

PENSIONABLE OVERSEAS PUBLIC SERVANTS ASSOCIATION

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

15th April 2009

Dear Members of the Review Committee,

**Response from the Pensionable Overseas Public Servants Association to  
the Public Consultation on Review of Post-Service Outside Work for  
Directorate Civil Servants.**

We fully support the policy to deter and deal with corruption, conflict of interest or transfer of benefits. This is essential to maintain the integrity of the public service as a whole and to sustain public trust in the institutions and people that serve them. Everyone taking up public office recognizes the need for such measures. Those in the directorate of the civil service and those holding political office have a particular responsibility to set an example themselves and to safeguard the public service from damage.

The public interest is best served by schemes that are clearly lawful. To do otherwise is to weaken confidence and trust in the commitment of Government and society to the rule of law, the bedrock of Hong Kong's success.

The right to work is part of the structure of a decent society. It is set out unambiguously in Article 33 of the Basic Law and underlined by Article 39's application of provisions of international covenants to Hong Kong and prohibition of restrictions that contravene such covenants. Any derogation from this right should be carefully considered and justified on an individual basis.

The current regime of control on post service employment provides general, across the board derogation from the right to work, imposing

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blanket and arbitrary constraints on every directorate officer, rather than presuming that there is a right to work that can only be infringed where there is clear justification with respect to a particular officer.

We adamantly disagree with the current regime. It is based on administratively convenient arrangements, driven by extraneous considerations, at the expense of proper consideration of individual cases. It undermines the rights of individuals without proper process. As such we believe the current arrangements to be unlawful.

In 2005, in response to the last review, our association proposed: -

**First**, there should be a presumption that any officer on retirement may seek employment, subject to such conditions that the Government may impose on an individual basis. The reasons for such conditions should be made known to the officer as he/she prepares for retirement. They should be clear, limited and reasonable, arising from the nature and facts of the officer's employment in the two years prior to leaving the service.

**Second**, there should be a simple system for an officer who has been advised of conditions before leaving the service to notify the Government of an intention to take up employment. Government should respond to that notification within one month if it is of the opinion that the employment would breach the conditions specified for that officer.

**Third**, there should be no restrictions on a blanket basis. All cases should be considered on their merits. There is no basis to restrict officers generally from taking up employment offers during final leave or during an arbitrary period thereafter.

We do not see any reason to change this recommendation.

We note from Chapter 4 of the consultation paper that similar approaches have been adopted in several other jurisdictions. We also note that the existing regime in Hong Kong is already the most restrictive of any jurisdiction covered by the survey. Hong Kong is also exceptional in applying tighter restrictions on permanent civil servants than on appointees to political office.

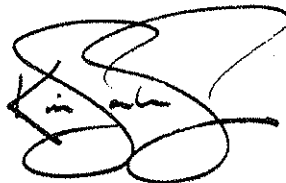
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We have previously raised concern that past tightening of restrictions contravened the written assurances given to civil servants in 1984 by the then Chief Secretary that 'terms of employment will not be changed to the detriment of serving officers'. We would again like to bring this concern to the attention of the Review Committee.

We point out that the number of cases in which there has been public complaint over the years is minimal. Indeed, the evidence provides ground for thinking that the existing restrictions are deterring people from continuing to put their experience and talents to work to the benefit of the community.

We note that the recommended approach would have the added benefit of removing the grounds for unfavourable comparison being drawn between the level of control exercised over one class of public officers – civil servants – and the relative freedom accorded to another class – appointed officials.

*Yours sincerely*

A handwritten signature in black ink, appearing to read 'K.A. Salkeld', with a large, stylized flourish extending from the end of the signature.

(K.A.Salkeld)  
Chairman  
Pensionable Overseas Public Servants  
Association

With **Annex** of responses to issues raised in the consultation paper.

**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?**

We have set out our view in our covering letter. Protecting the public interest requires the protection of individual rights and durable safeguard of each individual's rights requires each individual to exercise his rights responsibly with respect to each other individual (collectively the public). A control regime that undermines individual rights in the name of an undefined or poorly conceived idea of public interest (and we do not find the discussion in 2.02 to 2.07 of the paper particularly clear) is, we submit, incompatible with the public interest.

**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?**

1. We do not think the current policy objective is appropriate. The introduction of 'negative public perception' as a factor that decision makers have to take account of creates an endless and unresolvable tension. Who is the arbiter of 'negative public perception'? Any decision now can be condemned for failing to take public perception into account even if there has been no real or potential conflict of interest.

2. The current policy objective as set out in the consultation paper gives no guidance to those applying it, or those monitoring its application, as to how to balance the different strands of the policy, protecting public interest or protecting individual rights to work. The terms 'appropriate balance' and 'This right [to work], though not absolute, should not be unduly restricted' provide no meaningful guidance and tend to promote confusion rather than clarity, consistency and legality.

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3. We suggest that the objective of the post service employment control regime could best be simply and clearly stated as follows:

*“To ensure that a directorate civil servant on final leave or after leaving the service will not take up work outside the civil service which will constitute a real or potential conflict of interest with their former duties to government and public”.*

This puts the focus on what can reasonably be judged, on what is the real basis for public concern and on what is the only basis on which the right to work can properly be limited, namely, the prevention of real or potential conflict of interest. The fact that any measures adopted to ensure that the objective is attained have to be reasonable and proportionate to be lawful is part of the guidance that should inform the application of the policy, it ought not to have to be stated in the policy objective itself.

4. Any real occasion of post service employment being offered as a ‘deferred reward’ is a matter for anti-corruption legislation and agencies to deal with. Suspicions and perceptions are a pervasive undercurrent of human nature but cannot be given sanction by being recognized as acceptable considerations in public policy without detriment to everyone. What might give rise to suspicion and perception cannot be determined on any reasonable or consistent basis. Only the particular duties of each individual officer provide a firm basis for policy in this matter.

5. The right to work should be taken as a fundamental presumption. Also, the need to maintain the attractiveness of the civil service as a career provides part of the general context within which the control scheme should be operated.

6. The statistics contained in the report make it abundantly clear that post service employment where there is real or potential conflict of interest is not a serious problem. Only a small fraction of retiring directorate officers now seek post service employment at all, of whom only a small proportion seek paid employment in commercial entities. Most applications to do so are approved.

7. While we consider that the issue of public perception is important because of the effect it has on public trust, the facts:

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- a) do not suggest that this is a matter to which an appropriate and efficient response is to increase the controls on all directorate level civil servants; but
- b) do suggest that the current regime is already both too onerous and too imprecise, acting as a general deterrent to use of skills and talents by ex-directorate officers for the benefit of society while at the same time failing to deal with the perceived problem of suspicion and complaint about particular public officers.

8. The quality of the public service depends in large measure on the manner in which it is managed. Actions need to be considered with a view to their effect, over time, on the character and capacity of the individuals and institutions that they influence. A recent individual case may have provoked some public demand for a reaction, but adding further general restrictions to the post service employment control regime for all officers would be ill judged. Account needs to be taken of other matters that are important to maintaining the public interest:

- a) the control regime was reviewed and significantly tightened as recently as January 2006, with the intent of addressing the kind of concern raised by the case cited in para.1.02 of the consultation paper. The fact that the control regime is under scrutiny again so soon gives reason to ask whether the changes then made were properly conceived;
- b) it is public policy to encourage talent to enter the public service, sometimes directly at senior level. Such a policy is ill served by broad-brush restrictions on post service employment;
- c) it is often to Hong Kong's benefit if former civil servants move on to employment in international organizations and other positions that reflect that quality of the public service here and give opportunity for Hong Kong's interests to be more widely understood and respected;
- d) retirement ages are relatively low in Hong Kong, especially for the disciplined services. There are frequent instances of

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directorates officers leaving the service before these ages are reached. General restraint on the ability of officers leaving the service to seek further employment may be damaging to individuals and cause loss to society;

- e) point d) is of particular relevance to professional officers who possess skills and experience that can continue to be put to good use for their profession and to the benefit of the community for long after their retirement but who, because of their specialization, are less likely to seek or be considered for employment in other fields;
- f) the responsibilities of directorate officers that may give rise to potential for public concern about conflict of interest vary greatly depending on rank and particular position held. It is most inappropriate to consider the kind of conditions that may need to be applied to a senior directorate officer who, for example, has been intimately connected with major contracts, as being suitable to apply to a junior directorate officer in the police or other department whose principal duty has been to uphold established law and policy;
- g) following from f), we think that as a general principle management should be more careful about applying conditions to more junior directorate officers;
- h) within the foreseeable future no civil servant will be serving on pensionable terms. This will have extensive influence on the considerations of individual officers and on the effectiveness of the existing control regime; and
- i) it is not easy to justify why the control regime applied to appointed public officials is less restrictive than that applied to permanent civil servants.

9. We note from Chapter 4 of the consultation paper that Australia and New Zealand have already implemented approaches to post service employment control based on individual agreements between civil servants and their employers. Canada has a general presumption against employment

by certain public officers (mostly political appointees rather than permanent civil servants) but allows individuals to apply for a waiver.

10. Hong Kong already appears to have the most restrictive general regime. It should be kept in mind that this regime is being imposed over the top of civil service regulations, anti-corruption legislation (together with a dedicated enforcement agency), clear law against disclosure of secrets, a vigorous media and an alert legislature.

**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?**

We have set out our recommendations in the covering letter. The current system of blanket restrictions is wholly inappropriate and should not be further extended. With respect to pensions, please see our response to Issue 7 below.

Given the highly varied nature of the work of different directorate officers, any general scheme applied to all is simply a bureaucratic exercise that in most cases will be inappropriate and unnecessary. Conditions should be tailored to particular individuals, given the work they have actually performed. As a general rule 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?**

To operate the alternative regime that we have proposed it will be necessary for management to maintain record of the matters with which a directorate officer has had dealings prior to retirement that may require conditions to be imposed on post service employment. This would form the basis for the issue of conditions to that officer. In case of any enquiry, this record would be available to the Government to assist in giving answer.

We note that it is not the practice in other jurisdictions to make public disclosure of all employment taken up by former civil servants.

**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?**

We do not consider the current regime appropriate, for reasons given above. Clearly the current regime is incapable of addressing and mitigating public concern over potential or perceived conflicts of interest – as evidenced by the case that has led to this review.

We are also concerned that civil servants are generally being treated more stringently than the political appointees who will more often be the persons making the decisions that may give rise to public concern over potential conflicts of interest. Civil servants are required to act within the remit of policies laid down by the Executive. They have to ensure that their decisions are consistent with those policies and with the law. There are clear procedures and penalties for failure to act in line with established policy and law. The justification for any greater control over post service employment of civil servants as compared with political appointees is unclear.

**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?**

We have no particular views on this. It may be considered in the context of the recommendation made in our covering letter for an entirely new approach to managing post service employment. If such an approach is adopted, the role of the Advisory Committee might best change to monitoring the imposition of conditions by the civil service management and, perhaps, acting as a point of appeal if an officer felt that unnecessary conditions were being placed on him/her.

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

Given changes to the terms of employment, in due course this will not be an issue since no civil servants will be serving on pensionable terms. In the interim, we question the justification for suspending pension for civil servants taking up employment in certain subvented organizations. Pensions, like contract gratuities, are a right earned by service before retirement. This is explicit in the pension legislation. We do not see reasonable grounds on which pension should be suspended simply for taking up paid employment after retirement. Similar suspension does not appear to apply to persons who have held political appointments.

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

We do not have any comment on the existing sanctions, other than to note again that they cease to be relevant when directorate officers cease to serve on pensionable terms.

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**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?**

We note that Hong Kong's disclosure arrangements are already much wider than other jurisdictions. We would not propose any further increase in disclosure.

