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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 Wednesday, 10 March 2004 at 10:45 am
in Conference Room B of the Legislative Council Building**

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

Public Officers attending : Mrs Agnes Allcock, JP
Deputy Director of Social Welfare (Administration)

Mrs Brenda FUNG
Principal Assistant Secretary for Health, Welfare and Food
(Elderly Services)

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

Miss Cecilla LI
Chief Social Work Officer (Family and Child Welfare) 1
Social Welfare Department

Mrs SO WONG Wei-yee
Chief Social Work Officer (Domestic Violence)
Social Welfare Department

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

Miss Amy CHAN
Senior Government Counsel, Department of Justice

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. Continue discussion on the compliance of the seven-year residence requirements for Comprehensive Social Security Assistance and Social Security Allowance with the Basic Law and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong (LC Paper Nos. CB(2)1616/03-04(01) to (03) and LS55/03-04)

Compliance of the seven-year residence requirements for Comprehensive Social Security Assistance and Social Security Allowance with the Basic Law

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

(DSG(C)) took members through the Administration's paper (LC Paper No. CB(2)1616/03-04(01)) which provided additional information regarding the legality of the revised residence requirement for Comprehensive Social Security Assistance (CSSA) and Social Security Allowance (SSA) (hereinafter called social security benefits) as requested by members at the meeting of the Subcommittee held on 2 February 2004.

2. Ms Cyd HO asked whether other social welfare benefits providing cash assistance to the needy were also not provided or regulated under statutory provisions as in the case of social security benefits. Ms HO pointed out that contrary to the social security benefits, the emergency relief fund was provided by statute, i.e. the Emergency Relief Fund Ordinance (Cap. 1103). However, similar to the social security benefits, the eligibility criteria of the emergency relief fund were not prescribed by law.

3. DSG(C) responded that some social welfare services and benefits were provided under statutory provisions, whereas others were provided by administrative measures, and together they made up what could be said to be the "social welfare" under Article 36 of the Basic Law.

4. Assistant Director of Social Welfare (Social Security) (ADSW) said that the emergency relief fund was established on a statutory basis pursuant to a lot of money donated by members of the public for the aid and relief of persons who suffered loss from a typhoon back in the 1960s. On the contrary, social security benefits were provided by administrative measures and policies determined through a series of decisions made by the Executive Council (ExCo) which were never codified into a particular law. As mentioned by the Department of Justice in the Administration's paper, although social security benefits were not provided by statute, such provision could be said to be in accordance with law because these benefits were developed historically through a process that was acceptable as part of the administrative law, i.e. a series of decisions made by ExCo which were well entrenched in a series of policy statements. ADSW further said that the Administration would seek legal advice if it was in doubt on the implementation of a certain new measure or policy. Legal advisers would then look at the general principles of the administrative law in deciding whether the proposed measure or policy was legally acceptable. Theoretically, all decisions made by ExCo pertaining to social security benefits could be opened to judicial review under the normal administrative law principles.

5. The Chairman noted that from the Administration's paper that social security benefits would not be subject to the protection of Article 36 of the Basic Law if a narrow interpretation was to be applied in interpreting that Article. However, if a generous interpretation was to be applied in interpreting the same,

provision of social security benefits did not need to be provided by statute as long as they had some basis in domestic law and could be claimed consistently with the law. In the light of this, the Chairman asked which approach was adopted by the Administration in interpreting the right to social security benefits under Article 36 of the Basic Law. The Chairman also expressed doubt as to whether the adoption of the revised residence requirement for social security benefits was an improvement as referred to in Article 145 of the Basic Law which provided that "On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region (HKSAR) shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs".

6. DSG(C) responded that there was no definitive interpretation from the court because there had not been an issue of litigation. DSG(C) however pointed out that in the Department of Justice's view, there was no question that the system of social security benefits had a basis in domestic law and the system was subject to legal requirements and legal safeguards.

7. On the progressive realisation concept raised by the Chairman in paragraph 5 above, DSG(C) said that this concept was set out in Article 2.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provided that "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". Apart from the explanation given in paragraph 8 of the Administration's paper for the meeting of the Subcommittee on 2 February 2004 (LC Paper No. CB(2)1063/03-04(01)), the Committee on Economic, Social and Cultural Rights (CESCR) had also stated in its General Comments No. 3 that the concept of progressive realisation constituted a recognition of the fact that the full realisation of all economic, social and cultural rights would generally not be able to be achieved within a short period of time. It was on the one hand a necessary flexible device reflecting the reality of the real world and the difficulties involved for any countries in ensuring the full realisation of all economic, social and cultural rights. Retrogressive measures, which required the most careful consideration, needed to be fully justified by reference to the totality of the rights and in the full context of the use of the maximum resources available.

8. DSG(C) further said that there was a relevant case in Chan To Foon & Others v Director of Immigration & Another [2001] 3 HKLRD 109 which Hartmann J took the view that the protection of the rights under ICESCR had to be subject to the existing social difficulties faced by Hong Kong -

"Hong Kong may therefore recognise the rights protected by ICESCR. But they are rights which, having regard to this territory's existing social difficulties, may only be guaranteed progressively; that is, as and when those difficulties are overcome".

It was therefore legitimate for the Administration to take into account the prevailing social and economic circumstances in deciding to impose the new criterion for eligibility for social security benefits. Even if it was accepted that the residence requirement was retrogressive, the Administration had complied with the requirement under Article 2.1 of ICESCR by taking this element into full and careful consideration before introducing the revised residence requirement for social security benefits. Justifications for introducing the residence requirements for social security benefits included to ensure that there was a rational basis on which social resources were allocated, particularly in times of tight fiscal situation when available resources were increasingly limited and demand was continuously rising; it was good policy to encourage migrants to plan for their subsistence before coming to Hong Kong; children under 18 were exempted from any prior residence requirement; and in cases of genuine hardship, the Director of Social Welfare (DSW) might exercise his discretion to exempt such residence requirement.

9. Ms Cyd HO said that although CESCR allowed each State Party to take into account its resource constraints when assessing the discharge of its obligation to ensure the satisfaction of the minimum essential levels of each of the rights provided for under the Covenant, this did not mean that such end could be achieved by a discriminatory mean. In her view, making length of residence in Hong Kong as an eligibility criterion for social security benefits was in breach of Article 2.2 of ICESCR. Article 2.2 of 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". Ms HO also disagreed that social security benefits were not provided by statute, having regard to the fact that annual social security expenditure was allocated by way of an Appropriation Bill passed by the Legislative Council (LegCo).

10. ADSW responded that the fact that annual social security expenditure was allocated by way of an Appropriation Bill passed by LegCo did not mean that social security benefits were provided or regulated under statutory provisions. The reason why annual social security expenditure was included in the Appropriation Bill was because the Financial Secretary was required by the Public Finance Ordinance (Cap. 2) to prepare in each year estimates of the revenue and

expenditure of the Government for the next financial year in the form of such a Bill. Approval would be sought from the Finance Committee of LegCo on any subsequent changes to the amount of money made available to social security after the enactment of the Bill due to a change of policy or amount of money to be spent.

11. Mr Michael MAK opined that imposing a stricter residence requirement for social security benefits was at variance with Article 145 of the Basic Law which provided that the HKSAR Government should formulate policies on the development and improvement of the social welfare system.

12. Deputy Director of Social Welfare (Administration) (DDSW) responded that if one looked at the issue from a wider perspective, the policy of varying the residence requirement was formulated having regard to the overall interest of the community as a whole. That being the case, the new residence requirement was considered a positive development.

13. DSG(C) supplemented that although Article 145 of the Basic Law provided that the HKSAR Government should formulate policies on the development and improvement of the social welfare system, the provisions also stipulated that any such development had to be made in the light of the economic conditions and social needs. The revision of the eligibility criteria was one of the measures adopted to ensure that long term sustainability of the provision of the social welfare benefits according to the needs of the community as a whole.

14. Mr Michael MAK enquired whether consideration would be given to imposing a less stringent residence requirement for social security benefits should the economy fully recover in future. In response, DDSW said that the Task Force on Population Policy recommended in its Report that the implementation of relevant decisions and programmes be reviewed regularly.

Compliance of the seven-year residence requirements for social security benefits with ICESCR as applied to Hong Kong

15. DSG(C) briefed members on the Administration's paper (LC Paper No. CB(2)1616/03-04(02)) which provided additional information on whether the revised residence requirement for social security benefits was in conformity with the provisions of ICESCR as applied to Hong Kong.

16. Dr LAW Chi-kwong was of the view that what CESCR allowed was the use of positive discrimination, such as not allowing a pregnant employee to perform a certain task, to achieve a legitimate aim, and making length of residence in Hong Kong as an eligibility criterion for social security benefits was certainly

not the case.

17. DSG(C) responded that the Administration had followed the jurisprudence laid down by the Court of Appeal in the Association of Expatriate Civil Servants of Hong Kong v Secretary for Civil Service (1996) HKPLR 333 to test whether making length of residence in Hong Kong as an eligibility criterion for social security benefits would amount to discrimination, and the answer was in the negative. As stated by Bokhary JA (as he then was) at 351-2 "Any departure therefrom must be justified. To justify such a departure it must be shown: one, that sensible and fair-minded people would recognise a genuine need for some difference of treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and, three, that such departure is proportionate to such need". It was clear from the principles elicited that not every difference in treatment would amount to discrimination. Discrimination would only take place if persons in analogous situation were treated differently and that the differential treatment had no objective and reasonable justification. DSG(C) further said that such a test was also reflected in the international jurisprudence.

18. ADSW supplemented that the change to the residence requirement was a positive one to achieve a legitimate aim. First of all, under the previous one-year residence requirement, persons born outside Hong Kong who enjoyed the right of abode under Article 24 of the Basic Law had to reside in Hong Kong for at least one year to become eligible for social security benefits. However, under the revised residence requirement, children under 18 were exempted from any prior residence requirement as the Administration considered that children should have access to all the available resources that could be provided as early as possible so that they could develop as well as possible to become contributing members of the society. The Administration also considered the restriction placed on adult new arrivals a positive change to achieve a legitimate aim, as this would avoid an over-reliance on public assistance by new arrivals. The imposition of a seven-year residence requirement would send a clear message to potential migrants that they should plan carefully and ensure that they had sufficient means to support themselves in Hong Kong.

19. Dr LAW Chi-kwong said that he was all for people helping themselves, but to use the reason that people had to become self-reliant to deny them social security was unacceptable. The Chairman added that deterring Mainland spouses to re-unite with their family members in Hong Kong could not be said to bring about a positive change to the existing social security system, as this would result in the creation of more split or single parent families.

20. ADSW responded that many of the new arrivals did have working capacity.

It was good policy for the Government to encourage them to be self-sufficient before resorting to public funds for their subsistence. It was also good policy to encourage migrants wherever they came from to plan for their subsistence before coming to Hong Kong.

21. Mr LEUNG Yiu-chung said that it was wrong to justify the imposition of the seven-year residence requirement solely from a fiscal constraint standpoint, and ignored the needs of people in dire financial situation.

22. ADSW responded that the implementation of the revised residence requirement was not merely to ensure a rational allocation of public resources, and was intended to send a clear message to potential migrants that they should plan carefully and ensure that they had sufficient means to support themselves in Hong Kong. Moreover, the new policy was made in response to the growing public disquiet about the problem of rising social security expenditure. ADSW pointed out that by and large the feedback received to date from the public was that the new measure was a reasonable and rational policy. DDSW stressed that in cases of genuine hardship, DSW might exercise his discretion to exempt a person from the residence requirement. Moreover, social security benefits were not the only form of assistance for new arrivals. Other forms of assistance and support were available to new arrivals regardless of their length of stay in Hong Kong. These included employment support services, emergency relief, grants from charitable trust funds, medical waivers, assistance in kind, referrals to singleton hostels for accommodation and day relief centres for meals.

23. Ms LI Fung-ying said that as a State Party of ICESCR, Hong Kong had the obligation to implement measures gradually to fully realise the rights provided for under ICESCR in Hong Kong. The fact that this was not the case by the imposition of a seven-year residence requirement for social security benefits was a violation of Articles 2.1 and 9 of the Covenant.

24. DSG(C) responded that ICESCR did not set out rights which were required to be implemented immediately but rather listed standards which were to be secured progressively, to the greatest extent possible, having regard to the resources available. There were relevant cases to support such views in CHAN Mei Yee v Director of Immigration HCAL 77/1099 and Mok Chi Hung v Director of Immigration [2001] 2 HKLRD 125. DSG(C) further said that the Administration accepted that it had a duty to consider its obligation under Article 9 of ICESCR in the formulation of social welfare policies. However, the actual realisation of the rights under ICESCR had to be subject to the availability of resources and to the existing social difficulties faced by the territory. It was legitimate for the Government to take into account the prevailing social and economic circumstances (in addition to other policy reasons) in deciding to impose

the new criterion for eligibility for social security benefits.

25. DSG(C) also said that the revised residence requirement would not amount to a restriction on the rights and freedoms enjoyed by Hong Kong residents. It must be borne in mind that changes in the residence requirement were part and parcel of the previous system. The residence criterion under the previous system was first established in 1948 as ten years and reduced in 1959 to five years and subsequently to one year in 1971. If Hong Kong residents had enjoyed rights on the basis of the previous system, then a variation of the benefits made in accordance with the previous system was not a restriction on that right. After the variation, there remained the same right to social security benefits on the basis of the previous system.

Continue discussion on issues raised at the meeting on 26 February 2004

26. Members noted the Administration's written response to a number of issues raised at the last meeting held on 26 February 2004 (LC Paper No. CB(2)1616/03-04(03)).

27. The Chairman enquired about the actions which would be taken by the Social Welfare Department (SWD) in response to the strong request made by some deputations at the last meeting to make the guidelines on granting of waiver of residence requirement for CSSA clearer and to publicise these guidelines.

28. DDSW responded that she had checked the guidelines used by all seven Senior Social Security Officers to waive the residence requirement for CSSA against the guidelines for waiving the same provided to members previously and recapitulated in paragraph 7 of the Administration's written response, and concluded that there were no major differences between them. As the circumstances of each case varied, it was not practicable to develop specific rules for establishing whether a person unable to satisfy the residence rule had genuine hardship. Notwithstanding this, DDSW said that she would be happy to elaborate on the principles adopted by SWD in the exercise of discretion under the CSSA Scheme to waive the residence requirement based on the Administration's past discussions with LegCo Members on the matter in the past year should members consider it useful. DDSW further said that the existence of DSW's discretionary power to waive the residence requirement for CSSA was already widely publicised through the "Guide to CSSA", the pamphlet on CSSA, the leaflet on the residence requirements for CSSA and SSA and the SWD's homepage, etc.

29. Dr LAW Chi-kwong suggested SWD to put up "Frequently asked questions" on its homepage to better help interested parties to understand the

operation of discretion under the CSSA Scheme to waive the seven-year residence rule. DDSW agreed to consider and invited members to put forward questions.

30. The Chairman further sought the Administration's views on the many instances pointed out by some deputations at the last meeting that new arrivals were asked by frontline staff of Social Security Field Units (SSFUs) to borrow money from friends or relatives instead of resorting on CSSA. The Chairman also asked whether SWD would consider making it a standard procedure for frontline SSFU staff to advise applicants or potential applicants who could not satisfy the residence requirement for the first time that the residence requirement might be waived in cases of genuine hardship.

31. DDSW responded that considering the great number of cases being served, coupled with the complexity of the system, it was inevitable that problems might arise occasionally over the handling of some individual cases. Nevertheless, these cases were isolated ones and where necessary, problems were rectified as soon as possible. DDSW further said that the exercise of discretion under the CSSA Scheme to waive the residence requirement was public knowledge. Moreover, potential new arrivals had been and would continue to be apprised of such through the Mainland authorities concerned.

32. ADSW supplemented that it would not be practicable to provide a standard script for frontline SSFU staff to advise all applicants or potential applicants of the exercise of discretion under the CSSA Scheme to waive the residence requirement, amongst others, as the circumstances of each case were different. Furthermore, to do so would put SSFU staff in a difficult position in determining whether such discretion should be exercised. A better approach would be to ensure that all SSFU staff fully understood the principles and guidelines for the exercise of discretion to waive the residence requirement. Having regard to the concerns raised by Kwan Fook and other deputations at the last meeting, staff of SSFUs had been reminded again to give more consideration to battered spouses who could not meet the seven-year residence requirement for CSSA.

33. Mr Michael MAK remarked that the absence of standard script for frontline SSFU staff in handling their clients might be one of the reasons why deserving cases were denied of assistance. To address such, Mr MAK hoped that more detailed guidelines on the exercise of discretion could be provided for frontline SSFU staff.

34. Mr WONG Sing-chi enquired whether there were any measure to ensure that frontline SSFU staff were treating their clients in a courteous, understanding and responsive manner and to provide them with clear and accessible help and information.

35. DDSW responded that SWD attached great importance to the system of management control, whereby staff of SSFUs were constantly guided through operational guidelines and instructions, briefing and sharing sessions, staff training and supervision, internal auditing, etc. to ensure as far as possible that all the cases were properly handled. In particular, frontline SSFU staff were required to undergo a series of training courses in their first three years of employment to strengthen, amongst others, their interview techniques, communication skills, and their understanding of customers' needs and problems. Training in these respects would be further enhanced to tie in with the implementation of the seven-year residence requirement. DDSW however hoped that members would appreciate that the CSSA Scheme was a complex system involving huge Government expenditure and a large clientele. Despite an ever-increasing caseload, there was no corresponding increase in manpower resources. Staff of SSFUs were under extreme pressure and in an unenviable situation. On the one hand, in order to safeguard public funds, it was incumbent upon them to investigate all applications thoroughly to ensure that assistance went to people genuinely in need. On the other hand, staff of SSFUs needed to provide prompt and efficient service for a large number of social security applicants and beneficiaries.

36. Miss CHAN Yuen-han opined that no matter how much training was provided to SSFU staff, as long as the guidelines on waiving the residence requirement for CSSA were unclear, people in dire financial situation would still be denied CSSA for their subsistence on the grounds that they could not satisfy the residence rule. This situation would be aggravated with the implementation of a more stringent residence requirement. In response, DDSW said that SWD would closely monitor the impact of the revised residence requirement including the number of CSSA applications which were rejected because of the applicant's failure to meet the seven-year residence requirement and the reasons for not granting exemption.

Conclusion

37. Members agreed to hold the next meeting on 25 March 2004 at 8:30 am to draw up conclusions and recommendations on the imposition of the seven-year residence requirement for social security benefits.

38. There being no other business, the meeting ended at 12:30 pm.