

**立法會**  
*Legislative Council*

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**Paper for the House Committee special meeting on 8 May 2020**

**Report of the Bills Committee on  
Occupational Retirement Schemes (Amendment) Bill 2019**

**Purpose**

This paper reports on the deliberations of the Bills Committee on Occupational Retirement Schemes (Amendment) Bill 2019 ("the Bills Committee").

**Background**

2. The Occupational Retirement Schemes Ordinance (Cap. 426) ("ORSO"), which came into force on 15 October 1993, provides for a registration system for Occupational Retirement Schemes<sup>1</sup> ("ORSO Schemes") voluntarily set up by employers under ORSO. The purposes of ORSO are to ensure that such schemes are properly regulated and provide greater certainty that the benefits promised to employees will be paid when they fall due.

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<sup>1</sup> Under section 2(1) of the Occupational Retirement Schemes Ordinance (Cap. 426), an Occupational Retirement Scheme ("ORSO Scheme") refers to a scheme, not being a contract of insurance under which benefits are payable only upon the death or disability of the insured, that has or is capable of having effect in relation to employment so as to provide benefits, in the form of pensions, allowances, gratuities or other payments, payable on termination of service, death or retirement, to or in respect of persons gainfully employed (whether in Hong Kong or elsewhere) under a contract of service in any employment.

3. There are two types of ORSO Schemes regulated under ORSO, namely, registered schemes and exempted schemes. Employers who operate ORSO Schemes are required to apply to the Registrar of ORSO Schemes ("Registrar") for registration of their schemes (i.e. "registered schemes") unless they are eligible for the following exemption criteria (i.e. "exempted schemes"), in which case exemption certificates will be issued –

- (a) being an offshore scheme registered or approved by an overseas authority performing functions which are generally analogous to those of the Registrar; or
- (b) being a scheme which has not more than 10% or 50 of the scheme's members, whichever is less, who are Hong Kong Permanent Identity Card holders.

4. Under ORSO, registered schemes are subject to various funding, audit and disclosure of information requirements, whereas exempted schemes are only required to comply with the requirements in relation to providing information to the Registrar and notifying him/her of certain changes of the schemes.

5. With the launch of the Mandatory Provident Fund ("MPF") System on 1 December 2000, ORSO Schemes may also be classified into two types according to their MPF exemption status, i.e. those schemes with MPF exemption granted by the Mandatory Provident Fund Schemes Authority ("MPFA")<sup>2</sup> pursuant to the Mandatory Provident Fund Schemes (Exemption) Regulation (Cap. 485B) (commonly known as "MPF-exempted ORSO Schemes") and those without (commonly known as "non-MPF exempted ORSO Schemes"). Contributions by employers<sup>3</sup> and employees<sup>4</sup> to ORSO Schemes are generally tax deductible.

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<sup>2</sup> After the establishment of the Mandatory Provident Fund ("MPF") System in Hong Kong, the Mandatory Provident Fund Schemes Authority has become the Registrar of ORSO Schemes.

<sup>3</sup> The deduction is limited to 15% of the total emoluments of the employee for the period to which the payments relate.

<sup>4</sup> Employees' contributions to MPF-exempted ORSO Schemes are eligible to tax deduction subject to the maximum deduction limit of \$18,000 annually.

6. The Registrar has recently noted that some ORSO Schemes might have been misused as a collective investment scheme with open participation, and this is contrary to the original policy intent of ORSO (i.e. ORSO Schemes should be employment-based). There is a concern that as these ORSO Schemes are outside the regulatory ambit of the Securities and Futures Ordinance (Cap. 571), such misuses of ORSO Schemes may compromise the integrity of the regulation of investment products in Hong Kong. In order to address the issue, the Administration considers it necessary to amend ORSO to ensure that only genuine ORSO Schemes are registered or exempted under ORSO.

### **The Occupational Retirement Schemes (Amendment) Bill 2019**

7. The Occupational Retirement Schemes (Amendment) Bill 2019 ("the Bill") was gazetted on 4 April 2019 and received its First Reading at the Legislative Council ("LegCo") meeting of 17 April 2019. The Bill seeks to amend ORSO to –

- (a) ensure that ORSO Schemes are genuinely based on employment;
- (b) enhance the enforcement powers of the Registrar; and
- (c) provide for related or technical amendments.

Details of the major provisions of the Bill are set out in paragraph 14 of the LegCo Brief on the Bill (File Ref: RTS/2/1C dated 3 April 2019). The Bill, if passed, will come into operation on the day on which the enacted Ordinance is published in the Gazette.

### **The Bills Committee**

8. The House Committee agreed at its meeting on 26 April 2019 to form a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**. Under the chairmanship of Hon Christopher CHEUNG Wah-fung, the Bills Committee has held one meeting to discuss the Bill with the Administration. It has invited relevant organizations, the public and the 18 District Councils to give written views on the Bill. A list of the organizations/individual which/who have given views to the Bills Committee is in **Appendix II**.

## **Deliberations of the Bills Committee**

9. Members in general support the proposed amendments in the Bill to prevent the misuse of ORSO Schemes as an investment vehicle open to persons who are not employees of the relevant employers of the schemes. In the course of deliberations, members have examined relevant issues in detail, including the proposed employment-based criterion, interpretation of employment, impact on employers, treatment of non-employee members in ORSO Schemes and various provisions related to enforcement actions.

### Employment-based criterion

10. The Bill seeks to amend the definition of "occupational retirement scheme" in section 2 of ORSO and introduce the meaning of "eligible person" for the amended definition. The effect of the proposed amendments is that the membership of ORSO Schemes under ORSO would be restricted to those who meet the conditions of "eligible person" under the new section 2A of ORSO.

11. The Bills Committee has sought clarification on the proposed employment-based criterion under the proposed amendments and relevant issues, namely, whether the common law test for determining employment relationship under the proposed amendments would be applied in the same way as it is under the Employment Ordinance (Cap. 57); whether the employment-based criterion would cover ex-employees of relevant employers of ORSO Schemes and employees who are affected by transfer of businesses or mergers and acquisitions; who could determine the existence or validity of an employment relationship under ORSO; whether contractors of organizations (such as consultants engaged under consultancy agreements) could participate in ORSO Schemes after the proposed amendments come into effect; and the required length of past employment to enable an employee to remain a member of the ORSO Scheme despite cessation of employment.

12. The Administration has advised that the common law test applied for determining employment relationship under the proposed amendments would be the same as that applied under the Employment Ordinance (Cap. 57). The employment-based criterion under the proposed amendments would require the terms of ORSO schemes to limit their membership to eligible persons, who would cover employees (whether past or present) of the relevant employers of ORSO Schemes, and individuals transferred from another ORSO Scheme to the scheme upon business transactions in good faith between the relevant employers of the two schemes. Individuals who were

once employees of the employers of relevant ORSO Schemes would generally be covered under the proposed employment-based criterion. ORSO has provided for statutory determination of membership of an occupational retirement scheme for persons providing service to proprietors of organizations.

13. The Administration has further advised that the existing section 3(5) of ORSO, and the new section 2B(2) which would replace it, provide that any person providing service on a full-time basis to a business or other organization in Hong Kong for a period of more than 4 years in such manner and subject to such degree of control that he may reasonably be regarded as an integral part of the organization is to be regarded as employed by the proprietor whether or not there is a contract of employment or service between such person and the proprietor.

14. Regarding the required length of past employment, the Administration has advised that MPFA would consider the actual circumstances of each case to determine whether compliance with the proposed employment-based criterion is satisfied. The duration for which an employee could remain in the relevant ORSO Scheme after cessation of employment would generally be governed by individual scheme rules.

#### Interpretation of "employment"

15. Members note that the proposed new section 2B(2) provides that if a person provides service on a full-time basis to a business or other organization in Hong Kong for a period of more than 4 years in a way and subject to a degree of control that the person may reasonably be regarded as an integral part of the organization, such provision of service is to be regarded as employment. The Legal Adviser to the Bills Committee has suggested that for the avoidance of doubt, the Administration should expressly state in the proposed new section 2B(2) that "a period of more than 4 years" shall be a continuous period and enquired whether the proposed new section 2B(2) would have any implication on the duty of the proprietor of the organization, who would be regarded as an employer under that proposed new section, under the Employment Ordinance (Cap. 57).

16. The Administration concurs with the above suggestion and has advised that it will move an amendment to the Bill to add "continuous" to the phrase "a period of more than 4 years" to make it clear that it refers to a continuous period of more than 4 years. As regards the implication on the duty of the proprietor, the Administration has advised that as expressly stated in the proposed section 2B(1), the new section 2B only applies for the

purposes of the definition of occupational retirement scheme in section 2(1) and of section 3 (i.e. Restrictions on operation of occupational retirement schemes). The interpretation of employment in the proposed section 2B(2) is hence confined to serving the purpose of administering ORSO only. As such, it would not have any implication on the duty of the proprietor of the organization under the Employment Ordinance (Cap. 57).

#### Non-employee members in ORSO Schemes

17. Members have enquired about the estimated number of ORSO Schemes cases which do not involve employment relationships; the distribution of such cases in relation to their MPF exemption status; and whether employers who wish to continue to operate the ORSO Schemes will need to terminate the membership of those scheme members who are not their employees when the proposed amendments come into effect.

18. The Administration has advised that as of May 2019, the Registrar preliminarily suspected that eight ORSO Schemes might have been misused as investment vehicles with open participation. The aggregate number of scheme members amounted to about 550. The number of members in each scheme who do not have actual employment relationships is yet to be determined before full investigation of the relevant cases. As regards non-employee members in ORSO Schemes, the Administration has advised that when the proposed amendments come into effect, employers who wish to continue operating the ORSO Schemes will need to make alternative arrangements about the membership of scheme members who are not their employees such as arranging for them to participate in other schemes as appropriate. MPFA will follow up those cases with employers.

#### "Public interest" as a factor in decisions made by the Registrar

19. Members note that the Registrar may make decisions to allow an application for registration of an ORSO Scheme under the proposed amended section 18 if the decision appears not to be contrary to the public interest; and withdraw or issue a proposal to withdraw an exemption certificate of an exempted scheme, and cancel or issue a proposal to cancel the registration of a registered scheme, under the proposed amended sections 11, 12, 42 and 45 if the decisions appear to be in the public interest. The Legal Adviser to the Bills Committee has sought explanation on the factors that the Registrar would take into account when considering what would constitute "public interest" in such decisions.

20. The Administration has advised that when deciding whether there is a "public interest" consideration, the Registrar will take into account all relevant factors and circumstances of a case, including but not limited to the interests of the members of the relevant scheme, whether the regulatory regime of Hong Kong will be compromised, and whether the scheme may be used to cause material negative impact on Hong Kong (e.g. impact on its reputation as an international financial centre).

21. For example, if the Registrar has reasonable belief that a scheme is involved in illegal activities such as money laundering or tax evasion, the Registrar may consider regulatory actions on the ground of "public interest" as Hong Kong's reputation as an international financial centre may otherwise be undermined. The Administration has emphasized that the Registrar will have to consider all relevant matters on a case-by-case basis when deciding on taking such action. The Registrar envisages that only in exceptional circumstances will the ground of "public interest" be invoked.

#### Impact on employers

22. The Bills Committee has enquired about the details of the views and concerns of employers and employer associations on the proposed amendments regarding, for example, the additional administrative measures for meeting the relevant reporting requirements, and the impact of the proposed amendments, if any, on overseas enterprises which are considering setting up businesses in Hong Kong.

23. According to the Administration, employers in general do not consider the new reporting requirements difficult as such requirements generally only involve making an additional declaration on top of the existing annual statement to confirm that the membership of the schemes complies with the employment-based criterion. Noting that under the proposed amended section 7 of ORSO,<sup>5</sup> the only ORSO exemption criterion would be for an offshore scheme to be registered or approved by a regulatory authority outside Hong Kong performing functions which are generally analogous to those of the Registrar, employer associations have suggested that the Registrar should make public the relevant regulatory authorities satisfying this criterion to facilitate employers' compliance with the ORSO exemption requirements. To this end, MPFA has already posted a list of authorities in a country, territory

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<sup>5</sup> Under the proposed amended section 7 of ORSO, the Registrar would no longer be able to issue an exemption certificate in respect of an ORSO Scheme with not more than 10% or 50 (whichever is less) of the members of the scheme who are Hong Kong permanent identity card holders.

or place outside Hong Kong for the purpose of section 7(4)(a) of ORSO for public reference on MPFA's webpage.

#### Enforcement actions

24. The Bill amends the existing section 44 of ORSO to empower the Registrar to apply for a court order to freeze the assets of a registered scheme on the Registrar's intending to issue a proposal to cancel the registered scheme's registration. The Legal Adviser to the Bills Committee has enquired whether the issue of the court order for freezing of assets of the employer in parallel with the proposal to cancel the registration of a registered scheme issued by the Registrar under the proposed amendment would deny the relevant employer of the opportunity to be heard by the courts.

25. The Administration has advised that under the proposed section 44(1A), before making the order for freezing the assets of the relevant employer, the court must satisfy itself, so far as it could reasonably do so, that it is desirable that the order be made and the order would not unfairly prejudice any person.

26. The Bills Committee has enquired about the enforcement actions that the Registrar can take apart from cancelling the registration and freezing the assets of the registered schemes when ongoing compliance with the proposed employment-based criterion is not satisfied.

27. The Administration has advised that one of the policy intents for the proposed amendments is to enable the Registrar to conduct investigation on or inspection in employment establishments or business premises for ascertaining compliance with the statutory requirements under ORSO, including collecting evidence required under the proposed employment-based criterion. When exercising the power of inspection, the Registrar would apply an objective "reasonable man" test based on the actual conditions to determine whether ongoing compliance with the proposed employment-based criterion is satisfied. For schemes in which most members are found not to have a genuine employment relationship with the employer, it is likely that their registration would be cancelled. In other cases, the Registrar would consider taking other measures to ensure compliance, such as requesting the scheme to remove the membership of non-employee members. The Registrar would also consider whether the non-compliance is a genuine mistake or omission when determining the appropriate measure.



### Inspection and investigation

28. The Bill adds a new Part VIIIA (i.e. Inspection and Investigation) to ORSO which confers inspection and investigation powers on the Registrar, comparable to the MPFA's powers in relation to MPF Schemes under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) ("MPFSO"). Referring to the general powers of inspection under the new section 66B in the new Part VIIIA, the Bills Committee has enquired about the rationale for empowering the Registrar to conduct inspection in employment establishments or business premises; whether prior notice for inspection to the relevant premises would be required and the form of notice to be given; whether surprise inspections have been conducted for regulating MPF schemes; and whether similar inspection powers are available to MPFA for regulating MPF schemes.

29. The Administration has advised that the purpose of the proposed amendments is to enable the Registrar to conduct investigation on or inspection in employment establishments or business premises for ascertaining compliance with the statutory requirements under ORSO. Under section 66B(3), in general, reasonable notice would be given to the occupier of the relevant premises of the intention to enter the premises for conducting inspection. The notice would be in the form of a letter specifying the purpose of the inspection and the documents to be inspected, and issued a few days prior to the inspection. Similar inspection powers are available to MPFA for regulating MPF schemes under MPFSO. Based on MPFA's experience with MPF trustees, MPFA has not encountered circumstances in which it considered necessary to carry out surprise inspections.

### Warrant of authority

30. Under the proposed section 80A, the Registrar may in writing appoint or authorize a person to perform functions, or specified functions, under or for the purposes of ORSO. Furthermore, the proposed section 66B(6) enables the Registrar to appoint outside experts (e.g. actuaries or auditors) to carry out an inspection on its behalf. In relation to the power of entering premises and inspecting materials under the proposed new section 66B, the Legal Adviser to the Bills Committee has sought clarification if the Administration would propose amendments to the Bill to add provisions in the proposed new Part VIIIA of ORSO for (a) empowering the Registrar to issue a warrant and (b) specifying the conditions to be satisfied by the Registrar before issuing a warrant.

31. The Administration has advised that the "warrant" as mentioned in the proposed section 66B(6) is a "warrant of authority" (in Chinese "授權書"). The proposed section is modelled on section 30A(5) of MPFSO. In essence, the "warrant of authority" should be regarded as a "copy of appointment" / "委任的文本" to show that a certain person is appointed by the Registrar to carry out an inspection on its behalf. It should not be interpreted as a "court warrant".

32. Considering the nature of such warrant of authority, and that the conditions (i.e. for ascertaining whether or not the provisions of ORSO are being complied with or have been complied with) for the Registrar to conduct inspection in a non-private dwelling are already set out in the proposed section 66B(1) of the Bill, the Administration does not consider it necessary to explicitly empower the Registrar to issue a warrant of authority or to specify the conditions to be satisfied before so doing.

#### Initiation of criminal proceedings

33. The Legal Adviser to the Bills Committee has enquired about the factors to be considered for either (a) initiating criminal proceedings under sections 66E and 66F against a person for failing to comply with an investigation requirement without reasonable excuse under section 66D, or (b) making an application to conduct a court's inquiry into such failure under section 66G.

34. The Administration has advised that under section 66H, the initiation of criminal proceedings under sections 66E and 66F and the application for conducting court's enquiry under section 66G are mutually exclusive to avoid duplicity. If an investigator requires the production of certain required documents or information, the investigator would consider making an application under section 66G for conducting a court's inquiry as the court might order the person to comply with the requirement within the period specified by the court.

#### Legal professional privilege

35. The Legal Adviser to the Bills Committee has sought explanation for the absence of a provision to provide protection for materials subject to legal professional privilege in the proposed new Part VIIIA of ORSO, and enquired whether the Administration would propose amendments to the Bill to provide expressly such protection in that Part.

36. The Administration has advised that the concept of legal professional privilege at common law has not been overridden by the Bill and will continue to be applicable in this context. A person who is subject to inspection or investigation under Part VIIIA can refuse the provision of certain documents that are subject to legal professional privilege. If the Registrar considers such refusal as a "reasonable excuse" pursuant to the proposed section 66E or 79A, the Registrar will not pursue such information in the inspection or investigation. As such, the Administration does not consider an express provision for upholding the concept of legal professional privilege to be necessary.

### **Proposed amendments to the Bill**

37. The Administration will propose a number of textual and technical amendments to the Bill with details set out in **Appendix III**. The purposes of the amendments are as follows:

- (a) in the proposed section 2B(2) to clarify that the requirement refers to a continuous period of more than 4 years (see paragraphs 15 and 16 above);
- (b) in the proposed section 33A to add the non-compliance of a registration condition as one of the reportable events that the relevant employer or administrator of a registered scheme must report to the Registrar;
- (c) in the proposed sections 42 and 45(1) to mirror the list of grounds based on which the Registrar may withdraw the exemption certificate of an exempted scheme, by adding the non-compliance of a registration condition as one of the grounds based on which the Registrar may cancel the registration of a scheme;
- (d) in the proposed section 67(6A) to standardize the practice with respect to non-group registered schemes with group registered schemes by removing the consequences for non-compliance with the newly added requirement on the submission of written statement; and
- (e) in the English text of the proposed section 2B(2) and in the Chinese text of the proposed section 10(1)(ab) for textual and formatting purposes.

38. The Bills Committee has raised no objection to the proposed amendments above and will not propose any amendment to the Bill.

**Resumption of Second Reading debate on the Bill**

39. The Bills Committee raises no objection to the resumption of the Second Reading debate on the Bill at a future Council meeting.

**Advice sought**

40. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 1  
Legislative Council Secretariat  
5 May 2020

**Bills Committee on Occupational Retirement Schemes  
(Amendment) Bill 2019**

**Membership List \***

**Chairman** Hon Christopher CHEUNG Wah-fung, SBS, JP

**Deputy Chairman** Hon Kenneth LEUNG

**Members** Hon WONG Ting-kwong, GBS, JP

Hon CHAN Kin-por, GBS, JP

Hon WU Chi-wai, MH

Dr Hon KWOK Ka-ki

Hon CHUNG Kwok-pan

Hon Alvin YEUNG

Hon Jimmy NG Wing-ka, JP

Hon HO Kai-ming

Hon CHAN Chun-ying, JP

(Total : 11 members)

**Clerk** Mr Derek LO

**Legal Adviser** Mr Mark LAM

\* Changes in membership are shown in Annex to Appendix I

**Annex to Appendix I**

**Bills Committee on Occupational Retirement Schemes  
(Amendment) Bill 2019**

**Changes in membership**

<b>Member</b>	<b>Relevant date</b>
Hon Tanya CHAN	Up to 19 May 2019

**Bills Committee on Occupational Retirement Schemes  
(Amendment) Bill 2019**

**List of organizations/individual which/who have given views to  
the Bills Committee**

1. Liberal Party
2. Mr David GUNSON
3. The Chinese Manufacturers' Association of Hong Kong
4. The Employers' Federation of Hong Kong
5. The Hong Kong Institute of Human Resource Management
6. The Hong Kong Professionals and Senior Executives Association
7. The Law Society of Hong Kong

**Occupational Retirement Schemes (Amendment) Bill 2019**

Amendments to be moved by the Secretary for Financial Services and the Treasury

<u>Clause</u>	<u>Amendment Proposed</u>
4	In the proposed section 2B(2), by deleting “period” and substituting “continuous period”.
4	In the proposed section 2B(2), in the English text, by deleting “the business or” (wherever appearing) and substituting “the”.
10(2)	In the proposed section 10(1)(ab), in the Chinese text, by deleting “(a)” and substituting “(i)”.
10(2)	In the proposed section 10(1)(ab), in the Chinese text, by deleting “(b)” and substituting “(ii)”.
25	In the proposed section 33A(1), in the definition of <i>reportable event</i> , by adding before paragraph (a)— “(aa) a condition imposed under section 18(4A), or amended under section 18(4B), is not complied with for the scheme;”.
27	By adding before subclause (1)— “(1A) Before section 42(a)— <b>Add</b> “(aa) a condition imposed under section 18(4A), or amended under section 18(4B), in respect of the scheme is not complied with;”.”.
30	By deleting subclause (1) and substituting— “(1) Section 45(1)(d)— <b>Repeal subparagraph (i)</b>



**Substitute**

“(i) a condition imposed under section 18(4A), or amended under section 18(4B), in respect of the scheme is not complied with;

(ia) any requirement of section 20 is not complied with;

(ib) any requirement of section 20A(1), (2) or (3) is not complied with;”.

44(6)

In the proposed section 67(6A), by deleting “or (gab)”.