

Occupational Retirement Schemes (Amendment) Bill 2019 (“the Bill”)

Government’s Response to Written Submissions

Item	Summary of views of submissions	Government’s Response
Directions and Objectives of the Bill		
1	<p>Supportive of the objectives and directions of the Bill</p> <p><i>[The Chinese Manufacturers Association of Hong Kong, Liberal Party, Hong Kong Professionals and Senior Executives Association and Hong Kong Institute of Human Resource Management, Employers Federation of Hong Kong, Law Society of Hong Kong]</i></p>	Noted.
2	<p>There is no public evidence that more regulation and increased powers are needed. The Mandatory Provident Fund Schemes Authority (MPFA) has only listened to a close small circle and it has been hostile to any submission apart from those invited.</p> <p><i>[Mr David Gunson]</i></p>	<ul style="list-style-type: none"> The Registrar of Occupational Retirement Schemes (the Registrar) has noted that a few entities might have misused Occupational Retirement schemes as collective investment vehicles with open participation, which is contrary to the original policy intent of the Occupational Retirement Schemes Ordinance (Cap. 426) (ORSO). Allowing such misuse of ORSO schemes would compromise the integrity of the regulation of investment products in Hong Kong as ORSO schemes are outside the regulatory ambit of the Securities and Futures Ordinance (Cap. 571) (SFO). The purpose of the Bill is to prevent and deal with such misuse more effectively by enhancing the enforcement powers of the Registrar and improving the governance of

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		<p>ORSO schemes.</p> <ul style="list-style-type: none"> When formulating the proposal, the MPFA has consulted relevant employers, employer associations, scheme administrators, industry bodies and professional bodies. The parties consulted agreed with the need to enhance the ORSO regulatory regime and were supportive of the proposals in general.
3	<p>The only result of the Bill is that it will lead to increased administration costs.</p> <p><i>[Mr David Gunson]</i></p>	<ul style="list-style-type: none"> When formulating the legislative proposals, we are mindful of keeping the compliance costs to the minimum. New reporting requirements arising from the proposals include (i) upon making applications for registration of an ORSO scheme - submission of statements from employers, auditors and solicitors to confirm that the schemes comply with the employment-based criterion; and (ii) as an ongoing requirement – submission of an annual statement from employers to confirm that the schemes comply with the employment-based criterion. It is envisaged that the additional administration costs as a result of the Bill will not be material.
4	<p>The Bill will not lead to improved scheme governance because “a determined abuser is hard to stop”.</p> <p><i>[Mr David Gunson]</i></p>	<ul style="list-style-type: none"> The purpose of the Bill is to prevent the misuse of ORSO schemes as investment vehicles open to individuals who are not employees of the relevant employers of the schemes. The legislative proposal will (i) enhance the powers of the Registrar to ensure that schemes are genuinely employment-based retirement schemes; and (ii) improve the governance of ORSO schemes. If, without reasonable excuse, a person other than an eligible person is allowed to be a member of a registered or exempted scheme, the relevant employer of the scheme commits an offence and is liable to a fine of up to

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		<p>\$500,000 and imprisonment for up to 2 years. In the case of a continuing offence, there is a further fine of up to \$10,000 for every day which the offence continues. These measures will help deter the abuse of ORSO schemes and combat non-compliance cases more effectively.</p>
5	<p>There is an assumption in the Amendment Bill that employment under the ORSO scheme refers solely to that canvassed under the Employment Ordinance and that investment is to be confined to Hong Kong vehicles.</p> <p><i>[Law Society of Hong Kong]</i></p>	<ul style="list-style-type: none"> • The ORSO regime aims to establish a registration system for retirement schemes established by employers, to ensure that such schemes are properly regulated and to provide greater certainty that the benefits promised to employees will be paid when they fall due. • Section 3(1) of the ORSO prohibits an employer from to operating, contributing to or otherwise participating in an ORSO scheme unless it is, inter alia, an exempted scheme or registered scheme. However, the employment is not confined to that canvassed under the Employment Ordinance and investment is not limited to Hong Kong vehicles. For example, a Hong Kong company may make contributions to its registered scheme in respect of the employment of his employees outside Hong Kong (e.g. Macau).
Cancellation of Exemption Criteria in Section 7(4)(b)/(c)		
6	<p>It is critical that employers are provided with clarity as to how the exemption process in section 7(4)(a) will be implemented.</p> <p><i>[Employers' Federation of Hong Kong]</i></p>	<ul style="list-style-type: none"> • The MPFA has published the “Additional Guidance Note on Application for an Exemption Certificate under Section 7(4)(a)” and the “List of Authorities in a Country, Territory or Place outside Hong Kong for the purpose of Section 7(4)(a) of the Occupational Retirement Schemes Ordinance (Chapter 426)” (the List) on the MPFA’s website. The additional guidance note sets out the criteria the Registrar may consider in assessing whether an overseas authority performs functions which

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		<p>are generally analogous to those conferred on the Registrar by the ORSO for the purpose of section 7(4)(a) and the supporting documents to be submitted for making applications.</p> <ul style="list-style-type: none"> • If the industry and employers have any further inquiries regarding applications under section 7(4)(a), they can contact the MPFA for assistance.
7	<p>It is insufficient for only five overseas authorities to be on the “List of Authorities in a Country, Territory or Place outside Hong Kong for the purpose of section 7(4)(a) of the ORSO”.</p> <p><i>[Employers' Federation of Hong Kong]</i></p>	<ul style="list-style-type: none"> • The List mentioned in item 6 above sets out the overseas authorities with which existing ORSO exempted schemes are registered or approved. It is envisaged that as the Registrar accumulates experience in scheme approval, more overseas authorities will be added to the list. • At the same time, the MPFA welcomes suggestions from the industry and employers on other overseas authorities for inclusion under the List. Employers may contact the MPFA if they are concerned about the admissibility of schemes registered or approved in any particular jurisdiction for the purpose of section 7(4)(a).
Proposed Amendments to the Definition of ORSO Schemes		
8	<p>It will no longer be unlawful to have an ORSO scheme provided that at least one member is a non-employee. The schemes which are regulated in proposed section 85 will not even be subject to registration.</p> <p><i>[Employers' Federation of Hong Kong, Law Society of Hong Kong]</i></p>	<ul style="list-style-type: none"> • The policy intent of the ORSO has all along been that registered schemes and exempted schemes should be employment-based. As such, ORSO schemes are carved out from the definition of collective investment schemes (CIS) under the SFO. If a scheme accepts any non-employee member, it will lose its ORSO scheme status. As a result, the scheme concerned will be subject to relevant regulatory requirements under the SFO. It is unlawful to operate a CIS without seeking prior approval from the Securities and Futures Commission (SFC). • The purpose of the proposed section 85 is to ensure that enforcement provisions under

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		the ORSO continue to apply to dubious schemes.
9	<p>Changing the definition of an ORSO scheme will lead to a growth of unregulated schemes inside and outside of Hong Kong.</p> <p><i>[Mr David Gunson]</i></p>	<ul style="list-style-type: none"> • All along, the policy intent of the ORSO has been that only schemes that meet the employment-based criterion should fall within the ambit of the ORSO and be eligible for registration or exemption under the ORSO. The proposed amendment to the definition of “occupational retirement scheme” aims to better reflect this original policy intent. • There will not be a growth of unregulated schemes inside and outside of Hong Kong. As explained in item 8 above, if a scheme accepts any non-employee member, it will no longer be carved out as a CIS. As a result, the scheme concerned will be subject to relevant regulatory requirements under the SFO. It is unlawful to operate a CIS without seeking prior approval from the SFC.
10	<p>It is unclear whether persons whose employment is “deemed” under section 2B would be regarded as “eligible persons”.</p> <p><i>[Law Society of Hong Kong]</i></p>	<ul style="list-style-type: none"> • Those whose employment is deemed under section 2B would be classified as “eligible persons”. This is because the meaning of an “eligible person” in section 2A(1) should be read together with the definition of “occupational retirement scheme” in section 2(1). The interpretation of employment in such definition is governed by section 2B.
Proposed Regulatory Requirements in relation to the Compliance of the Employment-based Criterion (“EBC”)		
11	<p>The requirement which the employer needs to confirm annually that it has complied with the EBC seems to be an “overkill”.</p>	<ul style="list-style-type: none"> • All along, the policy intent of the ORSO has been that ORSO schemes should be employment-based. It is therefore the fundamental duty of an employer to ensure the persons whom it arranges to be enrolled into its ORSO scheme are in compliance with EBC on an ongoing basis.

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	<i>[Employers' Federation of Hong Kong, Law Society of Hong Kong]</i>	
12	<p>It is uncertain whether auditors can provide auditor's statement as per the requirements in Schedule 1 Part 1 section 1A and Schedule 1 Part 2 section 2A.</p> <p><i>[Law Society of Hong Kong]</i></p>	<ul style="list-style-type: none"> • In drawing up this requirement, the MPFA has consulted the Hong Kong Institute of Certified Public Accountants.
13	<p>The MPFA did not take up the Law Society of Hong Kong's suggested amendments to the solicitor statement in Law Society's letter to the MPFA on 29 May 2018.</p> <p><i>[Law Society of Hong Kong]</i></p>	<ul style="list-style-type: none"> • After several renditions of the Bill, the wording appeared in the final version of the Bill is different from the version commented by the Law Society in May 2018. • As for the Law Society of Hong Kong's suggestion to include further elaborations of eligible persons in the solicitor's statement, please refer to our response in item 10 above.
Application for Registration/ Exemption		
14	<p>The Registrars' power in imposing conditions upon exemption or registration should be limited, subject to statutory criteria or removed.</p> <p><i>[Employers' Federation of Hong</i></p>	<ul style="list-style-type: none"> • The proposed amendments aim at enhancing the Registrar's supervisory powers and the flexibility in exercising his powers to deal with different situations. • Representation and appeal mechanisms against any conditions being imposed (or amended) with respect to the granting of registration or exemption certificate have been provided for under the Bill (i.e. proposed sections 7(5D), 8, 18(4C) and 19). • The proposed power to impose conditions is commonly found in the law of other

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	<i>Kong, Law Society of Hong Kong]</i>	financial regulatory regimes such as the Mandatory Provident Fund Schemes Ordinance (Cap. 485), the Insurance Ordinance (Cap. 41), the SFO, etc.
15	<p>The change of “the registrar shall allow the application” to “the Registrar may allow the application” in section 18(1)(e) should be a concern as it increases the uncertainty of the position.</p> <p><i>[Employers' Federation of Hong Kong, Law Society of Hong Kong]</i></p>	<ul style="list-style-type: none"> • Application for registration has to be considered on a case-by-case basis. For example, the Registrar may consider not appropriate to register a scheme having regard to the interests of the members of the scheme as a whole, even though the conditions prescribed in section 18(1) are satisfied. An appeal mechanism is provided for under section 19(2) of the ORSO if an applicant who applies for registration of its scheme is dissatisfied with the Registrar's decision to refuse its application.
Trusteeship Requirement		
16	<p>Proposed section 25(5) “codifies” the general trust law obligations of a trustee and may operate to remove equitable remedies from a beneficiary.</p> <p><i>[Employers' Federation of Hong Kong, Law Society of Hong Kong]</i></p>	<ul style="list-style-type: none"> • The amendment will not remove equitable remedies from a beneficiary. The proposed section 25(5) is not intended to supplant or prevail over a beneficiary's right to claim for equitable remedies and hence would not affect such right. Also, we have not included any express provision which replaces the common law duties of trustees in the Bill. • The rationale for the inclusion of section 25(5) is to provide the basis for supervisory/enforcement actions to be taken by the MPFA against a trustee if there is any breach of the duties. • It should be highlighted that these trusteeship requirements are already applicable to MPF-exempted ORSO schemes, pursuant to the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485B). We are only proposing to extend this

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		requirement to the remaining population of ORSO schemes.
17	<p>Upon registration, the Registrar needs to be satisfied that the proposed new section 25(5) is complied with. It is difficult for the Registrar to do so.</p> <p><i>[Employers' Federation of Hong Kong, Law Society of Hong Kong]</i></p>	<ul style="list-style-type: none"> • Under the proposed amendments to paragraph 3 of Part 1 of Schedule 1 to the ORSO, for a scheme in respect of which an application for registration is made, the applicant (i.e. the relevant employer of the scheme) is required to provide the Registrar with, among other things, a statement stating whether or not the requirements of section 25(5) have been complied with. • In order for the employer of a scheme to satisfy himself that he can give a confirmation as required under paragraph 3 of Part 1 of Schedule 1, it is expected that the employer should generally have a proper process to appoint suitably qualified and competent trustee(s) to administer the scheme and to monitor the performance of the trustee(s), having regard to relevant factors such as the nature of business, size and structure of the employer.
18	<p>In section 3 of Schedule 1 Part 1, the employer is being required to confirm that the Trustee has complied with its fiduciary obligations. This should not be imposed on the employers.</p> <p><i>[Employers' Federation of Hong Kong, Law Society of Hong Kong]</i></p>	
Information etc. to be Given to the Registrar		
19	<p>In section 33(1), the Registrar's power to demand information has been extended from the trustee/ employer to any person, which may</p>	<ul style="list-style-type: none"> • Section 33(1) of the existing ORSO only applies to the designated person or the relevant employer of a registered scheme. The powers currently provided under this section are inadequate as other persons may be in possession of the required information or document of a scheme. Expanding the scope of persons under this

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	<p>result in persons only peripherally involved with a retirement scheme being requested to provide information. Protection for legally privileged information may also be overridden.</p> <p><i>[Employers' Federation of Hong Kong, Law Society of Hong Kong]</i></p>	<p>section is necessary from the perspective of scheme members protection.</p> <ul style="list-style-type: none"> • The concept of legal professional privilege at common law is not overridden by the Bill and will continue to apply.
Transfer of Benefits		
20	<p>In proposed section 70B, transfer of benefits can only be made between schemes where relevant employers agree. The provisions which permit a Trustee to effect a transfer of benefits where the member/employee requests will become void.</p> <p><i>[Employers' Federation of Hong Kong, Law Society of Hong Kong]</i></p>	<ul style="list-style-type: none"> • Under the proposed section 70B, a trustee may accept a transfer of benefits between schemes upon scheme member's request as long as the circumstances set out in subsection (2) are met. • The restriction on transfer of benefits is intended to minimize the chance of ORSO schemes being misused for holding monies of unknown source and ensure that only bona fide transfer-in payments are allowed.
Disclosure by Registrar		
21	<p>The coverage in section 78(1)(ca) of the words "<i>other professional adviser acting or proposing to act in</i></p>	<ul style="list-style-type: none"> • The proposed provision is modelled on section 42(1)(caa) of the MPFSO.

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	<p><i>a professional capacity” seems too wide.</i></p> <p><i>[Law Society of Hong Kong]</i></p>	
22	<p>There should be further limitation, or qualification in section 78(1)(h).</p> <p><i>[Law Society of Hong Kong]</i></p>	<ul style="list-style-type: none"> • This provision enables the Registrar to disclose information to the public. The disclosure is limited to any material facts of the case, any details of, or reasons for the Registrar's exercise of power under section 11,12, 14, 42, 45 or 47, as well as the Registrar application under section 44. These provisions are related to the withdrawal of exemption certificates of exempted schemes, cancellation of registration or the Registrar's application to the court to freeze the assets of registered schemes. In these cases, we are of the view that disclosure to the public of the above information is in line with public interest.
23	<p>In section 78(1A), suggest changing the requirements of the three conditions “(a), (b) OR (c)”, to “(a) OR (b), AND (c)”. Similar suggestion for section 78(1)(eb).</p> <p><i>[Law Society of Hong Kong]</i></p>	<ul style="list-style-type: none"> • We view that the three requirements stipulated in paragraphs (a), (b) and (c) are equally important. The proposed provision is modelled on section 42(1A) of the MPFSO.
Transition Period		
24	<p>Sufficient and reasonable transition period should be provided for filing of applications for exemption under</p>	<ul style="list-style-type: none"> • Transitional provisions have been included in the proposed section 86 to provide, among other things, that where the Registrar receives an application for exemption or registration in respect of a scheme before the commencement of the Bill that has not

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	<p>the proposed new rules. <i>[Employers' Federation of Hong Kong]</i></p>	<p>been finally disposed of on the commencement date, the pre-amended ORSO should apply.</p>
Miscellaneous		
25	<p>The definition of "member" is deleted and replaced with the definition of "eligible person", but the term "member" is still being used in the ORSO. <i>[Employer Federation of Hong Kong, Law Society of Hong Kong]</i></p>	<ul style="list-style-type: none"> • The proposal to repeal the definition of "member" is to address the concerns that the new provision of eligible person may overlap considerably with the definition of members which may give rise to confusion as to whether someone who does not fulfil all the requirements of "eligible person" is still a member. • It is intended that the ordinary meaning of "member" be adopted in section 2A(2) and other provisions of the ORSO after the deletion of the definition of "member".
26	<p>Section 66C(3) appears to be redundant in light of the definition of "investigator" and section 66D. <i>[Law Society of Hong Kong]</i></p>	<ul style="list-style-type: none"> • In section 2(1), "Investigator" refers to "a person carrying out an investigation under section 66C". Section 66C(3), on the other hand, is the empowering provision. It empowers the Registrar or the person appointed under section 66C(2)(b) to exercise the powers under section 66D.