

18 April 2009

Dear Ron,

I welcome this opportunity to contribute to the discussion. Preservation of an apolitical civil service with a commitment to excellence and the highest levels of integrity are fundamental to public trust in good governance.

Before commenting further, I should declare my own interest. I am a retired civil servant, subject to the 'old arrangement' described in para. 10 of Annex B to your Consultation Document. I have been given approval to accept post-retirement employment, am working, but am still within the control period.

The Case for a Wider Review

Your Committee's terms of reference do not extend to Principal Officials. That is unfortunate and, in my view, misguided. Amendments to arrangements over the last few years have resulted in a number of discrepancies and inequities. It would be opportune to correct them. More fundamentally, in line with Hong Kong's constitutional development, it is the Principal Officials, not civil servants, who now sit in the Executive Council, who are privy to and participate directly in the most sensitive deliberations of Government policy-making, and who are ultimately responsible for the exercise of discretion in the execution of policy. Any review aimed at enhancing public trust, good governance, and the integrity and impartiality of the civil service should start with their political masters and arrangements for the latter's post-public service employment. The public interest and equity demand that arrangements for both be mutually consistent and reinforcing. Currently they are neither.

While Principal Officials, and more recently other political appointees, are expected to seek the advice of a Committee on Post-departure Employment, they are not bound to follow the advice given. Nor indeed does the Government have any means of enforcing that advice, or sanctioning those who fail to heed it. Compare and contrast the already strict system and sanctions applicable to permanent and pensionable civil servants.

In fairness, it must be noted that the Government's switch away from pensionable employment terms since 1 June 2000 will considerably reduce the efficacy of such sanctions. This reinforces the argument for a fresh look at arrangements that takes account of both the advent of political appointments and the abolition of pensionable terms of service for civil servants.

One further discrepancy deserves mention and this relates to the suspension of payment of pensions to civil servants who accept employment with certain subvented organizations (Annex E to the Consultation Document refers). The justification normally cited for suspension of pension, as with civil servants who are occasionally re-employed on agreement terms following formal retirement, is that it is inappropriate that a pension and a salary be simultaneously paid from the public purse. However, in the case of a number of civil servants who have retired in order to take up the post of Principal Official, this same logic is deemed not to apply. That may be expedient, but it is clearly a nonsense. Again, this underlines the need for a wider review.

My comments on specific issues on which you sought views are set out in the attached Annex, but as the Irish farmer advised the stranded American tourists, "If I were you, I wouldn't be starting from here!" My starting point is that the current arrangements are out-dated and inappropriate to Hong Kong's changed and changing circumstances. My firm conviction is that your starting point should be those changed circumstances as outlined below.

Outlines of a New System

Potential conflicts of interest are not unique to Hong Kong's public sector, nor indeed are they limited to the public sector. Sensible practical arrangements have been devised elsewhere in the world for public and private sector alike. I am grateful to you and your colleagues for setting out several examples from other jurisdictions in more detail and with greater accuracy than was the case with the last consultation. The examples given differ in detail, but their common denominators provide a useful guide as to how we might move forward. In particular:

- (i) none of them prohibits civil servants from post-retirement employment;
- (ii) most in fact encourage it and take for granted a greater degree of inter-change between government and the private sector than has historically been the case in Hong Kong;

- (iii) most focus on potential conflicts created by particular activity rather than employment in the private sector per se;
- (iv) most are designed to prevent egregious abuse rather than unduly to fetter the rights of a particular group;
- (v) most appear relatively efficient and un-bureaucratic to operate;
- (vi) all rely on statutory controls to prevent either the release or the misuse of privileged information; and
- (vii) all but one provide no public disclosure of post-service employment; the one exception, UK, discloses information in respect of only the most senior grades of civil servant.

In essence, the examples you cite are all honour systems. They take for granted that the majority of civil servants will behave sensibly after leaving public office. I believe that Hong Kong should do the same. My comments at Annex should thus be read in conjunction with the key elements described above. In addition I offer four more general observations.

General Observations

My first observation relates to public perception. Hong Kong prides itself on being a community in which the Rule of Law prevails. A key principle of that Rule of Law is a presumption of innocence. It is regrettable that in an earlier review, a previously simple concept of conflict of interest was elaborated into a "real, potential or perceived conflict of interest". The addition of "imagined" could hardly have widened the net further. However, in the furor generated by Mr Leung's case, the idea has been given an added temporal dimension in the form of a "suspicion or perception over 'deferred reward'", and here I am quoting your words from 5.31(a). That is not merely regrettable. That overturns presumption of innocence for a whole class of individuals, i.e. directorate grade civil servants, on the grounds of a suspicion in advance of a potential guilt. That is repugnant.

My second observation relates to erosion of terms of service. There has been some public commentary to the effect that it is alright if retired civil servants work pro bono, but they should not be allowed to accept gainful employment in addition to receiving a pension. Indeed, former senior government officers who have publicly announced that they will only work pro bono have been cited as deserving of particular praise. I detect here the tyrannical voice of political correctness. Whether to work for a wage or a whimsey is a matter of personal choice. Civil servants employed on pensionable

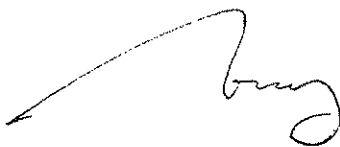
terms accepted a contract for deferred payment of a significant portion of their salaries in exchange for loyalty. That was well understood by both parties. However, it was never part of that contract that they could not seek gainful employment post-retirement. Rather the presumption was that they could, if they so wished, subject to conditions that have been progressively "refined". Refinements introduced post-1997 are arguably already contrary to both the spirit and the letter the relevant provisions of the Basic Law. It would, in my view, be unwise to do them further violence.

My third observation concerns age discrimination. Hong Kong has inherited a system under which civil servants must retire at the age of 60, though they may retire earlier. By international standards that is relatively young. To add to that requirement an effective ban on future gainful employment would not only deny the community access to talent and experience, but would also disadvantage all civil servants relative to other members of the community.

My final remarks respond to the suggestion that private sector only offers jobs to retired civil servants as a reward for past favours, or because they can fix things, or other improper motives. Such arguments are politically self-serving. Your own figures demonstrate how few retired civil servants apply to go back to work. A little more research would demonstrate that their performance thereafter has been mixed. Behind both phenomena lies the simple fact that, in a competitive environment, the private sector cannot afford to hire fools or retain the incompetent. Nor, I submit, would most wish to hire those whose integrity they knew to be suspect.

Thank you again for the opportunity to comment. It has been my experience that crises provide the best opportunity for positive change. I trust that you and your colleagues will seize this one.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tony Miller', with a long, sweeping underline that extends to the left.

Tony Miller

Responses to Individual Issues Raised
NB To be read in conjunction with covering letter

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?

What should be recognized is that protection of individual rights demands that extreme care be exercised in delineating public interest whenever and wherever the two conflict. Thus a control regime should be designed to deal with egregious behaviour and not penalize the majority simply because it is feared a minority may misbehave.

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?**

The current policy objective has fallen into the trap of thinking evil of all. Including (a) would fall further into the trap. Including (b), while seeking to redress the balance, does not change its fundamentally negative approach. I would prefer a policy objective based on a presumption of innocence. I would also prefer that it take a positive approach to the useful deployment of all talent in the community at every stage of life.

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 organizations for retired civil servants in receipt of monthly pension payments?**

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

(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?

It should be clear from my covering letter that I consider the existing regime unduly restrictive, inefficient and inappropriate to Hong Kong's changing constitutional circumstances. Against that background, the proposal at (a) is nonsense and a contravention of human rights. As regards (b) and (c), I firmly believe that the focus should be on "activity" and not "employment" per se. Both the US and the Australian models provide good examples of how this tailored approach can be made to work effectively to the benefit of the community as a whole. Having said this, I accept as a general principle that there should be less need to impose conditions on more junior directorate officers.

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?

No. Again the system should be based on a presumption of innocence, backed by statutory controls on the release or misuse of privileged information and rigorous enforcement of anti-corruption legislation.

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?

As set out in my covering letter and further elaborated above, I do not consider the current system appropriate. Indeed I am concerned that, far from mitigating public concern over potential or perceived conflicts of interest, the most recent changes to the system have encouraged the notion that public suspicion, as opposed to public interest, is more important than individual rights.

I also remain concerned that civil servants are treated more stringently than political appointees. Increasingly, the exercise of political judgment and the use of discretion in administering individual cases will fall to them rather than career civil servants. It is imperative that arrangements for their post-service employment be clarified before any further tinkering with arrangements for civil servants be initiated.

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?

I have no strong view on this. Over the long run, I believe that the Committee has served the community well. However, if we were to move closer to, for example, the Australian model, then it might be more appropriate for the Committee to move towards an appeal function in relation to decisions taken by Human Resource Managers in the civil service.

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

As mentioned in my covering letter, the current position is anomalous. Why should the pensions of civil servants taking up employment in certain subvented organizations be suspended, when the same does not apply to those taking up political appointments? Once a pension has been earned, it should be paid. That is how contracts are supposed to operate. If an individual chooses, following retirement, to serve the community in another way, whether in business or an organization paid for from the public purse, he or she should be free to do so without penalty.

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

Generally speaking, yes. However, they will gradually cease to be relevant as fewer and fewer directorate officers will serve on pensionable terms. A more appropriate question would be how to address this fact.

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?

I would object to both. Such disclosure might feed public prurience; it would do nothing to improve the system. I would advocate something closer to the UK's system.

Ends