

**立法會**  
**Legislative Council**

LC Paper No. LS65/10-11

**Panel on Public Service**

**Paper on the constitutionality of cessation of the  
legal assistance scheme (known as the Private Solicitors Scheme)  
previously run by the Food and Environmental Hygiene Department**

**Purpose**

At the meeting of the Panel on Public Service held on 16 March 2011, members discussed issues relating to cessation of the legal assistance scheme previously run by the Food and Environmental Hygiene Department (FEHD) for its eligible staff, known as the Private Solicitors Scheme (PSS) with effect from 1 January 2011. According to the Administration<sup>1</sup>, the PSS was first implemented in the two municipal services departments (i.e. the then Urban Services Department (USD) and the then Regional Service Department (RSD)) in late 1980s with the approval of the two Municipal Councils for the then General Duties Teams responsible for hawker control duties. FEHD continued to operate the PSS upon its establishment in 2000. Legal assistance under the PSS included assistance during the investigation process and was provided to eligible departmental staff when they were involved in alleged criminal offences arising from their discharge of enforcement duties. The Administration has decided to discontinue the PSS as it considers that there is a significant overlap between the PSS and the legal assistance scheme operated by the Civil Service Bureau (CSB) in accordance with Civil Service Regulation No. 477 (CSR 477) which is applicable to all civil servants<sup>2</sup>.

2. The legal adviser to the Panel was requested to advise whether the cessation of the PSS would constitute a breach of the Basic Law. This paper provides information and analysis on this issue.

---

<sup>1</sup> See the paper provided by Civil Service Bureau to the Panel on Public Service in March 2011 (LC Paper No. CB(1)1544/10-11(03)).

<sup>2</sup> Under this scheme, civil servants may be provided with legal assistance when they are involved in criminal proceedings, civil proceedings or death inquests arising from the performance of their official duties. Civil servants charged with criminal offences would be eligible for assistance under the scheme if the civil servant concerned was acting in the course of his duty when the alleged offence was committed and the offence is not corruption-related. However, the scheme does not cover legal assistance during the investigation process.

### **Articles 100 and 103 of the Basic Law**

3. One of the arguments raised by the staff members of FEHD is that the cessation of the PSS contravenes Article 100 of the Basic Law. Article 100 of the Basic Law provides that-

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

4. Another provision that is related for the purposes of this analysis is Article 103 of the Basic Law which provides that-

"The appointment and promotion of public servants shall be on the basis of their qualifications, experience and ability. Hong Kong's previous system of recruitment, employment, assessment, discipline, training and management for the public service, including special bodies for their appointment, pay and conditions of service, shall be maintained, except for any provisions for privileged treatment of foreign nationals."

### **Principles applicable to interpretation of Articles 100 and 103 of the Basic Law**

5. The principles applicable to interpretation of Articles 100 and 103 of the Basic Law, as laid down by the Court of Final Appeal (CFA) in *Secretary for Justice v Lau Kwok Fai & Another*<sup>3</sup>, are as follows:

- (a) Article 100 is to be given a purposive construction. Its principal object is to ensure continuity of employment so that a public officer would be no worse off than he was before 1 July 1997.
- (b) Article 100 does not seek to prohibit or inhibit changes to "pay, allowances, benefits and conditions of service", except to the extent that such changes were less favourable than before 1 July 1997.
- (c) Article 103 is designed to preserve the continuity of Hong Kong's previous system of recruitment, employment, assessment, discipline,

---

<sup>3</sup> (2005) 8 HKCFAR 304.

training and management for the public service. This does not entail preservation of all of its elements. Some degree of change is to be expected in any system governing the public service. The broad question is whether the system continues or is so materially changed that it becomes another system.

### **Whether cessation of the PSS contravenes Article 100 of the Basic Law**

6. To determine whether the cessation of the PSS would constitute a breach of Article 100, it is necessary to consider whether the nature of the PSS is such that it amounts to a benefit or a condition of service for eligible staff appointed before 1 July 1997. It has been established in decided cases that the legal relationship between the Hong Kong Government and civil servants is contractual in nature and that the principles in the law of contract also apply to employees of the Government<sup>4</sup>. In *Lau Kwok Fai*, the term "conditions of service" in Article 100 was interpreted to denote the terms of public officer's contract of service which would ordinarily include the letter of appointment and the Memorandum on Conditions of Service (MOCS) attached to that letter, which the public officer received on appointment<sup>5</sup>. Since the term "benefits" appears in the same context as "conditions of service" in Article 100 of the Basic Law, based on the CFA's interpretation of "conditions of service", it is likely that "benefits" in Article 100 would be interpreted as benefits set out in the public officer's letter of appointment and MOCS.

7. The following paragraphs set out the issues that may be relevant to the consideration of whether the PSS forms part of the conditions of service or contractual benefits of the FEHD staff.

### Whether the PSS is provided as an express term of contracts for the FEHD staff

8. We have reviewed the standard appointment letters and MOCS in respect of the relevant staff of USD, RSD and FEHD both before and after 1 July 1997 provided by the Administration in its letter to the Clerk to the Panel on Public Service on 11 April 2011 (the said letter without enclosures is at Appendix 1). It is noted that no reference is made to the PSS (or any assistance under that scheme) in those appointment letters and MOCS. As to fringe benefits, it is noted that-

---

<sup>4</sup> *Lam Yuk Ming v AG* [1980] HKLR 815; *Fung Yiu Bun v Commissioner of Police* [2002] 4 HKC 15; and *Chan Tak Keung v Commissioner of Police* [2002] HKEC 880.

<sup>5</sup> *Secretary for Justice v Lau Kwok Fai & Another* (2005) 8 HKCFAR 304, paragraph 37.

- (a) in various versions of the standard MOCS before 1 July 1997, there is a standard provision which reads as follows-

"A term of his employment is that an officer will only be eligible for fringe benefits, including those benefits referred to hereunder and the benefits laid down in the Civil Service Regulations, in accordance with the regulations relating to the provision of such benefits and to the regulations relating to the prevention of double benefits."

- (b) in the latest version of "Memorandum on Condition of Service for Officers Appointed on New Probationary Terms" [GF. 607(Revised August 2007)], it is provided that-

"An officer will only be eligible for fringe benefits, including those benefits referred to hereunder and the benefits laid down in Civil Service Regulations, in accordance with the rules and regulations governing the provision of such benefit. The rules and regulations may be revised from time to time, and the revisions may result in the reduction of such benefits."

- (c) the MOCS both before and after 1 July 1997, there is a standard provision concerning change in conditions of service-

"Notwithstanding anything contained in this Memorandum or in the covering letter of the offer of employment, the Government reserves the right to alter any of the officer's term of appointment, and/or conditions of service set out in this Memorandum or the said covering letter should the Government at anytime consider this to be necessary."

9. As indicated by the above standard provisions on fringe benefits in various versions of MOCS, civil servants are eligible for benefits laid down in Civil Service Regulations (CSRs) under their contracts of service. However, the PSS is not laid down in CSRs. According to the relevant materials provided by the Administration, the PSS is only set out in the relevant guidelines, notices, administrative circulars, operation instructions or alike (the relevant Circulars) issued by USD, RSD and FEHD at different periods of time<sup>6</sup>.

---

<sup>6</sup> The relevant Circulars are listed in Summary of Annexes in CSB's letter to Clerk to the Panel on Public Service dated 11 April 2011 (see Appendix 1 to this paper).

Whether the PSS has been incorporated into the contracts of service

10. Although no express reference is made to the PSS in the relevant appointment letters and MOCS, it is noted that clause 1.1 of the MOCS before 1 July 1997 (the relevant MOCS) provides that "the officer is subject to Colonial Regulations, Government Regulations and Circulars, *Departmental Instructions* and to any Ordinances or Regulations which apply to the office or to the department to which he is appointed. On assuming duty, it is the responsibility of individual officers to acquaint themselves with all such regulations and instructions. Any officer in doubt as to where to find them should consult his Department Secretary or his senior officers." We are not aware that the PSS is referred to in any primary or subsidiary legislation. The question to consider is whether *Department Instructions* in clause 1.1 of the relevant MOCS could be interpreted to cover the relevant Circulars such that the PSS has been incorporated into the contracts of service of the relevant FEHD staff.

11. Clause 1.1 of the relevant MOCS, as drafted, does not appear to confer any benefits upon a public officer. Instead, the references to "the officer is subject to ..." and "it is responsibility of individual officers to ..." seems to suggest that the clause serves to impose a duty on a public officer to comply with the body of existing regulations and instructions (including instructions issued by a specific department that the officer works for) of the Government of Hong Kong. It is further noted that salary and other benefits under the relevant contracts of employment are all dealt with in other parts of the relevant MOCS where the PSS or the relevant Circulars are not mentioned, whether directly or indirectly. Hence, it is unlikely that the PSS had been incorporated into the employment contracts of the relevant FEHD staff by virtue of clause 1.1 of the relevant MOCS.

Whether the PSS could be an implied benefit provided in the contracts of service

12. In the absence of an express term, it is necessary to consider whether there is an implied term in the contracts of service by which the Government has undertaken not to cease the PSS. The question of whether a term may be implied into the contracts of service of public officers has been considered by CFA in *Lau Kwok Fai*. In that case, it was held that there was no sound basis for the argument that there was an implied term in the contracts under which the Government undertook not to introduce legislation to reduce public officers' pay, given the wide range of possible exigencies, economic, political and social, which might confront a government and require unexpected legislative measures. CFA considered that the Government would not fetter itself in this way in making private contracts<sup>7</sup>.

---

<sup>7</sup> *Secretary for Justice v Lau Kwok Fai & Another* (2005) 8 HKCFAR 304, paragraph 39.

13. It is noted from the relevant Circulars that when the PSS was introduced in 1987, it was put on a trial period of 12 months and subject to an approval for extension by the two municipal councils. Thereafter, the two municipal councils had respectively conducted assessments on the PSS (run by USD and RSD) and approved to extend it for further periods on several occasions. Given that the PSS was subject to periodic review and approval for extension by the two municipal councils, it seems that the PSS was more of a discretionary benefit than a contractual benefit which the relevant FEHD staff were entitled to under their employment contracts.

14. Based on *Lau Kwok Fai* and the discretionary nature of the PSS, it is unlikely that a term could be implied in the relevant contracts of service by which the Government has undertaken that it will never cease the PSS and will continue to provide such scheme to the relevant staff of FEHD indefinitely. Indeed, CSB has indicated that FEHD management had confirmed that it could find no record of any undertaking given to the relevant staff in the context of the 1994 Regrading Exercise and when FEHD was set up in 2000 that the PSS would not be ceased<sup>8</sup>.

15. In the light of the above analysis, it is unlikely that the PSS would be regarded as a condition of service or a contractual benefit, whether express or implied, of the staff concerned and hence is not within the scope of the protection of Article 100 of the Basic Law. On this basis, no issue of contravention of the Article should arise from the cessation of the PSS.

### **Whether cessation of the PSS contravenes Article 103 of the Basic Law**

16. Under Article 103 of the Basic Law, Hong Kong's previous system of employment and management for the public service shall be maintained. Article 103, as drafted, appears to refer to the previous system that applies to the public service as a whole instead of various separate systems of employment and management that were respectively applicable to staff of specific departments of the Government. Indeed, in *Lau Kwok Fai*, the previous system of civil service pay adjustment applicable to the public service as a whole is considered to be a system of the public service for the purposes of Article 103<sup>9</sup>. On this basis, it is unlikely that the PSS which was only run by USD and RSD before 1 July 1997 would be regarded as the previous system of employment and management for the public service of Hong Kong protected by Article 103 of the Basic Law.

---

<sup>8</sup> See paragraph 2 of CSB's letter to Clerk to the Panel on Public Service dated 11 April 2011 at the Appendix 1 to this paper.

<sup>9</sup> In *Lau Kwok Fai*, CFA held that the conduct of a pay trend survey was not so inherent an element in the scheme of determining pay adjustments that a failure to conduct a survey would of itself, no matter what the circumstances, constitute a breach of Article 103. See *Secretary for Justice v Lau Kwok Fai & Another* (2005) 8 HKCFAR 304, paragraph 74.

17. Even if the PSS may be regarded as a part of the previous system of employment and management of the public service for the purposes of Article 103, based on the interpretation principle mentioned in paragraph 5(c) above, to decide whether the cessation of the PSS would amount to a breach of Article 103, it is necessary to consider whether any change brought about by the cessation of the PSS is such that it would affect "the continuity of the system as a whole" or result in a fundamental change of the previous system of management for the public service. It should be pointed out that the cessation of the PSS does not mean that the FEHD staff would no longer be provided with legal assistance by the Government. As set out in the appointment letter and MOCS, they are eligible for fringe benefits laid down in CSRs which include the legal assistance scheme provided under CSR 477. Although the legal assistance scheme under CSR 477 does not cover assistance during the investigation stage, given that the PSS was only applicable to specified grades in a single department (i.e. FEHD) of the civil service, it is unlikely that the courts would regard this change as having the effect of materially changing the overall system of employment and management for the public service to the extent that it becomes another system. On this basis, it appears unlikely that the cessation of the PSS would amount to a breach of Article 103.

## **Conclusion**

18. In the light of the above analysis, it would appear that the PSS does not form part of the conditions of service or contractual benefits for the relevant staff of FEHD appointed before 1 July 1997. As such, the protection provided under Article 100 of the Basic Law does not cover the PSS. Further, based on the CFA's interpretation of Article 103 expressed in *Lau Kwok Fai* and the available information on the PSS, even if the PSS is to be regarded as part of the previous system of employment and management of the public service, it is unlikely that the cessation of the PSS would amount to a breach of Article 103 as any change brought about by the cessation should not have the effect of materially changing the previous system of employment and management for the public service.

Encl.

Prepared by

Legal Service Division  
Legislative Council Secretariat  
30 May 2011

政府總部  
公務員事務局  
香港中環雪廠街 11 號  
中區政府合署西座



CIVIL SERVICE BUREAU  
GOVERNMENT SECRETARIAT  
WEST WING  
CENTRAL GOVERNMENT OFFICES  
11 ICE HOUSE STREET  
HONG KONG

本函檔號 Our Ref.: (26) in CSBCR/DP/5-070-001/1 Pt. 5

電話號碼 Tel. No.: 2810 2140

來函檔號 Your Ref.: CB1/PL/PS

傳真號碼 Fax No.: 2530 0986

電郵地址 E-mail Address: csbts@csb.gov.hk

網址 Homepage Address: <http://www.csb.gov.hk>

11 April 2011

Legislative Council Secretariat  
(Attn: Ms Joanne MAK, Clerk to Panel)  
Legislative Council Building  
8 Jackson Road  
Central  
Hong Kong

Dear Ms Mak,

**Panel on Public Service  
Follow-up to meeting on 16 March 2011**

Thank you for your letter of 17 March 2011 on the captioned subject. We now enclose the information as requested under items (a) to (d) in your letter at **Annexes A to D**. For items (a) and (b), the Food and Environmental Hygiene Department (“FEHD”) has advised that prior to the setting up of FEHD in 2000, offers of appointment to the relevant grades, i.e. Hawker Control Officer, Health Inspector and Foreman, were made by the Urban Services Department (“USD”). Officers so appointed were posted to fill vacancies in both USD and the Regional Services Department.



As for the information requested under item (e) of your letter, FEHD management has re-confirmed that it could find no record of any undertaking given to the relevant staff in the context of the 1994 regrading exercise and when the Department was set up in 2000 that the Private Solicitors Scheme would not be ceased.

Yours sincerely,



( Ms Ivy LAW )  
*for Secretary for the Civil Service*

Encl.

c.c. Director of Food and Environmental Hygiene Department  
(with summary of annexes only)

## Summary of Annexes

**Annex A** - Appointment letters and Memorandum on Conditions of Service (“MOCS”) in respect of the Health Inspector (“HI”), Hawker Control Officer (“HCO”) and Foreman (“Fm”) grades issued before 1 July 1997<sup>1</sup>

Annex A(1)	Appointment letter of HI II issued in May 1996 and MOCS (G.F. 301 - Revised June 1993) <i>(Note: This is the last appointment offered before 1.7.1997)</i>
Annex A(2)	Appointment letter of Assistant Hawker Control Officer (“AHCO”) issued in 1995 and MOCS (G.F. 301 - Revised June 1993) <i>(Note: This is the last appointment offered before 1.7.1997)</i>
Annex A(3)	Appointment letter of Fm issued in February 1993 and MOCS (G.F. 301 - Revised May 1992) <i>(Note: This is the last appointment offered before 1.7.1997)</i>

**Annex B** - Appointment letters and MOCS in respect of the HI, HCO and Fm grades issued after 1 July 1997<sup>1</sup>

Annex B(1)	Appointment letter of HI II issued in November 1997 and MOCS (G.F. 301 - July 1997) <i>(Note: This is the first appointment offered after 1.7.1997)</i>
Annex B(2)	Appointment letter of AHCO issued in 1998 and MOCS (G.F. 301 - July 1997) <i>(Note: This is the first appointment offered after 1.7.1997)</i>
Annex B(3)	Appointment letter of HI II issued in August 2001 and MOCS (G.F. 607 - June 2000) <i>(Note: This is the first appointment offered after 1.1.2000)</i>

<sup>1</sup> It was confirmed by FEHD that before 2000, offer of appointment to the Health Inspector, Hawker Control Officer and Foreman Grades were made by the Urban Services Department, and these recruits were then posted either within the Urban Services Department or to the Regional Services Department to fill vacancies and to meet operational requirements. Therefore, the sample appointment letters to these grades before 2000, as provided here, were issued by the Urban Services Department only.

Annex B(4)	Appointment letter of AHCO issued in 2008 and MOCS (G.F. 607 - Revised August 2007) <i>(Note: This is the first appointment offered after 1.1.2000)</i>
Annex B(5)	Appointment letter of Fm issued in September 2008* and MOCS (G.F. 607 - Revised August 2007) <i>(Note: This is the first appointment offered after 1.1.2000)</i>

\* There was no appointment offered in the Foreman Grade after 1 July 1997 and before 1 January 2000.

**Annex C - Guidelines, notices, administrative circulars or alike issued in respect of the Private Solicitors Scheme (“PSS”) by the two municipal councils and by FEHD**

***Annex C(1) Circulars issued by FEHD***

Annex C(1)(a)	FEHD Administrative Circular No. 38/00 dated 1 January 2000 on “Assistance to staff who are held by the police and other law enforcement bodies or involved in legal proceedings in relation to their official duties”
Annex C(1)(b)	FEHD Administrative Circular No. 16/03 dated 19 August 2003 on “Assistance to staff who are involved in legal proceedings in relation to their official duties”

***Annex C(2) Operation Instructions issued by the Urban Services Department (“USD”)***

Annex C(2)(a)	USD Environment and Recreation Branch Operation Instruction No. 14/87 dated 23 July 1987 on “GDT Private Solicitors Scheme”
Annex C(2)(b)	USD Environment and Recreation Branch Operation Instruction No. 16/87 dated 14 December 1987 on “GDT Private Solicitor Scheme”

**Annex C(3)      Circulars issued by Regional Services Department (“RSD”)**

Annex C(3)(a)	RSD Establishment Circular No. 17/87 dated 4 June 1987 on “Legal Assistance to members of the General Duties Teams”
Annex C(3)(b)	RSD Administrative Circular No. 33/91 dated 13 September 1991 on “Legal Assistance to members of the General Duties Teams”
Annex C(3)(c)	RSD Headquarters Administrative Circular No. 16/97 dated 29 August 1997 on “Provision of legal services to members of the Hawker Control Teams”

**Annex C(4)      Operation Manuals issued by FEHD**

Annex C(4)(a)	Operational Manual for Hawker Control - Item No. 28 “Hawker Control Team Private Solicitors Scheme” <i>(Amendment date: September 2003)</i>
Annex C(4)(b)	Operational Manual for Cleansing Services – Item No. 13 “Guidelines on Issue of Form 1A” <i>(Amendment date: September 2003)</i>
Annex C(4)(c)	Operational Manual on “Implementation of Fixed Penalty System (Minor Public Cleanliness Offences)” (Paragraph 20) <i>(Amendment date: December 2008)</i>
Annex C(4)(d)	Operational Manual on “Implementation of Fixed Penalty System (Minor Public Cleanliness Offences)” (Appendix XXXVI) <i>(Amendment date: December 2005)</i>

**Annex D -      Civil Service Regulation 477<sup>2</sup>**

Civil Service Bureau  
Food and Environmental Hygiene Department  
April 2011

<sup>2</sup> CSB has not issued further operational or procedural guidelines.