connection with public service under the Government, and that offence is certified by the Chief Executive to have been gravely injurious to Hong Kong or to be liable to lead to serious loss of confidence in the public service;
- (b) an offence under Part II of the Prevention of Bribery Ordinance (Cap. 201), and that offence is related to the person's previous public service under the Government; or
- (c) treason under section 2 of the Crimes Ordinance (Cap. 200).

Judiciary Administration
13 November 2003

**Cases since 1 July 1997 of Retired Judges and Judicial Officers
who were granted permission to
continue to receive their pensions while taking up
employment and appointments after their retirement by the Chief Justice**

1 **Case 1**

- 1.1 A retired judicial officer (a Magistrate) was given permission to work part-time as a consultant in a solicitor's firm.
- 1.2 District Judges and above (with a retirement age of 65) have to give an undertaking to the Chief Executive on appointment not to return to practise as a barrister or solicitor in Hong Kong after leaving the Judiciary. However, judicial officers (normally with a retirement age of 60) are not subject to such an undertaking and can return to private practice.
- 1.3 In granting permission in this case:
 - (a) The Magistrate was asked to confirm and duly confirmed that he had no professional contacts with the firm over the previous 2 years.
 - (b) Before 1997, permission had usually been granted to judicial officers to return to private practice subject to a 6 months' sanitisation period after cessation of active service. In 1995, before delegation of the discretion to the Chief Justice, the Governor, on the recommendation of the Chief Justice, granted permission to two judicial officers (who had been working in tribunals where lawyers have no right of audience) to return to practise as barristers and to dispense with any sanitisation period. In 1996, the Chief Justice granted permission to a judicial officer to return to practise at the Bar subject to a 6 months' sanitisation period.
 - (c) A sanitisation period of 6 months from cessation of active service was imposed.

2 **Case 2**

2.1 A retired High Court Judge was permitted to take up the position of non-executive director of a company, a part-time position.

2.2 In granting permission, it was noted that:

(a) The judge had confirmed that he had not dealt with any case involving the company or any company in the group to which it belonged.

(b) The appointment would commence after 12 months from cessation of active service.

3 **Case 3**

3.1 A retired High Court Judge was permitted to act as Deputy Judge of the Court of First Instance of the High Court for 3 months. This was an ad hoc temporary position, although it involved full time work during the period of appointment. (The appointment was effective 6 months after cessation of active service).

3.2 In granting permission, it was noted that:

(a) Deputy Judges of the Court of First Instance are paid an honorarium (which does not involve any contractual gratuity).

(b) In 1994, in order to have flexibility to meet the operational needs of the courts, general permission was granted by the Chief Justice for retired judges and magistrates to be appointed as deputies without suspension of pension. (At about the same time, the Secretary for the Civil Service similarly granted such general permission in relation to those retired judges and judicial officers under the old pension scheme governed by the Pensions Ordinance, Cap. 89). See para 6(a) of the paper.

(c) Pursuant to such general permission in 1994, one judge and three judicial officers were appointed deputies without suspension of pension. See para 6(b) of the paper.

4 **Case 4**

4.1 A retired High Court Judge was granted permission to take up an appointment as a non-executive director of a company, a part time position.

4.2 In granting permission, it was noted that:

(a) The judge confirmed that he had not dealt with any case involving the company or any company in the group to which it belonged.

(b) The appointment would be effective some 17 months after cessation of active service.

5 **Case 5**

5.1 A retired High Court Judge was granted permission to take up appointment as Chairman of the statutory Administrative Appeals Board, a part time position. (The appointment was effective within 1 month after cessation of active service).

5.2 It is doubtful whether the appointment to such an office is subject to any provision of Cap. 401, but for the avoidance of doubt, permission was granted.

5.3 In granting permission, the condition was imposed that as Chairman of the Board, the retired judge should not handle any case which he had previously dealt with as a judge. It was noted that the Chairman is paid an honorarium (which does not involve any contractual gratuity).

6 **Case 6**

6.1 A retired High Court Judge was granted permission to take up a part-time teaching appointment with a tertiary education institution, a part time position. (The appointment was effective 3 months after cessation of active service).