

Legislative Council Panel on Public Service

**Supplementary information on
post-service outside work of retired directorate civil servants
and the appeal channel before reunification**

Background

At the meeting of the Panel on Public Service on 17 November 2008, Members requested the Administration to -

- (a) provide information on (i) the control regime governing post-service outside work of retired directorate servants on pensionable and Civil Service Provident Fund (“CSPF”) terms, (ii) the various sanctions which the Administration can take if a retired directorate civil servant took up outside work within the control period without securing the Government’s prior permission, (iii) the ceiling – if any – on reduction or forfeiture of pension or other retirement benefits for failure to comply with the control regime, and (iv) the amount of damage the Administration may claim or may be awarded against a retired civil servant through civil proceedings for failure to comply with the control regime and, specifically, whether or not it is capped by the accrued retirement benefits attributable to the Government’s Voluntary Contribution (“GVC benefits”) for a retired civil servant on CSPF terms; and
- (b) confirm whether under the lapsed Colonial Regulations, a public servant aggrieved by a decision to reduce his pension might appeal to the UK Government in addition to the Governor.

The requested information is provided in the ensuing paragraphs.

Control regime and sanctions governing post-service outside work of retired directorate servants

2. The control regime governing post-service outside work of retired directorate civil servants on pensionable and CSPF terms is explained in a paper provided by the Administration for discussion by the Panel on 27 October 2008 (referenced LC Paper No. CB(1)84/08-09(01)). The paper sets out the policy objective, the statutory and contractual bases, the rights of

serving and retired civil servants, the control arrangements, the assessment criteria, the sanctions and processing procedures of the control regime. A copy of the paper is at **Annex** for Members' reference.

3. If a retired directorate civil servant took up outside work during the control period without prior permission, Secretary for the Civil Service ("SCS") may invoke either one or a combination of the following sanctions (as stated in paragraph 15 of the above quoted paper) –

- (a) pension suspension under the pension legislation;
- (b) initiating civil action to seek an injunction or sue for damage (under contract law);
- (c) withdrawal of approval;
- (d) suspension of approval for a specified period;
- (e) reporting to the relevant professional body where the matter concerns professional negligence/misconduct or may involve a possible breach of the code of conduct of the relevant profession;
- (f) issue of a public statement of criticism;
- (g) placing a warning/reprimand in a register for public inspection;
- (h) issue of a reprimand letter which may be copied to the outside employer; and/or
- (i) issue of a warning letter.

4. Except for the sanction at paragraph 3(a) above which may be applied to retired directorate civil servants on pensionable terms only, all the other sanctions may be applied to retired directorate civil servants on pensionable and CSPF terms. According to the relevant pension legislation¹, the Administration may suspend² a civil servant's pension if he has, within two years (or more as specified by the Administration) after his retirement, taken up an outside work without SCS's prior written permission.

5. As regards the sanction of instituting civil action to sue for damages

¹ The pension suspension provisions under section 16 of the Pensions Ordinance (Cap. 89) and section 30 of the Pension Benefits Ordinance (Cap. 99) are relevant.

² The pension legislation does not provide for forfeiture or reduction of a civil servant's pension or allowance if he has taken up an outside work without SCS's prior permission.

against a retired directorate civil servant under contract law for failure to comply with the control regime, legal advice obtained indicates that there is no limit on the amount of damage the Administration may claim. Legal advice also indicates that the amount of damage that may be awarded will be decided by the court having regard to the merits and circumstances of each case, and that the amount has no particular relationship with the amount of pension or GVC benefits granted to the civil servant concerned. In other words, there is no question of the amount of damage claimed or awarded being capped by the pension or GVC benefits granted to the civil servant concerned.

Appeal channel before reunification

6. Under the lapsed Colonial Regulations (“CRs”), a public servant aggrieved by a decision of the then Hong Kong Government could appeal to the Secretary of State for Foreign and Commonwealth Affairs and the Queen of the United Kingdom, in addition to the Governor. The appeal channel to the UK Government lapsed at the end of June 1997 when the CRs were localised and replaced by the Public Service (Administration) Order.

Civil Service Bureau
December 2008

For information
on 27 October 2008

Legislative Council Panel on Public Service

**Control Regime for Post-service Outside Work
of Directorate Civil Servants**

Purpose

This paper briefs Members on the current control regime governing post-service outside work of directorate civil servants¹.

Policy Objective

2. The policy objective on post-service outside work control is to ensure that directorate civil servants on final leave or who have left the service will not take up any work outside the Government which may constitute a real or potential conflict of interest with their former government duties or cause negative public perception embarrassing the Government and undermining the image of the civil service, without at the same time unduly restricting the said individuals' right to pursue employment or other work after ceasing government service.

Statutory and Contractual Bases for Control

3. The control over post-service outside work for directorate civil servants is based on the provisions in the two pension-related Ordinances (i.e. Pensions Ordinance (Cap. 89) and Pension Benefits Ordinance (Cap. 99)), the appointment terms and conditions, and civil service regulations and circulars.

Pension Ordinances

4. The control over post-service outside work for directorate civil servants and former civil servants appointed on pensionable terms is provided for in the pension ordinances. Section 16 of Pensions Ordinance governing the Old Pension Scheme provides that:

¹ A directorate civil servant is one who has been appointed substantively to a civil service post pitched at the rank of Directorate Pay Scale 1 to D8 (or equivalent), with D8 being the highest rank.

“(1) The Chief Executive may direct that any pension or allowance granted to a person shall be suspended as from such date as the Chief Executive shall specify if such person has, within 2 years after his retirement and without the prior permission in writing of the Chief Executive² –

- (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 such business or the business of such partnership or company or of his employment is, in the opinion of the Chief Executive, carried on in Hong Kong, and such direction shall be forthwith notified in writing by the Secretary (Secretary for the Civil Service) to the person concerned.

(2) The Chief Executive may specify a period of more than 2 years for the purposes of subsection (1) where he thinks fit, and such specification shall be forthwith notified in writing by the Secretary (Secretary for the Civil Service) to the person concerned.”

Section 30 of the Pension Benefits Ordinance provides similar provisions in respect of the New Pension Scheme.

Appointment Terms and Conditions of Service

5. The conditions of service for directorate civil servants appointed on agreement terms or new terms are set out in a Memorandum on Conditions of Service (MOCS) that accompanies the letter of appointment³. Both the

² The Chief Executive has delegated this statutory power to the Secretary for the Civil Service.

³ At present, a small number of directorate civil servants are employed on agreement terms for various operational reasons. Agreement terms provide for a fixed-term appointment normally up to three years, and subject to renewal as necessary on a case-by-case basis. The benefits that a directorate civil servant on agreement terms receives after satisfactory completion of a fixed-term of service takes the form of an end-of-agreement gratuity which is a lump-sum payment expressed as a percentage of his total salary during the employment agreement.

Civil servants employed on new terms refer to all civil servants recruited from 1 June 2000 onwards. They enjoy retirement benefits in the form of a Mandatory Provident Fund for their initial years of service (normally three to six years); and retirement benefits in the form of the Civil Service Provident Fund

appointment letter and the MOCS form part of the contract of employment between the Government and a civil servant.

6. The requirement to seek permission before taking up outside work on completion of agreement or service is set out in the MOCS for individual appointments along the following line: “A *director* civil servant is required to seek the Government’s prior permission for taking up outside work during the final leave period before his formal departure from the Government and/or within a specified control period counting from the said departure upon expiry of the final leave. ‘Outside work’ refers to appointments, employment or any other work undertaken outside the Government and includes entering into business on one’s own account, becoming a partner in a partnership, becoming a director of a company, becoming an employee, etc. The officer is subject to the arrangements governing the taking up of outside work by directorate civil servants as set out in the relevant Civil Service Regulation and Civil Service Bureau Circular.” Such post-employment requirement is enforceable only if it protects a legitimate interest, goes no further than is reasonably necessary to protect that interest and in doing so does not damage the public interest. The onus is upon the former employer to justify the reasonableness of such restriction in the circumstances of the case.

7. For directorate civil servants employed on agreement terms at ranks below D8 or equivalent, the ‘specified period’ is normally two years for those with six or more years of continuous service and one year for those with less than six years’ continuous service. At present, there is no civil servant at D8 or equivalent who is appointed on agreement or new terms.

Civil Service Regulations and Circulars

8. All civil servants are required to observe the civil service regulations and circulars in taking up post-service employment. The policy objective, arrangements and requirements of post-service outside work control are clearly spelled out in the relevant regulations and circulars, and form part of the employment contract between the Government and the civil servants. By implication, such contractual obligations shall survive after civil servants cease service.

Scheme for their remaining years of service upon confirmation to permanent terms.

Right of Individual Serving or Former Civil Servants

9. An appropriate balance needs to be struck between the public interest and avoidance of conflict of interests on the one hand, and an individual's right to work and other fundamental rights as provided under the Basic Law, the Personal Data (Privacy) Ordinance (Cap. 486), the Hong Kong Bill of Rights Ordinance (Cap. 383) and other international covenants as applied to Hong Kong on the other hand.

Control Regime

Control Arrangements

10. The following outlines the key control parameters under the current control regime -

- (a) directorate civil servants who wish to take up post-service outside work during their final leave period and/or within a specified sanitisation period and/or control period are required to seek prior permission from the Secretary for the Civil Service;
- (b) directorate civil servants are normally not allowed to take up any outside work during the specified sanitisation period other than unpaid work with specified non-commercial organisations⁴ under blanket permission;
- (c) directorate civil servants are not allowed to take up full-time paid work or work of a commercial nature during their final leave period, unless there are special considerations and there is no problem of dual identity; and
- (d) the Secretary for the Civil Service may approve an application with or without conditions, e.g. additional sanitisation period or work restrictions, or may reject an application

11. The Administration conducted a review on the control regime governing post-service outside work of directorate civil servants in 2005 and

⁴ "Specified non-commercial organizations" means –

- (a) charitable, academic or other non-profit making organisations not primarily engaged in commercial operations; or
- (b) non-commercial regional/international organisations; or
- (c) the Central Authorities of the People's Republic of China

decided to tighten the control with effect from a forthcoming date (i.e. no retrospective effect). Accordingly, there are currently two sets of arrangement for directorate civil servants as follows –

- (a) Pre-January 2006 arrangement (the ‘old arrangement’) — it applies to (i) directorate civil servants who ceased active service before 1 January 2006 and who have retired on pensionable terms; and (ii) directorate civil servants on agreement terms filling civil service posts pitched at Directorate Pay Scale D3 or above (or equivalent) whose last agreement with the Government was entered into before 1 January 2006; and
- (b) Post-January 2006 arrangement (the ‘new arrangement’) — it applies to (i) directorate civil servants on pensionable or new permanent terms who cease active service on or after 1 January 2006; and (ii) directorate civil servants on agreement terms whose last agreements, including renewals of agreement, were entered into on or after 1 January 2006.

12. The ‘new arrangement’ is more stringent than the ‘old arrangement’. For example, under the ‘new arrangement’, all directorate civil servants, irrespective of their terms of appointment and the circumstances of their leaving the civil service, are subject to control. The sanitisation and control periods are longer, and there are more restrictions on the taking up of outside work during final leave and on the scope of work, and greater transparency on taken-up outside work. A comparison of the ‘old arrangement’ with the ‘new arrangement’ is at Annex.

13. Under the ‘new arrangement’, a case record on approved post-service outside work taken up by civil servants at Directorate Pay Scale 4 and above (or equivalent) will be placed on a register in Civil Service Bureau for public inspection upon request. The basic information will be kept on the public register until the expiry of the concerned applicant’s post-service control period or after he has notified Civil Service Bureau of the cessation of the approved outside work, whichever happens earlier.

Assessment Criteria

14. Within the policy objective stated above, the specific assessment criteria to be considered in each application from a directorate civil servant (and a former directorate civil servant) include –

- (a) whether the applicant, while in the civil service, had been involved

in the formulation of any policy or decisions, the effects of which directly or specifically benefited or could directly or specifically benefit his own business or prospective employer;

- (b) whether the applicant or his prospective employer might gain unfair advantage over competitors because of the applicant's access to sensitive information while in the civil service;
- (c) whether the applicant, while in the civil service, had been involved in any contractual or legal dealings to which his prospective employer was a party;
- (d) whether the proposed work would have any connection with the assignments/projects and/or regulatory/enforcement duties in which the applicant had been involved while in the civil service;
- (e) whether the applicant's taking up of the proposed work would give rise to public suspicion of conflict of interest or other impropriety; and
- (f) whether any aspects of the proposed work would cause embarrassment to the Government or bring disgrace to the civil service.

Sanctions

15. The current control regime governing post-service outside work of directorate civil servants is promulgated through civil service regulations and circulars. These regulations and circulars also state that where there is a breach of the regime governing post-service outside work, the Secretary for the Civil Service may consider invoking either one or a combination of the following forms of sanction against the concerned individual -

- (a) pension suspension under the pension legislation for civil servants on pensionable terms;
- (b) initiating civil action to seek an injunction or sue for damage (under contract law);
- (c) withdrawal of approval;
- (d) suspension of approval for a specified period;
- (e) reporting of an incident to the relevant professional body where it

concerns professional negligence/misconduct or may involve a possible breach of the code of conduct of the relevant profession;

- (f) issue of a public statement of criticism;
- (g) placing a warning/reprimand in a register for public inspection;
- (h) issue of a reprimand letter which may be copied to the outside employer; and/or
- (i) issue of a warning letter which may be copied to the outside employer.

Processing Procedures

16. The relevant Permanent Secretary of Bureau, Head of Department and/or Head of Grade are required to provide assessments on an application received in accordance with the assessment criteria and other requirements laid down in the relevant Civil Service Bureau circulars and regulations. After collating all the assessments, the Civil Service Bureau will seek the advice of an independent Advisory Committee on Post-service Employment of Civil Servants before submitting a recommendation on each application to the Secretary for the Civil Service for decision. The Chief Executive and Principal Officials (other than the Secretary for the Civil Service) appointed under the Political Appointment System are not involved in the process.

Advice Sought

17. Members are invited to note the current control regime governing post-service outside work of directorate civil servants.

Civil Service Bureau
October 2008

**Key Elements of the ‘Old’ and ‘New’ Arrangements
Governing the Post-service Outside Work of Directorate Civil Servants**

‘Old Arrangement’	‘New Arrangement’
1. Coverage	
<ul style="list-style-type: none"> * Directorate civil servants on pensionable terms who retired and ceased active service before 1 January 2006. * Directorate civil servants on agreement terms at D3 or above (or equivalent) whose last agreement with the Government was entered into before 1 January 2006. 	<ul style="list-style-type: none"> * Directorate civil servants on pensionable or new permanent terms who cease active service on or after 1 January 2006. * Directorate civil servants on agreement terms upon their entering into agreements, including renewal of agreements, on or after 1 January 2006.
2. Sanitisation period	
<ul style="list-style-type: none"> * Minimum sanitisation period for directorate civil servants retired on pensionable terms – 6 months. * No minimum sanitisation period for directorate civil servants on agreement terms at D3 or above (or equivalent). Such requirement may be imposed on a case-by-case basis. 	<ul style="list-style-type: none"> * Minimum sanitisation period for directorate civil servants retired or retiring on pensionable or new permanent terms – <ul style="list-style-type: none"> ➤ D4 or above (or equivalent) – 12 months; ➤ Others – 6 months. * No minimum sanitisation period is specified for directorate civil servants leaving the civil service on grounds other than retirement (e.g. agreement civil servants and resignees). Each case will be considered on its own merits.
3. Final leave period	
<ul style="list-style-type: none"> * Subject to prior permission. 	<ul style="list-style-type: none"> * Directorate civil servants are not permitted to take up any full-time paid work or any work of a commercial nature (including

‘Old Arrangement’	‘New Arrangement’
	<p>self-employment) during the final leave period, unless there are special considerations. Directorate civil servants on final leave may, upon approval, take up part-time or notionally paid work with specified non-commercial organisations, subject to there being no problem of dual identity.</p>
4. Control period	
<ul style="list-style-type: none"> * Directorate civil servants retired on pensionable terms – <ul style="list-style-type: none"> ➤ D8 or equivalent – 3 years; ➤ Others – 2 years. * Directorate civil servants on agreement terms at D3 and above – 1 year (only in respect of outside work in the same field and where there is a possible conflict of interest). 	<ul style="list-style-type: none"> * Directorate civil servants retired on pensionable or new permanent term – <ul style="list-style-type: none"> ➤ D8 or equivalent – 3 years; ➤ Others – 2 years. * Directorate civil servants who left the service on grounds other than retirement after six or more years of continuous service – <ul style="list-style-type: none"> ➤ D8 or equivalent – 3 years; ➤ Others – 2 years. * Directorate civil servants who left the service on grounds other than retirement after less than six years of continuous service – <ul style="list-style-type: none"> ➤ D8 or equivalent – 1.5 years; ➤ Others – 1 year.
5. Restrictions on scope of work	
<ul style="list-style-type: none"> * Work-specific restrictions may be imposed on a case-by-case basis. 	<ul style="list-style-type: none"> * Standard restrictions will generally be imposed on all approved cases of outside work. The applicants should not – <ul style="list-style-type: none"> (a) be personally involved, directly or indirectly, in the bidding for any government land, property, projects, contracts or franchises; (b) undertake, or represent any person in,

‘Old Arrangement’	‘New Arrangement’
	<p>any work including any litigation or lobbying activities that are connected in any way with –</p> <ul style="list-style-type: none"> (i) the formulation of any policy or decision; (ii) sensitive information; (iii) contractual or legal dealings; (iv) assignments or projects; and/or (v) enforcement or regulatory duties, <p>in which he had been involved or to which he had access during his last three years of service; or</p> <p>(c) engage in any activities which would cause embarrassment to the Government or bring disgrace to the civil service.</p> <p>* Further specific restrictions on scope of work may be imposed on a case-by-case basis.</p>
6. Transparency	
<p>* Information pertaining to individual cases of outside work is not disclosed, unless with the prior consent of the civil servants concerned.</p>	<p>* For approved outside work taken up by directorate civil servants at D4 or above (or equivalent), the basic information (limited to the name of the applicant, his last civil service post title, date of cessation of active service, restrictions/sanitisation imposed on the approved work, commencement date of the approved work, and where applicable, identity of outside employer, the applicant’s position in the outside organisation and a brief description of his main duties in the outside organisation) will be included in a</p>

‘Old Arrangement’	‘New Arrangement’
	<p>register for public inspection on request. An entry will be kept until the expiry of the applicant’s control period or after he has notified the Civil Service Bureau of the cessation of the outside work, whichever happens earlier.</p> <ul style="list-style-type: none"> * For approved outside work taken up by directorate civil servants below D4 (or equivalent), where there is public concern about the propriety of the work, the basic information may be disclosed on a case-by-case basis. * As regards unpaid outside work in specified non-commercial organisation performed under the blanket permission for all directorate civil servants, the relevant information may be disclosed on a case-by-case basis where there is public concern.