

**Extract of Views from Bureaux/Departments, Staff Councils/Associations
and Individual Officers/Groups of Officers on the “Approving Criteria”
proposed in the Consultation Paper on “Review of Policy on Post-service
Employment of Former Civil Servants” issued in March 2005**

A. Views from Bureaux/Departments

- ‘Supported. But like present arrangement, it would require good judgement to discern cases where there is possible negative public perception.’

- ‘In the light of the detailed information required for the assessment of the conflict of interest, we suggest that the applicant be required to furnish all the stipulated information in his/her application form to facilitate the assessment by the approving authority.’

- ‘Our directorate officers have expressed grave concerns on how “public perception angle” will be applied in vetting applications. It would be too vague to say that a proposed employment giving rise to public suspicion of impropriety should be rejected. They are of the view that some objective criteria should be laid down to ensure fair and effective scrutiny of all applications. CSB may also wish to consider putting in place an appeal channel for unsuccessful applications.

In case of [our] staff, we have frequent access to sensitive/confidential information in the course of discharging [our duties] while in government service. For equity’s sake, it is important that attention should only be focused on the applicant’s duties in the last two years (or three years if CSB’s proposal is accepted eventually) in applying the test of conflict of interest.’

- ‘We agree that “conflict of interest” should remain a key factor in considering applications for post-service employment. The test should be whether the duties of the applicant during the last few years of active service and the proposed post-service employment satisfy the criteria under Item 6 of Annex B to your consultation paper.’

- ‘The mischief which restrictions on post-retirement employment of civil servants should properly be designed to prevent is *actual* conflicts of interest which arise through the nature of the civil servant’s post-retirement business or employment. Such conflicts are unlikely to arise in respect of civil servants below the rank of D4, or in respect of professional grades, since neither category is responsible for policy decision-making. Any controls on post-retirement employment should reflect that fact. In addition, the mischief should not be characterised as “potential” (which cannot be objectively defined) or “perceived” (by whom?) conflicts of interest, far less “negative public perception” (whose perception constitutes “the public”, and on what basis can that justify denying a former civil servant the right to make a livelihood?) or “embarrassment to the Government” (there is no reason why, in the absence of a conflict of interest, a former civil servant should not be free to engage in whatever lawful business he wishes. Any attempt, for instance, to prevent a former civil servant from pursuing a career as a journalist critical of Government would fall foul of the right to freedom of speech in Article 27 of the Basic Law, though it would no doubt embarrass the Government.). None of these vague and ill-defined terms can reasonably justify depriving a former civil servant of his right to earn a living.’

- ‘There might be practical difficulties in meeting the requirement to make reference to the specific contractual or legal dealings, assignments/projects and/or regulatory/enforcement duties when assessing the conflict of interest.’

- ‘We are concerned about the practical difficulties in assessing the potential conflict of interest if the burden of such record tracking is placed on departments (rather than the applicant himself/herself). It will be very difficult and create a lot of administration work for departments concerned to track the contractual/legal dealings, assignments, projects and enforcement work etc handled by an officer that is part and parcel of his/her daily work over a number of years. Such information is not stored on individual officer basis but kept in scattered records.’

- ‘We have no objection to the proposed approving criteria.’

- ‘We agree that “Conflict of interest” should be taken into account when considering an application. However, we have reservation on adopting “public suspicion of impropriety or conflict of interest”. The Government as a responsible employer should protect the interest of staff and assume the responsibility of deciding on whether a real conflict of interest is substantiated.’

- ‘It is accepted that the Administration has the duty to balance the public interest in the integrity and impartiality of the civil service against the rights of retiring civil servants. It is difficult, however, to gauge perceived or potential conflict of interest as oppose to a genuine one (e.g. where an officer has been offered employment by a commercial undertaking with which he has previously had close official or contractual dealings). Public perception is difficult to assess. It can be swayed by particular individuals or media outlets, and in recent years has become noticeably more negative towards civil servants.’

- ‘We believe that the purpose of the proposed restriction on post-service employment of former civil servants should be to prevent actual conflicts of interest. Such conflicts are unlikely to arise in respect of lawyers since they are mainly responsible for handling legal matters. It is far too wide if the proposed control measures are to prevent “potential” or “perceived” conflicts of interest of former directorate civil servants with their former government duties, as such conflicts cannot be objectively defined. It is equally inappropriate if the control measures are to prevent “embarrassment to the government”; a former civil servant may engage in a post-service employment which is beneficial to the society but may cause embarrassment to his former employer. What constitutes a conflict of interest situation should be clearly defined. And if legal professional accepts work where a conflict of interest arises, there is in place a set of control and sanction mechanism imposed by the governing professional bodies.’

- ‘I support setting out the approving criteria and control standards explicitly. I also agree with the need to review an applicant’s past service, but doing so for just three years may not be enough to cover one posting. To ensure clarity and consistent application, we need to have comprehensive definitions of “senior officers”, “work of particular sensitivity” and any other significant terms.’

- ‘At present, the officer is required to fill in an application form for post-retirement. He gives a very brief description of the duties in the proposed employment. As the Department needs to examine the duties of the officer in the proposed employment against his duties in the past two or three years in government service before the recommendation is given, it would be advisable if a reference should be provided (to be included as a requirement for application) by the proposed employer of the officer to list out the scope of work of the employment. This would assist in assessing the application to see whether conflict of interest and public perception problem would exist. This information also forms the basis for granting approval and applying restrictions.

Departments need to keep records of duties of all directorate officers prior to the three-year period as the duty lists of those directorate officers would normally not cover each and every projects/tenders/contracts they have handled.’

- ‘It is the proposal to make it clear that the HoD and approving authority would normally focus on the duties in which the applicant was involved in the last three years of his/her active service. Does it mean that the service at any non-directorate ranks will also be included? If only directorate officers are subject to this requirement, should the consideration be focused on his service while at the directorate ranks?’

(B) Views from Staff Councils

- ‘We have grave doubts about the “perceived conflict” criteria. By applying your notion of “perceived conflict”, practically any employment of any civil servant in the private sector after retirement or resignation could be construed to be a ‘perceived’ conflict of interest irrespective of how remote or unlikely that may be. Your proposals are literally telling all former directorate officers to remain unemployed for a lengthy period after leaving the service.

We would like to ask you how many proven cases of “conflict of interest” by former directorate officers have been registered over the last three decades, suggesting that conflict of interest is a problematic?

We believe the “number” is negligible when compared with the size of the directorate

grade. Unless your decision to introduce harsher and unreasonable restrictions is made purely for political expediency, we feel that you have a duty to defend and protect civil servants us from being unfairly discriminated against because of one unfortunate incident by one individual former directorate officer.’

(C) Views from Staff Associations

- ‘We fully recognise the Government should be able to take steps to protect the public interest and to address the issue of the need to avoid conflict of interest (real or potential – we see no basis on which to determine how ‘perceived’ conflict of interest should be an issue). However, we feel that the onus should be on the Government to specify types of employment that individual officers may not work during the so called ‘sanitization period’ following their retirement from the civil service. Examples might include a restriction on a directorate officer in the Lands Department from taking up employment in a capacity that would result in that former civil servant engaging in land acquisition related issues for a specified period.’

- ‘We fully recognise the Government should be able to take steps to protect the public interest and to address the issue of the need to avoid conflict of interest (real or potential – we see absolutely no basis on which to determine how ‘perceived’ conflict of interest should be an issue). However, there must be a clear and rational connection between the restrictions placed on officers and the public interest that the restrictions seek to protect. The onus should be on the Government to specify the types of employment that individual officers may not take up during the so called ‘sanitization period’ following their retirement from the civil service or the completion of their contracts with the Government. Examples might include a restriction on a directorate officer dealing with land matters in the Lands Department from taking up employment in a capacity that would result in that former civil servant engaging in land acquisition related issues for a specified period.’

- ‘我們認同公務員退休後就業需要接受一定程度的規管，以防止利益衝突和引致公眾負面的看法。我們贊成諮詢文件所建議，將審批準則明確化。’

(D) Views from Individual Officers/Groups of Officers

- ‘While there is no dispute on “Conflict of interest” to be taken into account when considering an application, there is reservation on the policy of not allowing former civil servant to enter into business or take up employment which may cause negative public perception because public perception is not always right and fluctuates with time. It would be up to the Government to manage public perception and correct it as and when appropriate. Besides, the approving officer who is of very senior position and has full record of the applicant’s official duties should be competent enough to objectively assess whether the proposed employment actually has any real conflict of interest.’

- ‘The proposed criteria on conflict of interest will cast the net too wide. For example, the consideration that “the officer was involved in any contractual or legal dealings to which the prospective employer was a party” would have far-reaching implications. In administering [various laws], [our] legal professionals do have legal dealings with a host of external stakeholders. Would that be perceived as conflict of interest?’

It is unlikely for a legal professional to have come into possession of commercially sensitive information. Such conflict of interest situations as may arise are readily identifiable and can be easily avoided. As long as conflict of interest situations are avoided, a legal professional will not profit from his former position.

In this regard, there should be a clearer understanding of what is meant by conflict of interest. It is something more than simply representing a party in a case against government. In every criminal case Government as the prosecuting authority is a party. It is NOT a conflict of interest to act as a defence lawyer unless one has knowledge of the case gained during employment within [the Department], nor is it a conflict of interest to advise or act for a client in a civil case against government. It should be made clear that conflict only arises when in acting against government a former officer has, or attempts to use, confidential or sensitive knowledge or information gained during his employment as a civil servant. Conflicts of interest in respect of legal professionals are readily identifiable and can be easily avoided in practice.

The conflict of interest rules under the code of professional ethics for legal professionals are already onerous, but they are also balanced in that they do not seek to prevent former public service lawyers from pursuing their professional career in the

private sector and do not deprive them of any livelihood during an extended period after leaving the civil service when they may not have any other source of income.

It should be clearly understood that there is no need for any of the controls on legal professionals leaving the service to take up employment as a lawyer in the private sector or to enter private practice on their own account. They are already subject to strict controls on professional behaviour which prevent them from accepting work where a conflict of interest arises. This may well also apply to other professionals to a greater or lesser degree. The appropriate control and sanction mechanism in the case of a legal professional is a complaint to the Bar Association or Law Society. A legal professional should be permitted to take up work as a lawyer in Hong Kong immediately upon leaving the service. There should be blanket permission to this effect.

Thus, only an actual conflict of interest should be subject to sanctions, and what amounts to actual conflict of interest should be clearly defined in accordance with the reaffirmed policy objective and guiding principles.

As to the negative public perception issue, any administrative restrictions not provided by law to prevent a former civil servant to exercise his freedom of speech to embarrass the Government would fall foul of the right to freedom of speech in Article 27 of the Basic Law and Article 16 of the Bill of Rights Ordinance. Moreover, embarrassment should lead to better governance.’

- ‘The existing policy consideration is “conflict of interest *OR* cause negative public perception”. It is doubtful if negative public perception is a legitimate public interest consideration. It is difficult to define “negative public perception” but it is rather certain that public perception is capricious. It is unfortunate that there is no indication of whether the consideration of “causing negative public perception” is also the basis of the relevant rules in other jurisdictions in CSB’s international benchmarking. It seems that conflict of interest is the only fundamental consideration in some common law jurisdictions I am familiar with.

Restriction of post-service employment of an individual former civil servant should be justified by public interest consideration. The evaluation should be as objective as possible for the sake of fairness. Taking subjective public perception into the evaluation may contaminate a fair process. Predicting the public perception doubles the subjectivity of the process, if not diminishes it to conjecture.

Even if CSB can justify that causing negative public perception is a legitimate consideration, it may need to take a closer look at why “causing embarrassment to the Government” is an appropriate factor of consideration in determining if negative public perception will arise. For example, an ex-senior civil servant joining a radio station as programme host commenting on public policies may cause embarrassment to the Government but generate positive public perception. CSB may need to think through the logic.’

- ‘Conflict of interest (real, potential and perceived): this element is worth a sanitization period and I’d suggest six months should be the most. Even for a AOSGA1 officer, his/her knowledge is rarely held solely by him/her. To avoid him/her trying to assert undue influence on his/her ex-colleagues, a better approach is to require him/her to, say, in the first three years of post-retirement employment, declare his/her last post title in all his/her dealings with Government (including the bidding of Government land and contracts, etc) and B/Ds concerned should in their records keep such declarations and a note setting out whether consideration has been given to this fact in considering that concerned bid/dealings and no matter yes or no, why and how. Such records will facilitate responding to public enquiries, if there should be any. Should any incumbent civil servant be unreasonably or unduly influenced by a retired officer’s, I suspect there will be a number of redress avenues already in place to take against the incumbent officer, e.g. Ombudsman for maladministration, LegCo’s scrutiny, disciplinary action by his own B/D or CSB, or even judicial review by the suffering party. After the 6 month, compulsory sanitization period, the officer should be allowed to undertake any kind of employment. In fact, it is doubtful whether the approving criteria and restrictions will be enforceable in practice at all.’

- ‘The proposed ‘key factors’ should provide good grounds for any civil servant who wishes to have a decision judicially reviewed. ‘Public perception’ is not a ground recognised in the law relating to restraint of trade and would therefore likely be rejected by the Courts. As regards proposal 2 in Annex B, the rights to freedom of employment are fundamental personal rights guaranteed to civil servants and the general public alike under the Common Law and the Basic Law (BL.33). To the extent that any new proposal limits the rights of a civil servant to a greater extent that was the case before 1 July 1997, such a change of conditions of service would be in contravention of BL.100. As regards the proposal at 6(b) of Annex B, “Public perception: whether the officer’s taking up of the proposed employment would give rise to public suspicion of impropriety or conflict of interest; and whether the proposed employment would cause embarrassment to the Government,” it is submitted that such a criterion falls outside the relevant considerations that the Government may lawfully take into account in coming to a decision, rendering the decision open to judicial review.’