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(These minutes have been
seen by the Administration)

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Panel on Welfare Services

**Subcommittee to study issues relating to the Comprehensive Social
Security Assistance and Social Security Allowance Schemes**

**Minutes of meeting
held on Monday, 2 February 2004 at 4:30 pm
in Conference Room B of the Legislative Council Building**

Members present : Hon LEE Cheuk-yan (Chairman)
Hon Cyd HO Sau-lan
Hon LEUNG Yiu-chung
Dr Hon LAW Chi-kwong, JP
Hon LI Fung-ying, JP
Hon Michael MAK Kwok-fung
Hon WONG Sing-chi

Member absent : Hon CHAN Yuen-han, JP

Public Officers attending : Mr Paul TANG, JP
Director of Social Welfare

Mrs Agnes Allcock, JP
Deputy Director of Social Welfare (Administration)

Mrs Rachel Cartland, JP
Assistant Director of Social Welfare (Social Security)

Mr LAI Shiu-bor
Chief Social Security Officer (Social Security)²
Social Welfare Department

Mr James O'Neil
Deputy Solicitor General (Constitutional)
Department of Justice

Miss Amy CHAN
Senior Government Counsel
Department of Justice

Miss M L WONG
Assistant Secretary for Health, Welfare and Food (Elderly
Services)⁴

Clerk in attendance : Miss Mary SO
Chief Council Secretary (2) 4

Staff in attendance : Mr LEE Yu-sung
Senior Assistant Legal Adviser 1

Miss Millie WONG
Senior Council Secretary (2) 4

I. Confirmation of minutes
(LC Paper No. CB(2)1152/03-04)

The minutes of meeting held on 2 January 2004 were confirmed.

II. Compliance of the seven-year residence requirements for Comprehensive Social Security Assistance and Social Security Allowance with the Basic Law
(LC Paper No. CB(2)1063/03-04(01))

2. At the invitation of the Chairman, Deputy Solicitor General (Constitutional)

(DSG(C)) took members through the above Administration's paper which provided additional information on the legality of the new residence requirement for Comprehensive Social Security Assistance and Social Security Allowance (hereinafter called social security benefits) effective from 1 January 2004.

3. Dr LAW Chi-kwong opined that the reason why the Administration did not make any distinction between permanent and non-permanent residents as an eligibility criterion for social security benefits was to avoid contravening Article 36 of the Basic Law which provided that every Hong Kong resident should have equal right to social welfare. Nevertheless, making length of residence as one of the eligibility criteria for social security benefits was discriminatory and thus violated the spirit and the substance of that Article. Dr LAW pointed out that people who came to Hong Kong under the Certificate of Entitlement (CoE) scheme were mostly under 18, whereas people who came to Hong Kong without a CoE were mostly 18 and above. Under the seven-year residence requirements for social security benefits, persons under 18, regardless of whether they had a CoE, would be exempted from any prior residence requirement when applying for these benefits. This however was not the case for people aged 18 and above and who also came to Hong Kong under the CoE scheme. They would still need to satisfy the seven-year residence requirements before they could be eligible for social security benefits. As residing in Hong Kong for a continuous period of not less than seven years was the requirement for acquiring permanent resident status under Article 24(2) and (4) of the Basic Law, seven years' residence requirement was therefore an important determinant of permanent resident status. To require new arrivals aged 18 and above to reside in Hong Kong for seven years before they could be eligible for social security benefits had in effect made a distinction between permanent and non-permanent residents as an eligibility criterion for these benefits.

4. DSG(C) responded that it was a well established legal principle that differences in treatment did not constitute discrimination, provided that there was reasonable and objective justification for such differences and that the measures adopted were rational and proportionate for the pursuit of a legitimate aim. As explained in paragraphs 9 and 11 of the Administration's paper, the purpose of the new residence requirement was for the pursuit of a legitimate aim and that there were reasonable and objective justifications for extending the previous one year residence requirement for social security benefits. It was therefore concluded that the new seven-year residence requirement did not result in unlawful discrimination under any circumstances.

5. Senior Assistant Legal Adviser 1 (SALA1) advised that Article 24 of the Basic Law provided, amongst others, that Hong Kong residents should include permanent residents and non-permanent residents of the Hong Kong Special

Administrative Region (HKSAR).

6. DSG(C) responded that there was no dispute as to what was mentioned by SALA1 in paragraph 5 above. DSG(C) however stressed that the distinction which was made was not as between permanent and non-permanent residents, and Article 24 of the Basic Law had no bearing on the rationality behind the residence requirements for social security benefits. As mentioned in paragraph 11(5) of the Administration's paper, even for those persons who had acquired permanent residence by status at birth under Article 24(2)(3) of the Basic Law and who had come to Hong Kong under the CoE scheme, they still had to satisfy the new residence requirements before they could be eligible for social security benefits.

7. Ms Cyd HO said that although the Committee on Economic, Social and Cultural Rights (CESCR) allowed a State party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), when discharging its obligation under Article 9 of the Covenant, to take into account the resource constraints of the place concerned, nowhere in that Article allowed a State party to introduce discriminatory measure on the grounds of resource constraints. Article 9 of the ICESCR provided that "The States Parties to the present Covenant recognize the right of everyone to social security". In her view, the Administration should adjust the levels of social security benefits under budgetary constraints, instead of introducing discriminatory measure against a particular group of people in order to save money. Ms HO further said that the imposition of the seven-year residence requirement as one of the eligibility criteria for social security benefits appeared to infringe paragraph 2 of Article 2 of the ICESCR which prohibited a State party to implement any measure which would deprive its people from social rights on the basis of national or social origin, amongst others. Paragraph 2 of Article 2 of the ICESCR provided that "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

8. DSG(C) responded that there was no question of the seven-year residence requirement having any unfair discrimination on the basis of race, gender or any other bases, for the reasons already given in paragraph 4 above and as explained in the paragraphs 9 and 11 of the Administration's paper.

9. Ms Cyd HO remarked that notwithstanding the various justifications given by the Administration for the imposition of the seven-year residence requirements for social security benefits, the policy was nevertheless discriminatory in its according different treatments to different people. Responding to Ms HO's enquiry on the meaning of "other status" in paragraph 2 of Article 2 of the ICESCR, SALA1 advised that according to the usual rules of statutory

interpretation, it would usually mean status similar in nature to the status mentioned in the preceding part of the sentence. SALA1 however pointed out that interpreting the provisions of an international covenant with rules of statutory interpretation might not always be appropriate. SALA1 further said that the scope of "social welfare" referred to in Article 36 of the Basic Law was not defined. What would be the social welfare that residents were entitled to could be a range of other services instead of merely CSSA.

10. Noting that the purpose of the new residence requirement was based on the Report of the Task Force on Population Policy, Ms Cyd HO enquired about the definition of "transient population" referred to in paragraph 5.2 of the Report. Ms HO hoped that people who had not resided in Hong Kong for seven years would not be treated as "transient population", having regard to paragraph 3 of Article 2 of the ICESCR which provided that "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals".

11. DSG(C) assured members that the right of both permanent and non-permanent residents of Hong Kong to social welfare was guaranteed under Article 36 of the Basic Law. Article 36, however, would not apply to people who were not qualified to obtain Hong Kong Identity Cards, such as those in transit through Hong Kong who were not staying more than 180 days. DSG(C) further said that although he did not know the definition of "transient population" used in the Report of the Task Force on Population Policy, he surmised that it referred to people such as foreign domestic helpers and migrant workers, who although were in Hong Kong for a period on a work contract, the period of their stay nevertheless qualified them to obtain Hong Kong Identity Cards.

12. Ms Cyd HO explained that the reason why she had the concern that people who had not resided in Hong Kong for seven years might be considered transient population and thus would be deprived of their right to social welfare was because members were told by the Administration at the last meeting that it would not waive a new arrival of the residence requirement if the person concerned could return to his/her place of origin. Director of Social Welfare (DSW) responded that the decision on whether or not to waive a new arrival of the residence requirement was based on whether he/she was in genuine hardship. In considering an application for waiver, consideration would be given, amongst others, as to whether it was the best option for the person concerned to return to his/her place of origin.

13. Mr LEUNG Yiu-chung expressed concern that if the Administration could introduce discriminatory measures, such as making length of residence as an

eligibility criterion for social security benefits, on the grounds of budgetary constraints, it could always use the same justification to introduce similar measures on other subsidised public services such as education.

14. DSW responded that it was the established practice of the Administration to conduct wide public consultation before making any changes to the eligibility criteria for subsidised public services. For instance, the new residence requirements for social security benefits had undergone thorough public consultation and had been approved by the Finance Committee.

15. Dr LAW Chi-kwong said that as there was nothing in the existing legislation demarcating Hong Kong residents on the length of their residence in Hong Kong, it was questionable whether the seven-year residence requirements for social security benefits was lawful having regard to Article 36 of the Basic Law which provided that "Hong Kong residents shall have the right to social welfare in accordance with law". Mr LEUNG Yiu-chung echoed Dr LAW's views.

16. DSG(C) responded that the right guaranteed under Article 36 of the Basic Law was not absolute, and could be subject to certain restrictions, say, for the promotion of the general welfare of a democratic society under the ICESCR. DSG(C) further said that Article 145 of the Basic Law provided that the HKSAR Government could, on its own, formulate policies on the development and improvement of the previous social welfare system in the light of the economic conditions and social needs. Not only was the present social security system in place before the coming in force of the Basic Law, so was the residence rule. The revision of the eligibility criteria was one of the measures adopted to secure the long-term sustainability of the social security system according to the needs of the community as a whole. Based on the aforesaid, there was no question that the imposition of the new residence requirements might be regarded as being not in conformity with the Basic Law or failing to comply with the obligation of the HKSAR Government under the ICESCR.

17. Dr LAW Chi-kwong said that the Administration had not answered his question on the legality of demarcating Hong Kong residents on the length of their residence in Hong Kong. Dr LAW pointed out that the reason why the Administration enacted law to reduce civil service pay was because there was nothing in the existing legislation allowing such. The Chairman shared Dr LAW's view, and queried whether making the eligibility criteria for social security benefits stricter could be said to be an improvement.

18. DSG(C) responded that different people might have different views on whether the new residence rule was an improvement. There was however no

question that the new measure was a development in the context of Article 145 of the Basic Law, having regard to the fact that the purpose of such was to secure the long-term sustainability of the social security system and the need for a rational basis on which public resources could be allocated in the light of fiscal constraints and ever-rising demands. A similar point was made by CESCR in its General Comment No 3 (5th session, 1990), at paragraph 10, which stated that State Parties were under a minimum core obligation to ensure the satisfaction of the minimum essential levels of each of the rights provided for under the Covenant although the resource constraints of the State concerned needed to be taken into account in assessing the discharge of such obligation.

19. The Chairman enquired about the reason(s) for the words "in accordance with law" in Article 36 of the Basic Law, having regard to the fact that the provision of social welfare was not established by law and was an administrative arrangement. In response, DSG(C) said that he was not in a position to give a definitive response but would need to conduct research on the matter.

20. SALA1 advised that the words "in accordance with law" in Article 36 of the Basic Law might mean statute law, common law and other laws applicable in Hong Kong. SALA1 also pointed out that as social security system in Hong Kong was not statute based and was an administrative scheme, "in accordance with law" under Article 36 might also mean that the application and processing would be governed by the relevant laws.

21. Dr LAW Chi-kwong was of the view that in order to comply with the expression "in accordance with law" under Article 36 of the Basic Law, no measure adopted for the development of the social welfare system should violate the ICESCR. Regrettably, the imposition of the new residence requirements was in breach of paragraph 2 of Article 2 of the ICESCR in that it was made explicitly clear in that Article that no State Parties should adopt any measure which discriminated people on the basis of national or social origin, amongst others.

22. DSG(C) responded that the social security system in Hong Kong had never been subject to an ordinance, and had always been an administrative scheme. As such, the social security system was subject to the general legal principles that applied to administrative law, such as whether the system was administered fairly and reasonably. For instance, there was scope for appeal under the social security system. If people disagreed with the decision of the appeal board, they could seek judicial review from the court. Moreover, the system was subject to the relevant restraints under the administrative law. As mentioned earlier at the meeting, the social security system had been in place before the coming in force of the Basic Law. Under Article 145 of the Basic Law, the HKSAR Government could formulate policies on the development and improvement of the previous

social welfare system in the light of the economic conditions and social needs. In adopting the new residence requirement, due consideration had been given to ensuring that a very fine balance between the interests of various sectors of the community and the long-term sustainability of the social services with limited financial resources was struck. As far as differences in treatment were concerned, DSG(C) reiterated that it was a well established legal principle that such did not constitute discrimination if it could be showed that they were reasonable, there were objective justifications for such differences in treatment, and that the measures adopted were rational and proportionate for achieving a legitimate aim. DSG(C) stressed that the new residence requirement did not discriminate a person on the basis of his/her place of origin or birth. Making a distinction for social security benefits based on the length of stay in Hong Kong was an acceptable distinction under the ICESCR.

23. Ms Cyd HO maintained her view that the new residence requirement was discriminatory. Ms HO pointed out that not only was the new policy in breach of Article 36 of the Basic Law, it was also in breach of Article 39 of the same which provided that "The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article". In the light of this, Ms HO requested the Administration to provide a paper on whether the new residence requirement was in conformity with Article 39 of the Basic Law as well as all the provisions of the ICESCR. The Chairman also requested SALA1 to provide a paper on the meaning of "in accordance with law" in Article 36 of the Basic Law.

Admin

SALA1

24. Members agreed to hold another meeting on 8 March 2004 at 4:30 pm to discuss the two papers mentioned in paragraph 23 above.

(Post-meeting note : The above meeting was subsequently changed to 10 March 2004 at 10:45 am).

25. There being no other business, the meeting ended at 5:48 pm.