Secretariat,, Committee on Review of Post-service Outside Work for Directorate Civil Servants.
10/F, West Wing, Central Government Offices,
11, Ice House Street,
Central,
Hong Kong.

16 March 2009.

Dear Members of the Review Committee,

Thank you for offering the opportunity to comment on the issues raised in the Consultation Document on the Review on Post-service Outside Work for Directorate Civil Servants.

On18 March 2005 I raised with the Secretary for the Civil Service by email my reservations over previous proposals in this area. There was no response to my views at that time.

My main focus in that representation was on the potential unlawful nature of proposed restraints of trade. I set out my views on balancing the rights and liberties of different parties, as well as my views on related provision of the Basic Law of the HKSAR. I referred to Lord Macnaghten's formulation setting the bounds between these liberties: *'All interference with individual liberty of action in trading and all restraints of trade ... are contrary to public policy', subject to exception if it is reasonable both with reference to the interests of the parties and of the public..."* [Texaco Ltd. v. Mulberry Filling Station Ltd., Ungoed-Thomas J. at 28.]

I have previously pointed out, and I repeat it here, that a misconception can arise that under English Common Law concepts there is a tension between the public interest and an individual employee's freedom to gain employment. There is none. The correct concept is that the individual's right to obtain subsequent employment under the Common Law is equated with the public interest. This is set out in Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. ([1894] A.C. 535, p. 565): *"All interference with individual liberty of action in trading, and all restraints of trade themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions: restraints of trade ... may be justified by the special circumstances of a special case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the*

interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

Thus it is correct to say that a balance must be drawn; but incorrect to view the public interest as being one thing and the individual's freedom to gain employment as being another. Both are aspects of the public interest.

I now turn to address the specific issues raised in the Consultation Document.

Issue 1: Should protecting the public interest and protecting an individual's right continue to be recognised as the two underlying principles of the control regime?

The 'public interest' is discussed in para. 2.02 of the document in terms of

(a) public trust;
(b) good governance; and
(c) integrity and impartiality of the civil service.

The Document has set out the issue as being a conflict between the 'public interest' and 'protection of the individual's right'. This presentation will promote a wrong impression that civil servants who seek to enjoy their rights are in conflict with the public interest. Given that the Basic Law preserves the application of the English Common Law system in Hong Kong, that the English Common Law clearly curbs restraint of trade and (as the Consultation Document subsequently sets out), freedom to seek employment is prescribed in the Basic Law and international covenants binding Hong Kong, it is more correct to say that ***the presumption is that the public interest favours the individual who wishes to enjoy his or her right to employment with minimum interference.***

A further issue that is not sufficiently addressed in the Consultation Document is the poor relative bargaining power of the individual civil servant as against that of the Government. The Government's ability to fund litigation is almost limitless, as contrasted with the position of a retired civil servant who has nothing but a pension, which the Government may be threatening to stop anyway. This issue was explored by Diplock. L. in Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 ALL ER 616]. *"It is, in my view, salutary to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning power, the public policy which the court is implementing is not some 19th century economic theory about the benefit to the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable. Under the influence of Bentham and of laissez-faire the courts in the 19th century abandoned the practice of applying the public policy against unconscionable bargains to contracts generally, as they had formerly done to any contract considered to be usurious; but the policy survived in its application to penalty clauses and to relief against forfeiture and also to the special category of contracts in*

restraint of trade. If one looks at the reasoning of 19th century judges in cases about contracts in restraint of trade one finds lip service paid to current economic theories, but if one looks at what they said in the light of what they did, one finds that they struck down a bargain if they thought it was unconscionable as between the parties to it, and upheld it if they thought that it was not."

This was also discussed in an OECD Policy paper on Civil Service Pension Schemes: *"Under some occupational pension schemes employees who leave their employment before attaining the normal retirement age, "early leavers", risk losing the pension benefits to which they assume they are entitled. An employee who wishes to change jobs may not, under such circumstances, do so for fear of losing pension benefits. Pension conditions of that kind may be in line with the employer's interests, but are an obstacle to labour mobility. They were common in earlier times but are in most countries no longer regarded as acceptable." [OECD SIGMA Policy Brief No. 2: Civil Service Pension Schemes.]*

Issue 2: Is the current policy objective appropriate? What is the view on including the following specific references in the policy objective –

(a) avoidance of suspicion or perception of 'deferred reward' for past favour done during government service?

(b) gainful use of limited human resources and attractiveness of the civil service as a career?

As regards (a), it is vital to separate completely the actuality of an offer of employment to a civil servant as a deferred reward, and 'suspicion or perception' of the same. The public (particularly in Hong Kong) has a right to expect appropriate measures to prevent corruption of senior officials. But at the same time, to quote *Fifoot:* "Law of Contract", 8th ed. (1972), at p. 366: *"Reason and justice would seem to prescribe that an agreement, reasonable between the parties, should not be upset for some fancied and problematical injury to the public welfare."*

Directorate civil servants have no monopoly on being susceptible to act corruptly in anticipation of future employment. Political appointees and legislators could be subject to the same temptation. Although the Document makes passing reference to equality of all people before the law, the civil service will expect to see some examination of whether other categories of public figures in positions of power should be subject to control or limitations.

Nor is the offer of post-retirement employment the only way in which a civil servant might be corrupted. In effect, in enjoying any of his or her normal rights in day-to-day life such as making substantial purchases, taking holidays or the education of children, there is a theoretical possibility that he or she could corruptly benefit from relationships built up through government work. Would civil servants be required to apply to a committee to seek education for their children, buy property or book a holiday if some day a case were discovered in which a civil servant had abused their position in relation to one of these activities?

The document implies that the more senior the officer, the more stringent the controls he or she may be subject to; but omits the fact that at the level of political appointees, members of statutory boards and legislators, the more prominent the public figure is, the less control he or she may be subject to.

The civil service and the laws of Hong Kong already have adequate measures to deal with conflict of interest or corruption after the event or during commission of improper acts. My view is that if a problem exists it should be tackled through specific enforcement or narrowly targeted preventive measures and not broad-brush bans on potentially innocent activities.

As regards (b), it is unlikely that reasonable restrictions will damp public interest in a civil service career. More likely, though, is that after reaching middle ranks, staff will resign early in order to ensure that they are clear of post-resignation restrictions well before they are perceived by the business community to be 'beyond their shelf life'. To the extent that the intellectual capital of ex-civil servants represents a potential benefit to society, restrictions on post-retirement in Hong Kong will result in ex-civil servants becoming an export item to places like Singapore, which seeks to build up it's intellectual capital with overseas expertise.

Issue 3: Is the current length of 'periods of restriction' for post-service outside work appropriate?
What is the view on –

(a) a lifetime ban on any paid employment or paid employment with commercial organisations for retired civil servants in receipt of monthly pension payments?

It is difficult to comprehend why the Committee has decided to consult on a proposal that potentially is in clear breach of the Basic Law and international covenant (5.10, 5.11). Apart from the constitutional objections that the Committee itself recognizes, such an arrangement would be clearly less favorable to serving civil servants that the conditions under which they worked before 30 June 1997, and would therefore be in breach of BL 100 AND 102. The Committee should not consider this proposal further.

(b) the length of 'periods of restriction' for former directorate civil servants engaged in specified fields of work while in government service?

Setting restrictions on senior civil servants representing a new employer before the Government or LegCo in matters directly related to their previous duties is a reasonable safeguard against conflict of interest, even long-term. Similar restrictions on preparing of tenders in areas relating to previous works are also reasonable. There should be no periods of restriction in respect of activities which are potentially innocent.

(c) the length of 'periods of restrictions' for post-service outside work in the same field as that pursued by a former directorate civil servant before leaving government service?

In general, the answer is the same as for (b). There is a lack of clarity about the scope of 'outside work' that is being discussed. While it is clear that it includes direct employment in an employer-employee relationship, and certain sorts of consultancy services, it is not clear whether it extends to buying and selling assets for profit or being involved and an independent creator. Can a retired civil servant become a novelist, pop star or painter and support himself financially by so doing (with all or part of the income deriving from Hong Kong) if his previous work had involved cultural activities or copyright? If the answer is 'no', a question arises as to whether that is an unwarranted infringement of his of her freedom of expression.

Issue 4: Should the past contacts/dealings of a former directorate civil servant with the prospective employer's parent and/or other related companies during his last few years of government service be disclosed and assessed for the purpose of conflict of interest, irrespective of whether the former directorate civil servant, in his applied-for post service work, will be involved in the business of these entities?

There should be little harm in such disclosure if it is expressed in general terms and is not likely to cause commercial loss to the parties involved.

Issue 5: Is the current imposition of work restrictions on approved taken-up outside work appropriate? Can the imposition of work restrictions address and mitigate public concern over potential or perceived conflict of interest?

Specific restrictions are common – even in relatively free systems such as that in the USA. Imposing specific conditions which seek directly to address clear and present conflicts of interest, even if the time-frame is longer, is preferable to imposing blanket bans that are unreasonable in terms of time and geographic scope. However, no amount of restrictions will mitigate public concern over 'perceived' conflict of interest. There will always be a substantial number of members of society who perceive conflict of interest, even where it does not substantively exist.

Issue 6: Should there be any change to the composition of and/or institutional support for the Advisory Committee on Post-service Employment of Civil Servants?

Any committee should be capable of discharging its functions promptly, so that the rights of applicants are not prejudiced. On no account should the Administration be allowed to drag its feet over processing an application in such a way that an opportunity for employment passes through lack of a decision. Employers normally anticipate a one to two month time-lapse between offering employment and the new recruit arriving for duty. Any system should not interfere with this normal time-frame.

Issue 7: Should there be any change to the pension suspension arrangement for post-service employment in specified subvented organisations by retired civil servants?

Pension is a reward for past service. Suspension with the aim of avoiding double benefits should only be imposed if the benefits involved are substantially the same benefit from the same source.

Issue 8: Are the sanctions provided under the current control regime adequate?

A civil servant's right to a pension is earned and is awarded on the basis of past service. Pensions are payable immediately upon retirement and a substantial part may be received as a capital sum. Any interference with this right should be pursuant to specific legislation and imposed by a court. The Administration should not be given the right to impose what amounts to administrative fines.

Issue 9: Is the current public disclosure arrangement appropriate? What is the view on –

> ***(a) disclosing the post-service outside work taken up by former junior directorate civil servants as well?***
> ***(b) disclosing the advice of Advisory Committee on Post-service Employment of Civil Servants on each of the post-service appointments taken up by former directorate civil servants?***

In general, a higher degree of transparency will go some way towards addressing public discomfort about post-retirement employment of civil servants. To the extent that disclosure would not cause economic cost to any party, it should be encouraged.

Other issues which may be relevant but are not specifically raised in the consultation document.

Post-retirement employment by certain civil servants has had a political profile in Hong Kong recently higher than such issues cause outside Hong Kong. I take this as a positive sign: I believe this is the result of the high degree of public censure of corruption in Hong Kong, which is one of Hong Kong's strengths.

At the same time, however, this public concern contains elements of risk. If an individual civil servant who formulates or executes policies that are unpopular subsequently seeks to take up post-retirement employment, there could be an adverse political reaction, even if the proposed employment were innocent. I believe that the present system will inevitably take into account such adverse public reaction. That is inherently unfair, as civil servants are not given the choice to dissent with policies they are employed to carry out.

I believe that broad-based, long lasting restrictions affecting the basic rights of retired civil servants should be ***replaced*** by focused provisions under the Prevention of Bribery Ordinance and related legislation. Specifically, in return for abolition of the present PPP system –

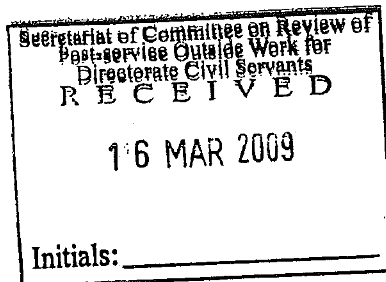
- All ex-civil servants (whether retired, dismissed or resigned) should be subject to five year statutory ban on representing any party (including themselves) in bidding for any government contract;
- All ex civil servants should be subject to a three year statutory ban on lobbying on behalf of any foreign government or commercial entity (local or foreign) before the Administration or the Legislature on any matter relating to their immediate previous duties. This should not restrict them from making representations before LegCo or statutory committees affecting their own rights if such a right is open to the public at large.

- The law should clearly state that a serving civil servant must report to the ICAC any offer of employment (direct or implied, in Hong Kong or overseas) that he or she reasonably infers to be linked to his present or immediate past duties in the Government. The ICAC should be given powers to investigate such cases, and if proven, such cases should be specified in the PBO as constituting attempted bribery. The objective of this is to provide a strong disincentive to the non-Government sector against activities that could be construed as offering a reward to civil servants for services rendered.
- Thought should be given to extending similar provisions to cover political appointees and members of statutory boards.

I have no objection to my views being made available to the public.

Yours faithfully,

(Stephen Selby)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