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Report of the Bills Committee on Disciplined Services Legislation (Miscellaneous Amendments) Bill 2009

Purpose

This paper reports on the deliberations of the Bills Committee on Disciplined Services Legislation (Miscellaneous Amendments) Bill 2009 (the Bill).

Background

The Civil Service Provident Fund Scheme

2. The Civil Service Provident Fund (CSPF) Scheme is the retirement benefits scheme for civil servants appointed on or after 1 June 2000 on new entry terms and when they progress onto permanent terms of appointment upon completion of probation and/or agreement. The CSPF Scheme is set up as a mandatory provident fund scheme under the Mandatory Provident Fund Schemes Ordinance (MPFSO) (Cap. 485). Both the Government (as an employer) and civil servants (as employees) are required to make mandatory contributions as stipulated under the MPFSO. On top of mandatory contributions, the Government also makes voluntary contributions. Under the MPFSO, the Government as an employer is allowed to set up rules of its own to govern the accrued benefits attributable to its voluntary contributions. In this connection, the Civil Service Bureau (CSB) has promulgated a circular in 2003 (CSB Circular No. 9/2003) on the Terms and Conditions of the CSPF Scheme governing the voluntary contributions under the Scheme.

3. Under the CSPF Scheme as provided in CSB Circular No. 9/2003, a civil servant's retirement benefits comprise the accrued benefits attributable to his mandatory contributions, the accrued benefits attributable to Government's mandatory contribution (GMC benefits) and those to Government's voluntary contribution (GVC benefits)¹. While GMC benefits are by law not to be tampered with under any

¹ Including Government's Voluntary Contribution made for all CSPF civil servants and Special Disciplined

circumstances, GVC benefits are by contract fully vested and payable to a CSPF civil servant when he leaves the service upon completion of at least 10 years of continuous service since first appointment², or under other specified circumstances (e.g. retirement, death or permanent incapacity). GVC benefits may also by contract be forfeited, in whole or in part, if a CSPF civil servant is found guilty of a disciplinary or criminal offence and is punished for the offence.

Disciplinary punishments

4. A civil servant who has been found guilty of a disciplinary or criminal offence upon completion of the relevant proceedings is subject to disciplinary punishments, which comprise two broad categories, namely, removal³ or non-removal punishments⁴. Under the civil service disciplinary system, civilian civil servants and senior civil servants in disciplined services departments (DSDs) are subject to the Public Service (Administration) Order (PS(A)O), while the junior and middle ranking civil servants of the disciplined services grades are subject to the disciplined services legislation (DSL)⁵. While all non-removal punishments in the PS(A)O and DSL are applicable to CSPF civil servants, the existing removal punishments which impinge on the provision of pension benefits are not applicable to CSPF civil servants. As the first batch of CSPF civil servants will complete 10 years of service by mid-2010 and be fully vested with their GVC benefits when they leave the service, there is a need to put in place before then removal punishment which may impinge on the retirement benefits of CSPF civil servants found guilty of misconduct or offences, according to the Terms and Conditions of the CSPF Scheme.

5. Based on the removal punishments in use for civil servants on pensionable terms, the Administration proposes the following three levels of removal punishments for CSPF civil servants –

Services Contribution (SDSC) made additionally for CSPF civil servants of the disciplined service grades.

² Except for SDSC which will only be vested and payable under one of the three specified circumstances, i.e. retirement on or after reaching the prescribed retirement age, death or retirement on permanent incapacity

³ At present, there are three main levels of removal punishments under the Public Service (Administration) Order (PS(A)O) and the disciplined services legislation (DSL) - (i) Level 1: dismissal (with forfeiture of all pension benefits); (ii) Level 2: compulsory retirement with reduction of up to 25% of pension benefits; and (iii) Level 3: compulsory retirement with pension benefits.

⁴ Under PS(A)O, there are three types of non-removal punishments - (i) reduction in rank; (ii) severe reprimand; and (iii) reprimand, and three types of financial penalties - (i) stoppage or deferment of increments; (ii) reduction in salary; and (iii) fine. The civil servants concerned are also subject to the summary punishment of written warning and verbal warning. Under DSL, there are similar punishments of reduction in rank, severe reprimand and reprimand, but the presence of warning and financial penalties varies from one DSL to another. Some punishments, e.g. forfeiture of pay, extra duties, etc, are present in some DSL but not PS(A)O.

⁵ This refers to the main ordinances and subsidiary legislation that are applicable to specific disciplined service grades/ranks of the Hong Kong Police Force, Fire Services Department, Correctional Services Department, Customs and Excise Department, Immigration Department and Government Flying Service.

Level of punishment	CSPF civil servants with 10 or more years of service⁶
Level 1	Dismissal with forfeiture of full GVC benefits
Level 2	Compulsory retirement with reduced GVC benefits (the percentage of reduction will be capped at 25% of the GVC benefits at the time of compulsory retirement of the staff concerned)
Level 3	Compulsory retirement with full GVC benefits

6. According to the Administration, the removal punishments proposed above are broadly comparable to those for pensionable civil servants.

The Bill

7. The Bill seeks to amend the DSL to –
- (a) introduce for CSPF civil servants removal punishments (i.e. dismissal with forfeiture of full GVC benefits and compulsory retirement with full or reduced GVC benefits);
 - (b) include retired CSPF civil servants as beneficiaries under their respective disciplined services welfare funds;
 - (c) provide for the compulsory retirement of traffic warden grade officers found guilty of disciplinary offence; and
 - (d) revise the date from which pay and allowance may cease to be payable to police officers upon criminal conviction.

⁶ A CSPF civil servant will be eligible for his GVC benefits when leaving the service after completing at least 10 years of continuous service. A civil servant with less than this period of continuous service, who is retired compulsorily under Level 2 or 3 punishment, will not be eligible for any GVC benefits.

The Bills Committee

8. At the House Committee meeting on 20 February 2009, Members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon LEE Cheuk-yan, the Bills Committee has held four meetings, including a meeting to receive views from deputations. The membership list of the Bills Committee is at **Appendix I**. A list of organizations that have submitted views to the Bills Committee is at **Appendix II**.

Deliberations of the Bills Committee

9. In principle, the Bills Committee supports the Bill which seeks to amend the DSL so that removal punishments impinging on retirement benefits and post-retirement entitlement under disciplined services welfare funds, etc. relating to CSPF civil servants in those services will be aligned with their pensionable counterparts or the rest of the civil service. The Bills Committee examines a number of issues related to the legislative proposals under the Bill during its scrutiny work. Concerns raised by the Bills Committee and information provided by the Administration are summarized in the ensuing paragraphs.

Legal basis for forfeiture and reduction of retirement benefits of CSPF civil servants

10. Members including Hon James TO and Hon Audrey EU have expressed concern whether the removal punishments impinging on the provision of retirement benefits under the CSPF Scheme proposed by the Administration (the Proposal) would constitute variation of the employment contract of CSPF civil servants. These members have requested the Administration to explain the legal basis for forfeiture or reduction of retirement benefits of CSPF civil servants who have committed misconduct or offence.

11. The Bills Committee has noted the Administration's advice that the contractual basis for the forfeiture of GVC benefits on disciplinary grounds is provided through the appointment terms and conditions of service as agreed and signed by civil servants upon appointment on new permanent terms, and through CSB Circular No. 9/2003. The conditions of service for civil servants appointed on new permanent terms are set out in the Memorandum on Conditions of Service (MOCS) that accompanies the letter of appointment. Both the appointment letter and MOCS form part of the contract of employment between the Government and a civil servant. The letter of appointment expressly stipulates that GVC benefits may be forfeited on disciplinary grounds. It also refers to CSB Circular No. 9/2003 and MOCS for detailed arrangements. Paragraph 5.1 of the Terms and Conditions of the CSPF Scheme provides that where a CSPF civil servant is found guilty of a disciplinary or criminal offence and is given a punishment upon conclusion of disciplinary proceedings, his GVC benefits may be forfeited, either wholly or in part, having regard to the findings and the decision on punishment. In paragraphs 5.2 and 5.3, it

is stipulated that where a CSPF civil servant leaves the service before the completion of disciplinary action, the Administration may withhold and/or forfeit his GVC benefits. Paragraph 5.5 further provides that where the misconduct or offence comes to light only after a CSPF civil servant has left the service and has fully paid his GVC benefits, the Administration may recover, either wholly or in part, such benefits by means of civil action if the officer is convicted of certain serious offences. Relevant extracts of CSB Circular No. 9/2003 are reproduced at **Appendix III**.

12. The Bills Committee has noted that the control regime on civil servants' discipline is provided through two instruments, namely, the PS(A)O made by the Chief Executive (CE) and the DSL. These disciplinary instruments set out, among others, the provisions governing how disciplinary proceedings should be instituted against civil servants alleged of misconduct or offences under their respective purview. While the PS(A)O is applicable to civil servants in civilian grades and senior ranking officers⁷ in disciplined service grades, the DSL is applicable to middle ranking officers or below in disciplined service grades⁸. The Administration will amend the PS(A)O and the relevant CSB regulations and circulars after the passage of the Bill for implementation of the Proposal for CSPF civil servants in the civilian grades and senior ranking officers in the disciplined service grades.

13. The Bills Committee has noted the Administration's explanation that the Bill seeks to, among others, include in the DSL references to removal punishments impinging on the retirement benefits (and specifically, GVC benefits) of CSPF civil servants employed in the disciplined services. The relevant proposals are dealt with in the Bill mainly by introducing the newly defined terms of "CSPF Scheme" and "retirement benefits". These amendments are technical but necessary as all the DSL predates the CSPF Scheme, and the retirement benefits referred to in such legislation, namely "pension, gratuity or other allowances", do not cover those benefits under the CSPF Scheme. As the disciplinary matters of the middle ranking civil servants or below in disciplined service grades are generally governed by the DSL apart from their employment contract, the Administration considers it prudent to amend DSL to remove any doubt caused by the lack of reference to the retirement benefits under the CSPF Scheme in the DSL, and to forestall any legal challenge as to the basis of forfeiture of GVC benefits for civil servants subject to the DSL. The Proposal, therefore, has no conflict with the employment contract with CSPF civil servants.

14. To ascertain the effect of the Bill on the contract of employment of CSPF civil servants, the Bills Committee seeks the advice of its legal adviser. Upon review of the information provided by the Administration, the legal adviser to the Bills Committee is of the view that the DSL referred to in the Bill in so far as it relates to punishments which impinge on retirement benefits, appears to reflect and implement

⁷ These refer generally to officers at a rank equivalent to Superintendent/Assistant Superintendent and above.

⁸ Except for Immigration Department in which only the junior ranking officers (i.e. those of the Immigration Assistant grade) are subject to DSL for the disciplinary offences specified therein, whilst the others are subject to PS(A)O.

paragraph 5.1 of the Terms and Conditions of the CSPF Scheme. No material deviation from the Terms and Conditions of the CSPF Scheme is evident.

Forfeiture and reduction of GVC benefits

15. The legal adviser to the Bills Committee observes that as forfeiture of GVC benefits seems to be part of the punishment that may be given, the phrase “is given a punishment” in paragraph 5.1 of the Terms and Conditions of the CSPF Scheme may more logically be read as “is to be given a punishment” in the context of the paragraph and in the light of the Administration’s explanation.

16. The Bills Committee has noted the Administration’s advice that the relevant disciplinary authority will mete out a punishment to a CSPF civil servant if he is found guilty of a disciplinary or criminal offence upon conclusion of disciplinary proceedings. Where the punishment is a non-removal one (e.g. reprimand), the civil servant’s GVC benefits will not be affected in any way. Where the punishment is a removal one (e.g. dismissal or compulsory retirement), the civil servant’s GVC benefits may be forfeited, wholly or in part, depending on the forfeiture (if any) that comes with the decision on punishment. The phrase “is given a punishment” which appears in the first part of paragraph 5.1 of the Terms and Conditions of the CSPF Scheme reflects the fact that a punishment will be given to the civil servant concerned. For the latter part of paragraph 5.1 of the Terms and Conditions, it reflects that the punishment given may or may not involve a forfeiture of GVC benefits.

Forfeiture of accrued benefits attributable to Special Disciplined Services Contribution (SDSC)

17. The legal adviser to the Bills Committee draws the Bills Committee’s attention to the practical effect of paragraph 4.4.1 of the Terms and Conditions of the CSPF Scheme, which states that the accrued benefits attributable to SDSC in respect of a disciplined service grade officer, subject to paragraph 5 of the same set of terms and conditions, will only be vested and payable under three specified circumstances, namely, retirement on or after reaching the prescribed retirement age, death or retirement on permanent incapacity. The same paragraph also states that if the officer concerned leaves the civil service in any circumstance other than the above-mentioned specified circumstances, he will not be entitled to any SDSC benefits.

18. The Administration has confirmed that the legal adviser to the Bills Committee is right in pointing out that the accrued benefits attributable to SDSC in respect of a disciplined service grade officer will be liable to be forfeited on disciplinary grounds if one of the three specified circumstances occurs before the conclusion of relevant proceedings. The extent of forfeiture will depend on the decision made after these proceedings. On the other hand, if a specified circumstance arises after the conclusion of such proceedings (which result in the meting out of a removal punishment, i.e. dismissal, or compulsory retirement with full

or reduced retirement benefits), the officer concerned will leave the civil service in a circumstance other than the specified circumstances and will not be entitled to any accrued benefits attributable to SDSC.

Percentage of reduction of GVC benefits

19. Members including Hon CHEUNG Man-kwong and Hon James TO have expressed concern that the maximum percentage (i.e. 25%) of reduction of the GVC benefits (the reduction ceiling) on compulsory retirement of CSPF civil servants is not provided in the legislation, as in the case of pensionable civil servants. Hon CHEUNG Man-kwong is concerned about the mechanism to protect CSPF civil servants from any abrupt changes to the maximum percentage of reduction in the future, in the absence of explicit provision in the legislation.

20. The Bills Committee has noted the Administration's explanation that the reduction ceiling of 25% of GVC benefits for CSPF civil servants under Level 2 punishment (i.e. compulsory retirement with reduced GVC benefits) is proposed having full regard to the extensive consultations with the staff sides before the introduction of the Bill. Unlike the retirement benefits of pensionable civil servants which are provided under the relevant pension legislation, the retirement benefits of CSPF civil servants are provided by employment contract which comprises the letter of appointment, MOCS and the CSB circulars and regulations referred thereto. It is therefore logical that the reduction ceiling for GVC benefits at 25% should be provided by way of contract (or more specifically in a CSB circular forming part of the employment contract with CSPF civil servants), such that it will apply to all CSPF civil servants on an equal footing. The Bill seeks to amend the DSL which governs generally, among others, disciplinary matters of middle ranking civil servants or below in the disciplined service grades only. It is not applicable to civil servants of civilian grades and senior ranking civil servants of the disciplined service grades, whose disciplinary matters are governed by the PS(A)O made by the CE. Amendments of the DSL by way of the Bill cannot therefore fully meet the purpose of specifying the reduction ceiling for GVC benefits, which affect all CSPF civil servants.

21. Responding to Hon CHEUNG Man-kwong's concern about safeguarding the interest of CSPF civil servants in the event of future revision to the reduction ceiling, the Administration has agreed to give a clear undertaking during the resumption of the Second Reading debate of the Bill that the Administration will consult extensively with the staff sides through the established staff consultation mechanism as well as the Panel on Public Service (PS Panel) in the event that there is a future need to revise the reduction ceiling, and that it would duly take their comments/views into account before making any such revision.

22. Hon James TO holds a strong view that the reduction ceiling on compulsory retirement of CSPF civil servants has to be provided in the legislation. He considers that the undertaking by the Secretary for the Civil Service to consult staff sides and

the PS Panel on any future changes to the reduction ceiling could not adequately safeguard the interest of CSPF civil servants. He has proposed Committee Stage amendments (CSAs) in order to provide the reduction ceiling of 25% in the DSL.

23. Having considered the CSAs proposed by Hon James TO, the Administration remains of the view that specifying the reduction ceiling for GVC benefits in a government circular is the best course, as it is consistent with the approach to provide the basis of the CSPF Scheme, including all its terms and conditions, in contract. The Administration does not support the CSAs proposed by Hon James TO.

24. The Bills Committee decides that it will not move the CSAs proposed by Hon James TO. The Bills Committee notes that Hon James TO plans to move the proposed CSAs in his own name.

Sanctions on/remedies from CSPF civil servants who have left the service

25. Members including Hon Audrey EU and Hon CHEUNG Man-kwong are concerned about the possible sanctions to be imposed on and the remedies to be sought from CSPF civil servants whose misconduct or offence comes to light only after the officer has left the service and has fully withdrawn the GVC benefits, e.g. former directorate CSPF civil servants in breach of the control regime for post-service outside work. These members have opined that the Administration may have to examine whether the control regime for pensionable civil servants will be equally effective for CSPF civil servants, and to align the sanctions under the control regime for post-service outside work applicable to pensionable and CSPF civil servants. Hon LEE Cheuk-yan nevertheless has pointed out that given the difference in the nature of retirement benefits for pensionable and CSPF civil servants, it may not be possible nor appropriate for the Administration to impose the same sanctions on these two types of officers who have left the service.

26. The Bills Committee has noted the Administration's advice that according to paragraph 5.5 of the Terms and Conditions of the CSPF Scheme as set out in CSB Circular No. 9/2003, where the misconduct or offence of a CSPF civil servant comes to light only after the civil servant has left the service and has fully withdrawn his GVC benefits, the Administration may recover, either wholly or in part, such benefits by means of civil action if the officer is convicted of –

- (a) the common law offence of misconduct in public office; or
- (b) any offence under Part II of the Prevention of Bribery Ordinance (Cap. 201), being an offence related to his previous government service; or
- (c) any offence related to his Government service, being certified by CE to have been gravely injurious to Hong Kong or to be liable to lead to serious loss of confidence in the public service; or

- (d) treason under section 2 of the Crimes Ordinance (Cap. 200).

27. As regards Hon CHEUNG Man-kwong's concern about the limited circumstances under which the Administration may recover the GVC benefits from former CSPF civil servants, the Administration has explained that the Terms and Conditions of the CSPF Scheme as provided in the CSB Circular No. 9/2003 do not currently provide the Administration with a basis to recover the GVC benefits already paid to a former civil servant who has left the service and has committed a misconduct or offence other than the four specified offences set out above. The grounds on which civil actions for recovery of GVC benefits for CSPF civil servants are designed having regard to the grounds on which pension benefits can be forfeited for a pensionable civil servant. In the case of CSPF civil servants, on top of the conviction of any of the three specified criminal offences applicable to pensionable civil servants in paragraph 26(b) to (d) above, there is already an additional common law offence of misconduct in public office.

28. As to members' concern about the control regime governing post-service outside work of directorate civil servants on CSPF terms, the Administration has explained that if a former directorate civil servant fails to obtain prior permission from the approving authority before taking up post-service outside work during the control period or fails to comply with the conditions imposed by the authority on an approved application, the authority may invoke either one or a combination of sanctions. These sanctions include initiating civil action to seek an injunction or sue for damage (under contract law), withdrawal or suspension of approval, issue of a public statement of criticism or reprimand letter or warning letter, etc.

29. The Bills Committee has also noted that the existing policy and arrangements for the control regime of post-service outside work for directorate civil servants is under review by an independent Committee on Review of Post-Service Outside Work for Directorate Civil Servants (Review Committee). The Administration has relayed to the secretariat of the Review Committee Members' concern about recovery of GVC benefits where there is a breach of post-service outside work restrictions but such a breach only comes to light after a CSPF directorate civil servant has left the service and has fully withdrawn his GVC benefits. The Review Committee will discuss this issue in the context of formulating its recommendations to the CE.

30. Since the PS Panel has been monitoring issues relating to the improvements of the control regime for post-service outside work of former directorate civil servants, the Bills Committee agrees that the subject be referred to the PS Panel for follow-up.

Review on the arrangements of disciplinary proceedings in disciplined services departments

31. The Bills Committee has noted the concern of the staff sides of the DSDs about certain practices in the disciplinary proceedings of civil servants subject to DSL (in particular the discrepancies in the mode of keeping records of hearings between DSDs and departments whose staff disciplinary matters are subject to the PS(A)O). Members including Hon LEE Cheuk-yan, Hon IP Wai-ming, Dr Hon PAN Pey-chyou and Hon James TO share the view that fair and consistent disciplinary proceedings across departments are crucial for safeguarding the interest of the civil servants concerned.

32. The Bills Committee has noted the Administration's advice that CSB has set up a task group with the management of the various disciplined services to review the relevant arrangements of disciplinary proceedings. As the subject falls outside the scope of the Bill, CSB is maintaining a dialogue with the relevant staff unions on this subject, and will report the progress to PS Panel in due course as appropriate. In case of major changes to the disciplinary procedures or related issues as a result of the review, the Administration will consult staff sides. The Bills Committee urges the Administration to expedite its work on the review so that the concerns of the staff sides of the disciplined services could be addressed as soon as possible.

Retrospective application of the provisions under the Bill

33. Hon James TO has expressed concern about the retrospective application of the proposed provisions under the Bill to CSPF civil servants who leave the service under other specified circumstances (e.g. reaching prescribed retirement age, death, permanent incapacity, etc, with less than ten years' service) before the passage of the Bill.

34. The Bills Committee has noted the Administration's advice that for CSPF civil servants who leave the service under other specified circumstances and are not found guilty of any serious misconduct or offence, they are entitled to be vested and paid their GVC benefits. For those who have left the service and are found guilty of serious misconduct or offence, the terms and conditions of their employment contract have already provided that their GVC benefits may be forfeited, wholly or in part. The Administration has not come across any case involving CSPF civil servants who leave under these specified circumstances committing serious misconduct or offence which warrant the imposition of removal punishment. In the rarity of event that such a case arises with punishment awarded between now and the commencement of the Bill, the Administration can deal with it in accordance with the terms and conditions of the employment contract. The Bill, if passed, will not have retrospective application to such a case. On the other hand, the transitional provisions in Part 6 of the Bill seek to cover possible disciplinary cases straddling commencement of the Bill. These transitional provisions have provided that the Bill applies to such cases even though the misconduct or offence is committed before the Bill comes into effect.

Vesting of provident fund benefits upon summary dismissal

35. The legal adviser to the Bills Committee draws the Bills Committee's attention to the apparent lack of clarity of the practical effect of the proposed section 31(2)(b) of the Police Force Ordinance (PFO) (Cap. 232), i.e. whether the CE could declare under the proposed section that provident fund benefits of a police officer dismissed under section 31(1) be "vested" to that officer, as such benefits may have already been vested in that officer before but subsequently forfeited upon summary dismissal.

36. The Administration has explained that the Bill does not seek to amend section 31(1) of PFO, which was enacted in the 1970s and has never been invoked. In practice, if this section is invoked, the Commissioner of Police may consider the need to recommend the CE to invoke section 31(2) in parallel for the officer concerned. The concept of vesting of provident fund benefits before payment of the benefits to the individual concerned is in line with those in the MPFSO and the Terms and Conditions of the CSPF Scheme.

37. Members including Hon LEE Cheuk-yan, Hon CHEUNG Man-kwong and Hon IP Wai-ming have asked the Administration to examine whether it is appropriate to use the word "vested" in clause 6 of the Bill (which seeks to amend section 31(2) of PFO).

38. The Bills Committee has noted the Administration's advice that when a civil servant is punished by dismissal upon conclusion of disciplinary proceedings, the effect is that he forfeits all claims to civil service benefits. In the case of a CSPF police officer who is summarily dismissed under section 31(1) of PFO, he forfeits all claims to his GVC benefits. There is therefore no question of vesting of GVC benefits to the police officer concerned, who has forfeited all claims to such benefits upon his summary dismissal. This notwithstanding, where the CE thinks fit to exercise his discretion under section 31(2) of PFO to provide the dismissed police officer with GVC benefits, the CE can declare that such benefits are to be vested in that officer. The Administration is of the view that the proposed formulation under clause 6 of the Bill, including the use of "vested" in the proposed section 31(2)(b) of the PFO, is in order from the drafting point of view.

Committee Stage Amendments

39. The Bills Committees has not proposed any CSAs to the Bill. Hon James TO has given notice to move CSAs to provide in the DSL the reduction ceiling of 25% for CSPF civil servants subject to the Level 2 punishment.

40. The Administration has not proposed any CSAs to the Bill.

Recommendation

41. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 17 June 2009.

Consultation with the House Committee

42. The House Committee was consulted on 5 June 2009 and supported the recommendation of the Bills Committee in paragraph 41.

Council Business Division 1
Legislative Council Secretariat
10 June 2009

**Bills Committee on Disciplined Services Legislation
(Miscellaneous Amendments) Bill 2009**

Membership list

Chairman Hon LEE Cheuk-yan

Members Hon James TO Kun-sun
Hon CHEUNG Man-kwong
Hon TAM Yiu-chung, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon IP Wai-ming, MH
Dr Hon PAN Pey-chyou

(Total: 7 Members)

Clerk Ms Rosalind MA

Legal Adviser Miss Winnie LO

Date 6 March 2009

**Bills Committee on Disciplined Services Legislation
(Miscellaneous Amendments) Bill 2009**

List of organizations which have submitted views to the Bills Committee

1. Disciplined Services Consultative Council (Staff Side)
2. Hong Kong Federation of Civil Service Unions
3. Government Disciplined Services General Union

Council Business Division 1
Legislative Council Secretariat
4 June 2009

**Extracts of relevant provisions relating to forfeiture of
accrued benefits attributable to Government's voluntary contributions
in Civil Service Circular No. 9/2003**

The Circular (main text)

Para. 9

“As for the payment of accrued benefits arising from GVC/SDSC, the bureau/department will verify the officer's service records and inform the Trustee whether payment could be made. In particular, the bureau/department has to check whether the officer meets the vesting criteria as stipulated in the ‘Terms and Conditions of the CSPF Scheme’ and to confirm that there are no disciplinary reasons to withhold, forfeit or reduce the accrued benefits attributable to GVC/SDSC before approving its payment.”

Annex A to the Circular

Para. 5.1

“Where an officer is found guilty of a disciplinary or criminal offence and is given a punishment upon conclusion of disciplinary proceedings, his accrued benefits attributable to the GVC (and the SDSC if applicable) may be forfeited, either wholly or in part, having regard to the findings and the decision on punishment.”

Para. 5.2

“Where an officer leaves the service –

- (a) before conclusion of disciplinary or criminal proceedings, if such proceedings have started; or*

- (b) *if formal proceedings have yet to start, but the Government has reasonable grounds to suspect that the officer may have committed a misconduct which, had the disciplinary proceedings taken place and the misconduct substantiated, would be so serious as to warrant a punishment of removal from the service,*

his accrued benefits attributable to the GVC (and the SDSC if applicable) may be withheld in full until conclusion of the relevant proceedings (or until a decision is taken by Government that no such proceedings will commence)."

Para. 5.3

"Subsequent to para. 5.2 above, upon conclusion of relevant proceedings to establish whether an officer's accrued benefits attributable to the GVC (and the SDSC if applicable) should be forfeited, the accrued benefits of the officer concerned may be forfeited either wholly or in part, having regard to the findings and the decision so made."

Para. 5.5

"Where the misconduct or offence comes to light only after the officer has left the service and has fully withdrawn his accrued benefits attributable to the GVC (and the SDSC if applicable), the Government may recover, either wholly or in part, such benefits by means of civil action, if the officer is –

- (a) *convicted of the common law offence of misconduct in public office; or*
- (b) *convicted of any offence under Part II of the Prevention of Bribery Ordinance (Cap 201), being an offence related to his previous government service; or*
- (c) *convicted of any offence related to his Government service, being 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; or*

(d) *convicted of treason under Section 2 of the Crimes Ordinance (Cap 200).*”

Annex B to the Circular

The entire Annex B which sets out the provisions on forfeiture of accrued benefits, amongst others, is attached at **Appendix**.

**Procedures on approving the payment of
Accrued Benefits Attributable to
Government Voluntary Contributions (GVC)/
Special Disciplined Services Contributions (SDSC)**

Procedures on releasing/withholding Accrued Benefits

When an officer is due to leave the service or gives notice to resign, his Department should check whether he meets the vesting criteria for accrued benefits attributable to GVC/SDSC (hereafter referred to as ‘accrued GVC/SDSC benefits’) as stipulated in the ‘Terms and Conditions of the Civil Service Provident Fund Scheme’.

2. If he is not eligible for the accrued GVC/SDSC benefits (e.g. less than 10 years continuous service with the Government, removal from service on disciplinary grounds with accrued benefits forfeited), his Department should inform the Trustee of the Master Trust Scheme (MTS) joined by the officer under the CSPF Scheme (hereafter referred to as ‘scheme trustee’) to return the accrued benefits to the Government.

3. If he meets the vesting criteria, his Department should check whether the officer is –

- (a) subject to, or likely to be subject to, disciplinary investigation or proceedings; or
- (b) under criminal investigation by the Police and/or ICAC.

In this regard, a letter giving consent to the Government to make any necessary enquiries for the purpose of establishing his eligibility to the accrued GVC/SDSC benefits and authorizing the disclosure of information relating to whether there is or exists any likelihood of, and if so, the nature of, any disciplinary investigation/proceedings or criminal investigation involving the officer by any person or authority to whom the relevant enquiries are made will be signed by the officer when he is offered permanent terms of appointment.

4. If the officer is not subject to/not likely to be subject to disciplinary action, or not under criminal investigation, his Head of Department (HoD) will check whether the officer has any other outstanding loan or payment with the Government. If there is no money due to the Government, the HoD will notify the scheme trustee to release the officer's accrued GVC/SDSC benefits. The decision to release the benefits should be made by an officer who is not lower than D2 in rank, or an officer who is at least two ranks above the officer leaving the service if the latter is at directorate level himself.

5. If there are allegations of misconduct against the officer or where disciplinary proceedings are in progress, his HoD, in consultation with the Civil Service Bureau (CSB), will consider whether to release or withhold the accrued GVC/SDSC benefits. If the officer is at directorate rank, his case will be considered by Secretary for the Civil Service (SCS).

6. Similarly, if the officer is currently under investigation by the Police or ICAC, his HoD, in consultation with CSB, will consider whether to release or withhold the accrued GVC/SDSC benefits. If the officer is at directorate rank, his case will be considered by SCS.

7. Where it is considered necessary to withhold an officer's accrued GVC/SDSC benefits, his Department should, as soon as practicable and normally not later than **three months** after the officer's last day in service, inform the officer of the proposed withholding action and the reasons for doing so. The officer should be invited to submit, within **14 calendar days**, a statement to explain why the proposed action should not be taken. If the officer has submitted explanation, the designated authority (i.e. his HoD or SCS if the officer is at directorate rank) should take this into account before reaching the decision on whether or not to withhold his accrued GVC/SDSC benefits and notify the officer accordingly. CSB should be consulted in advance. Under such circumstances, the decision to withhold an officer's accrued GVC/SDSC benefits should normally be made no later than **four months** after the officer's last day in service.

8. In parallel, the Department should notify the scheme trustee of the withholding action. During the period in which an officer's accrued GVC/SDSC benefits are withheld, he will be allowed to continue to exercise his right as a scheme member to decide how the accrued GVC/SDSC benefits are to be invested within the scheme.

9. The initial withholding period will be **three months**. The designated authority should review the case within the initial withholding period, and thereafter at regular intervals to decide whether the withholding should continue. Normally, the withholding will be up to a maximum of **six months** (for an officer who is subject to disciplinary investigation) or **12 months** (for an officer who is being investigated by the Police or ICAC) counting from the date when the accrued GVC/SDSC benefits is first withheld. By the end of the withholding period, if the officer is not subject to disciplinary or criminal charge, the designated authority should consider whether the accrued GVC/SDSC benefits should be released or forfeited on the basis of the progress/outcome of the investigation. If the designated authority decides to forfeit the accrued GVC/SDSC benefits or if the officer is subject to disciplinary or criminal charge, the designated authority should take action in accordance with the procedures on forfeiture of the accrued benefits as set out in paragraphs 10 to 16 below. Otherwise, after consultation with CSB, the order to withhold the accrued benefits should be rescinded.

Procedures on Forfeiture of the Accrued Benefits

10. If, after investigation by the Police or ICAC, no criminal charges have been made, or an officer is charged but subsequently acquitted of all criminal charges, or an officer is convicted but subsequently his conviction is quashed upon appeal, the department should study the relevant report and, if necessary, conduct a departmental investigation. The department should examine whether there is any evidence to suggest a disciplinary misconduct, or whether the investigation or the court case has revealed other misconduct which may warrant disciplinary action. If, as a result of the investigations/examination, there is evidence of a misconduct which is serious enough to warrant forfeiture of accrued GVC/SDSC benefits, the designated authority may approve the continued withholding of the officer's accrued benefits and pursue the disciplinary/forfeiture proceedings (see paragraph 13 below). Otherwise, after consultation with CSB, the order to withhold the accrued benefits should be rescinded.

11. If, after investigation by the Police or ICAC, an officer is charged and is convicted of criminal offence, the designated authority should study the court ruling when available and, after consultation with CSB, take a view as to whether the officer's accrued GVC/SDSC benefits should be forfeited, having regard to the gravity of the criminal conviction.

12. If disciplinary proceedings has been taken and upon completion of

the proceedings, the designated authority will, on the basis of the outcome of the proceedings and in consultation with CSB, consider whether to release or forfeit the accrued GVC/SDSC benefits.

13. In circumstances where disciplinary proceedings cannot be completed on the last day of an officer's service, the department concerned will ask the officer to indicate whether he wishes to continue with the proceedings. If the officer wishes to continue with the proceedings, he should indicate in writing, within **14 calendar days**, that he agrees to the continuation of the disciplinary proceedings and that he will attend the disciplinary inquiry if conducted. Upon receipt of the officer's written confirmation, the proceedings will continue in the same manner as if the officer has not left the service until the proceedings are completed. If the officer indicates that he does not wish to continue with the proceedings or if no reply is received from the officer after the stipulated deadline, the designated authority would discontinue the disciplinary proceedings, and consider the case on the basis of evidence collected from previous investigation. This procedure is referred to as the 'forfeiture proceedings'.

14. If the designated authority decides not to forfeit the accrued GVC/SDSC benefits after the disciplinary/forfeiture proceedings, he will, after consultation with CSB, approve the release of the accrued GVC/SDSC benefits. The officer designated in the department to certify payments of accrued GVC/SDSC benefits will notify the scheme trustee to release the accrued benefits to which the officer is entitled.

15. If the designated authority decides to forfeit the benefits, either wholly or in part, after the disciplinary/forfeiture proceedings, the Department concerned will notify the officer in writing that –

- (a) consideration is being given to forfeiting his accrued benefits, either wholly or in part, and the grounds for so doing; and
- (b) the officer may submit representations within **30 calendar days**, and that the representations, if made, would be considered by the designated authority before a final decision is made.

16. If representations from the officer are not received by the end of the specified period or if the representations are not considered exculpatory, the designated authority may, after taking into account the advice of CSB and the

Public Service Commission, exercise his authority to order forfeiture of the officer's accrued GVC/SDSC benefits, either wholly or in part. The officer should be notified of the decision accordingly.

Appeal Mechanism

17. If the officer is aggrieved by a decision to forfeit his accrued GVC/SDSC benefits, he may make representations to the Chief Executive (CE) within a period of **30 calendar days** counting from the date of the notification of the decision. The CE shall determine the merits of the representations. He may confirm, vary or reverse the decision to which the representations relate.

Recovery of the Accrued Benefits already paid out

18. Where the misconduct or offence comes to light only after the officer has left the service and has fully withdrawn the accrued GVC/SDSC benefits, the Government may recover, either wholly or in part, such benefits by means of civil action, if the officer is –

- (a) convicted of the common law offence of misconduct in public office;
or
- (b) convicted of any offence under Part II of the Prevention of Bribery Ordinance (Cap 201), being an offence related to his previous government service; or
- (c) convicted of any offence related to his Government service, being 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; or
- (d) convicted of treason under Section 2 of the Crimes Ordinance (Cap 200).