Secretariat, Committee on Review of Post-service
Outside Work for Directorate Civil Servants
10/F, West Wing,
Central Government Offices

Comments of the consultation document on
Review of Post-service Outside Work for Directorate Civil Servants

It is indeed a sad thing that I, like anyone else in HK, am entitled to take part in this public consultation on how much human rights can be bestowed on a handful of people who, being directorate civil servants, stand at about 1,200 in number.

The review on post-service outside work for directorate civil servants was triggered by public concern over the approval given by the Secretary for the Civil Service (SCS) to Mr LEUNG Chin-man to take up post-retirement employment with a subsidiary of New World Development Co Ltd. Now, the government exploits LEUNG's case by conducting a review on post-service employment, which includes post-retirement employment, post-resignation employment, and employment in the private sector after completion of employment contract with the government at an age that could be anything between 20 and over 60.

Now, I come to address the issues set out 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?

This question is like asking whether Christians should continue to believe in Christ. So, my answer to the question in Issue 1 is certainly "yes".

However, while there is no conflict between the three persons of the Trinity, there could be conflicts between public interest and an individual's right. To address these conflicts, the consultation paper gives an overview on how these conflicts are managed by seven countries, and suggests that, since those countries are found to have struck the balance at different points between public interest and an individual's right, we in HK can try to find our own point of balance after conducting a pubic consultation.

My comment on this suggestion is that it is simple stupidity to expect the executive arm of the government (hereinafter to be called the government) to defend an individual's right when there is a conflict between an individual's right and what the government perceives as public interest. The government has a tendency to confuse us by equating government interest to public interest.

Before explaining the difference between public interest and government interest, I would first like to say something about the word neutrality. For decades, HK people had been successfully brainwashed to believe that we had a civil service that was neutral in any debates on how to make HK a better place to live. One day in 1999 (or 2000? Can't remember), HK woke up to the challenge mounted by Mr James Tien Pei Chun, who rightly pointed out that the civil service was indeed not neutral, since it was the civil service that formulated policies and sold them to politicians and the public. Mr Tien's success in disputing the neutrality of the civil service was one of the many reasons for the subsequent introduction in 2001 of the political system under which Government Secretaries are politically appointed.

So, what the government would like us to believe to be true could be untrue.

Now, I would like to come to "public interest". When Ms IP LAU Shuk-yee ran for election to the

Legislative Council, she had to make a public apology for her zeal in selling a bill in connection with Article 23 of the Basic Law a few years ago. To the people who put her in the Legislative Council, her apology was made in public interest. But this apology is certainly not in government interest.

I would like to give another example of public interest.

SCS made a public apology for approving Mr LEUNG's application for his employment with New World. This apology was made more in government interest than public interest.

On 27 February 2009, the Court of Appeal quashed the decision of the Town Planning Board (TPB) that banned a subsidiary of the Swire Group from constructing a 50-storey building in Seymour Road for possible adverse effects on traffic and the environment. (Case No. CACV 407/07.) I cannot imagine any reason for the TPB's ban other than for public interest. But the court rules that, in this case, it will be more in public interest to protect the developer's right to construct the building.

There have been numerous court cases to demonstrate that what the government says are public interest are in fact not public interest.

In the consultation document, the government does not explain a word why civil servants' post-service employment could be against public interest. It does give a vague example, however. In para 5.25 of the consultation document, there is an imaginary case of a medical specialist who was responsible for the regulation of the private medical sector while in government service and wanted to take up a post-retirement job in a private hospital. This imaginary case is used to usher in the questions of possible conflict of interest and suspicion of "deferred reward". But the consultation document does not explain why there is a conflict of interest. As far as public interest is concerned, I do not see any conflict of interest from a medical point of view, unless there is suspicion that this medical specialist performed his public duties in such a way as to hope that a "deferred reward", taking the form of a post-service employment in a private hospital, would be offered to him. Let us put aside "deferred reward" for the moment. The government must first go deeper to explain why there is a possibility of a conflict between public interest and the medical specialist's right to work after retirement in a private hospital. The government needs to explain this so that we can judge whether it is really public interest or merely government interest. Otherwise, it is only right for us to believe that the government's fear for the medical specialist to work in a private hospital may stem from the worry that hidden agenda kept by the government might be made known to private hospitals after the medical specialist starts working for the private hospital. The government often stresses transparency in government business, to the extent that, in its guidelines to civil servants over the matter of Access to Information, confidential information can be given in response to an enquiry. Then, why is there any conflict between public interest and the medical specialist's right to work after retirement as far as "confidential" information is concerned? Apart from confidential information, are there any other reasons that, in the eyes of the government, may lead to a conflict of interest? What are those reasons? The government has a duty tell us.

Now I come to "deferred reward". If the medical specialist performs his duties in such a way as to pin his hope on a possible deferred reward, he should be dealt with in accordance with the anti-bribery law, not in accordance with any control mechanism developed by the former employer, in this case the government, to only veto his right to work. His right to work can be taken away if the suspicion about a "deferred reward" is substantiated. Suspicion that cannot be proven cannot justify any attempt to suppress this right.

Issue 2: <u>What is the view on including the following specific references in the policy objective –</u>

(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?

I do recognise the importance of (b) above, i.e. gainful use of limited human resources. It therefore should be included in the policy objective. However, it is more relevant to consider (a), i.e. avoidance of suspicion and perception of a "deferred reward", vis-à-vis an individual's right. So the question should be whether an individual's right should be made subordinate to suspicion and perception of a possible deferred reward for past favour done during government service.

The answer to this question is simple. **An individual's right cannot be made subordinate to suspicion and perception. And it cannot be made subordinate to the need to avoid suspicion and perception. This right can only be curtailed when the suspicion has been substantiated.**

The time within which comments and suggestions are made in response to the consultation document coincided partly with the period when the movie Slumdog Millionaire was shown in HK. In the movie, an uneducated youth who grew up in slum and managed to answer all the questions in a quiz on TV was suspected cheating and, as a result, was subjected to physical torture by the police. The suspicion was simply based on the belief that the youth, who grew up in slum and had received little education, could not have possibly given the correct answers if he did not cheat. In real-life HK, we are not much different; in a smear campaign, when a person is made suspected of receiving "deferred reward", he can be subjected to mental torture, with his human rights taken away.

It is government interest to dispel or substantiate a suspicion in a matter of grave public concern. If the government is unable to dispel or substantiate the suspicion, it could face the danger of losing the next election, which, however, could be in public interest.

I have, again, explained the difference between government interest and public interest. We do not have an elected government in HK, but it is safe to repeat here that the SCS's open apology was made in government interest, not in public interest.

I have also explained the difference between a deferred reward and suspicion/perception of a deferred reward, and that there is a hell of difference between a deferred reward and suspicion/perception of a deferred reward.

So, (a), i.e. avoidance of suspicion or perception, has more to do with government interest than public interest, and it must be made subordinate to an individual's right.

Issue 3: Is the current length of "periods of restriction" for post service outside work appropriate?

Thanks to the consultation document, I have come to know that HK tops all the overseas jurisdictions surveyed by the consultant in "periods of restriction". The courts in Australia and New Zealand simply throw the governments' control mechanism, including periods of restriction, out of the window. However, the consultation document is silent on how the courts of the other five jurisdictions deal with the governments' control regimes. Only civil servants in France and UK are required to apply for prior approval for outside employment after retirement from public service. Of all the seven jurisdictions surveyed, only UK has a sanitisation period, which lasts only six months. In HK, the sanitisation period is 12 months.

We in HK do not appear to have had a court case in which the control mechanism was judged by the court. Before our court charts the way for HK, some sort of control mechanism, or restrictions, is understandably appropriate. In this connection, I will come to "periods of restriction" again while discussing Issue 8.

Issue 4: Should the past contacts/dealings of a former civil servant with a prospective employer's parent and /or related companies during his last few years of government service be disclosed and assessed for the purpose of (avoiding) conflict of interest,....?

Now, let us again look at the case of Ms IP LAU Shuk-yee. There is no need to speculate that, in 2007, when she ran for election for the first time, the support she received from DAB was due to her contacts/dealings with DAB while she was Secretary for Security, an office which carried an employment status that straddled from one of civil servant to one of politically appointed official. Such contacts/dealings must not be made a reason for taking away a person's right to work for the interest of HK.

It could also be in public interest if an officer retired from the Social Welfare Department and joined a non-governmental organisation (NGO) to, say, lead the battle against the government's One Line Vote policy. Surely, when he was a civil servant, he had contacts/dealings with NGOs. Such contacts/dealings could not possibly be avoided, but these contacts/dealings must not be used as a reason for taking away his right to work with an NGO after his retirement from the civil service. In this case, I see no conflict between public interest and his right to work. But certainly it is against government interest if a senior civil servant who, against his wish, carried out the government's One Line Vote policy while in the civil service is, after his retirement, seen to lead a battle against the same policy.

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

It has been explained above that conflicts of interest may not be evil, if government interest, not public interest, is involved. It has also been explained that an individual's right cannot be made subordinate to suspicion and perception. And it has been explained that the consultation document stops short of elaborating why there could be conflict of interest if an ex-civil servant works in the private sector.

One or two newspapers in HK carry pages of contents that amount to pornography. They sell like hotcakes. But still, to many, those pages do cause negative perception. But we never imagine that this negative perception can be used as a reason to suppress the right to publish. So, why perception can be made a reason to take away a person's right to work?

Potential or perceived conflict of interest should be dismissed from our discussion.

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 Servant?

The Advisory Committee should be scrapped. I will explain this when I come to Issue 8.

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

I bet that this pension suspension arrangement will be scrapped, because there is clearly a need to remove double standards.

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

Consideration should be given to overhauling the control regime by following the practice adopted in the USA, which has more to do with law enforcement than with administrative measures. Protection of an individual's right is administration of justice. The government cannot be trusted when it comes to administration of justice, because it is constantly swayed by media-induced or politician-induced public opinion. The kind of "deferred reward" discussed in the consultation document is a kind of quid pro quo amounting to bribery. But quid pro quo, i.e. give

and take, is almost a daily business of any government. Quid pro quo in government business may not amount to bribery in its strict sense but, because politics, which is dirty sometimes, comes in, morality is often at stake. To protect government interest, there is good reason for a government to resort to expediency under the pressure of misled public opinion at the expense of an individual's right. The court is more reliable than the government when it comes to administration of justice. The court is not easily swayed by public opinion.

Following the USA model is to make a conflict of interest that is evil a criminal offence, and "deferred reward" for past favour given punishable by law. A mechanism based on law enforcement will also serve as a deterrent. Adopting the USA model will, apart from providing a deterrent, mean trying to substantiate the suspicion by law enforcement, making it fair to all the parties concerned, i.e. the public, the former civil servant and the government. An individual's right to work must not be made subordinate to the decision of the government which is susceptible to sway by politicians and public opinion that, at times, can amount to a smear campaign that serves the purpose of blackening the integrity of the government and, as a side effect, the former civil servant.. Besides, crimes in the civil service, if any, such as "deferred reward", should be dealt with by law, not by politics.

Issue 9: Is the current public disclosure arrangement appropriate?
Please follow the USA model.

Other views
I would like to expand my views on "public perception" which, according to the advice given by the Civil Service Bureau on the net, is one of the criteria that determines whether an application from a former civil servant for taking up a job in the private sector can be approved, but which, strangely, is entirely missing in paragraph 3.28, which is under the heading of assessment criteria, of the consultation document. But the consultation document does put emphasis on "avoidance of suspicion or perception of deferred reward" and the need to "mitigate public concern over potential or perceived conflict of interest". Let's talk about Public perception.

Public perception can be misleading sometimes. I am saying this not because we belong to a race a significant number of which had, as recently as just 40 years ago, positive perception of the treatment given to millions of teachers all over our motherland by their students who, wearing a red band on their arm, sentenced them to kneeling, some of them on broken glass. In those years, Hong Kong did have mixed opinion about that kind of treatment. I will instead use the case of Ms LAW FAN Chiu-fan as an example to explain why "public perception" can sometimes be misleading. FAN LAW Chiu-fan had no choice but to resign from the office of Commissioner of the ICAC amidst negative public perception of what she had said to a few academics while she was Permanent Secretary for Education and Manpower. The academics accused her of intervening academic freedom, and this accusation reduced her integrity to rubbles, so much so that it was considered that a person of such integrity could not be allowed to continue to take the helm at the ICAC. A subsequent judicial review, however, cleared her name, but this does not alter the fact that she has unjustifiably lost her job. This is a classic example of a career unjustly ruined by "public perception". The post of Commissioner, ICAC is a quasi-civil service job, which appears to be irrelevant to the subject of this consultation, which is confined to matters of the civil service. But the cause of her resignation relates to her former job with the Education Bureau. If she can be made subjected to such unjust treatment, any civil servant can face the danger of receiving similar treatment. The government visualised this danger, hence the decision to apply for a judicial review, which was made more for

setting the heart of other civil servants at ease than for clearing her name. The result of this judicial review points to the fact that public perception is an unreliable criterion. An individual's right to work must not be made subordinate to public perception. If public perception is allowed to come in simply because the individual is a former civil servant, it will be an obvious case of unjust discrimination. Statutory law, not public perception, or the fear of bringing the government into disrepute, is a more reliable control mechanism. The government's reputation is up to the government to build, not at the expense of a civil servant's or former civil servant's human rights.

The case of LAW FAN Chiu-fan demonstrates the fact that the government is entirely incapable of defending a civil servant's or a former civil servant's human rights when it comes to public perception. The government of course realises its constitutional duty to propose and draft a bill in pursuance to Article 23 of the Basic Law. But obviously it does not have the guts to do so for fear of negative public perception. If this government puts public perception before its constitutional responsibility, how can it win confidence that it has the ability and the sincerity to defend a civil servant's human rights? No wonder the government is selling the idea that "suspicion" can be made a reason for suppressing human rights. This is going to be an unfortunate reality for civil servants, unless, as in the case of LAW FAN Chiu-fan, the matter is taken to court.

Epilogue

We already have anti-bribery law. I am not qualified to give advice on whether the existing anti-bribery law should be augmented for the purpose of specifically addressing "deferred reward". The consultation document gives little information about the control mechanism in USA, such as how effective it is in comparison with that of, say, New Zealand or France. Albeit the scanty information, it wins my confidence since it is the law, not politics, which calls the shot. If we already have anti-graft law, why should we look to other tools to work out a control mechanism? As regards "periods of restriction" in USA, the consultation document gives the impression that the restriction, categorised into 1-year ban, 2-year ban and life-long ban on certain activities, only applies to a narrow band of the civil service. And the bans do allow some flexibility, such as the freedom to provide "behind-the scenes" assistance to the new employer. HK should work out a band based on the one in USA before consideration is given to the question of whether a bill is required to augment the existing anti-graft law.

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