

## **LEGCO PANEL ON WELFARE SERVICES**

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

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

#### **Purpose**

This paper provides additional information regarding the legality of the new residence requirement for Comprehensive Social Security Assistance (CSSA) and Social Security Allowance (SSA) (together referred to as “social security benefits” in this Paper) effective from 1 January 2004, as requested by Members at the special meeting held on 18 December 2003.

#### **Members’ concern**

2. Some Members have expressed the concern that the new residence requirement, which requires seven years’ residence and one year’s continuous residence immediately before the date of application as eligibility criteria for receiving social security benefits, are inconsistent with the right to social welfare guaranteed under the Basic Law and other international covenants applicable to the Hong Kong Special Administrative Region (“HKSAR”).

#### **The Administration’s response**

3. The Administration takes the view that, for the reasons as explained below, the imposition of the new residence requirement as one of

the criteria for eligibility to social security benefits is in conformity with the human rights provisions of the Basic Law.

### **The right to social welfare under the Basic Law**

4. Article 36 of the Basic Law provides:

“Hong Kong residents shall have the right to social welfare in accordance with law. The welfare benefits and retirement security of the labour force shall be protected by law.”

5. Article 145 of the Basic Law further provides:

“On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs.”

### **The right to social security guaranteed under ICESCR**

6. The right to social security is guaranteed under Article 9 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) which provides:

“The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”

7. The Committee on Economic, Social and Cultural Rights (“CESCR”) gave an explanation on the nature of the right to social security in its General Comment No. 6 (30<sup>th</sup> session, 1995), at paragraph 26:

“Article 9 of the Covenant provides generally that States parties “recognize the right of everyone to social security” **without specifying the type or level of protection to be guaranteed.** However, the term “social security” implicitly covers all the risks involved in the loss of means of subsistence for reasons beyond a person’s control.” (Emphasis added.)

8. In its General Comment No.3 (5<sup>th</sup> session, 1990), at paragraph 10, CESCR stated that States Parties are 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 need to be taken into account in assessing the discharge of such obligation:

“...the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic form of education is, prima facie, failing to discharge its obligations under the Covenant....By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”

### **The purpose of the new residence requirement**

9. In the present case, the adoption of the seven years-residence rule for qualification for social security benefits was recommended by the Task Force on Population Policy chaired by the Chief Secretary for Administration in its report (“the Report”) released on 26 February 2003. The purpose for the tightening of the eligibility criteria for social security has explicitly been stated in various parts of the Report:

“3.24 ...In formulating a population policy for the HKSAR, we need to take the opportunity to consider critically the privileges of Hong Kong’s residents in terms of their eligibility for subsidized services. We need to ensure that there is a rational basis on which our social resources are allocated, particularly in times of tight fiscal situation when available resources are increasingly limited and demand is continuously rising.”<sup>1</sup>

“5.2 In drawing up its recommendations, the Task Force

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<sup>1</sup> It has further been stated in paragraph 3.24 of the Report that an analysis of the effect on public expenditure arising from the provision of CSSA to new arrivals, shown at Annex III of the same Report, illustrates that in the case of CSSA proportionally more resources are allocated to new arrivals than to the rest of the population.

has taken into account the following principles and considerations:

- ...to address the problem of rising social expenditure and limited resources, the recommended measures should help to provide a more rational basis for the provision of subsidized benefits to the residents of Hong Kong and our growing transient population.”

“5.55 As pointed out in Chapter III, because of rising public expenditure in providing various highly subsidized services, the implications for public finances have become an issue of major concern to the SARG and the community.”

“5.56 In approaching this complex issue, we have to strike a very fine balance between the interests of various sectors of the community and giving due regard to the long-term sustainability of our social services within limited financial resources.”

10. The Administration has produced relevant data and statistics to substantiate the policy for the imposition of the new residence requirement in its Legislative Council Brief on “Residence Requirements for Social Security Benefits” dated 3 June 2003, at paragraphs 13 to 14:

“As at the end of December 2002, 14.9% of total CSSA recipients were new arrivals [with less than seven years’ residence in Hong Kong], compared with 12.0% at the end of March 1999. Between March 1999 and December 2002, the number of CSSA cases involving new arrivals increased significantly by 48%, while the CSSA caseload grew by 14% over the same period. The estimated CSSA expenditure on new arrivals increased from \$1,467 million (or 10.8% of total CSSA expenditure) in 1999-2000 to \$1,728 million (or 12% of total CSSA expenditure) in 2001-02....There is growing public disquiet about the burgeoning welfare spending and a general consensus in the community that there is room for tightening the existing residence requirement for CSSA, which is considered too lax.”

## **Justifications for the imposition of the seven-year residence requirement**

11. In the present case, the requirement for a reasonable period of residence is justifiable on the following grounds:

- (1) As explained in paragraphs 9 to 10 above, the tightening of the eligibility criteria for social security benefits is for the purpose of maintaining a rational basis for the allocation of public resources in the light of fiscal constraints and is for the pursuit of a legitimate aim. Relevant data and statistics have been produced by the Administration in support of the increase in the length of residence required.
- (2) Many of the new arrivals do have working capacity. It is good policy for the Government to encourage them to be self-sufficient before resorting to public funds for their subsistence. It is also good policy to encourage migrants wherever they come from to plan for their subsistence before they come to Hong Kong.
- (3) Most developed countries require a prior period of residence as a condition for the receipt of non-contributory welfare benefits.
- (4) Despite the tightening of criteria for receiving social security benefits, there is a safety net to ensure that no one will lack the essential means of subsistence. Other forms of welfare support are available to people who do not satisfy the residence requirement.<sup>2</sup> Children aged below 18 are exempted from any prior residence requirement. In cases of genuine hardship, the Director of Social Welfare may always exercise his discretion to exempt such residence requirement for social security benefits.
- (5) The policy does not make any distinction between permanent and non-permanent residents. Even for those persons who have acquired their permanent resident status by birth under Article 24(2)(3) of the Basic Law and who have come to Hong Kong under the “Certificate of Entitlement” scheme, they still have to

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<sup>2</sup> As noted in paragraph 19 of the Legislative Council Brief on “Residence Requirements for Social Security Benefits”, “Other forms of assistance and support, such as 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, are available to new arrivals”.

satisfy the new residence requirements before they can be eligible for social security benefits.

- (6) Having regard to the considerations stated above, the view taken is that the imposition of the new residence requirements does strike a reasonable balance between the interests of the individual and the interest of the community as a whole. There is a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued.

12. For the reasons as specified above, even with the imposition of the new residence requirement, the HKSAR Government has been able to discharge its obligations under Article 36 of the Basic Law and Article 9 of the ICESCR. There are sufficient safeguards to ensure the satisfaction of the minimum essential levels of the right to social welfare and that the residents in Hong Kong have not been and would not be deprived of “essential foodstuffs, of essential primary health care” or of “basic shelter and housing” bearing in mind that any such assessment on the discharge by the Government of such obligation has to take into account the resource constraints of the place concerned as stated by CESCR.

### **Development and improvement under Article 145 of the Basic Law**

13. Although Article 145 of the Basic Law provides that the HKSAR Government shall formulate policies on the development and improvement of this [the previous social welfare] system, the provisions also stipulate that any such development has to be made “in the light of the economic conditions and social needs”.

14. The revision of the eligibility criteria is one of the measures adopted to secure the long term sustainability of the provision of the social security benefits according to the needs of the community as a whole. As stated in paragraph 14 of the Legislative Council Brief:

“While we [the Administration] are committed to providing an effective and sustainable safety net for the financially vulnerable, we also need to strike a reasonable balance among the interests of various sectors of the community, having regard to the long-term sustainability of our social services and the need for a

rational basis on which our public resources are allocated in the light of fiscal constraints and ever-rising demands.”

15. On the above premises, the imposition of the new residence requirement may be regarded as being in conformity with the requirement of Article 145 of the Basic Law.

**Health, Welfare and Food Bureau**  
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