

**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 International Covenant on Economic,  
Social and Cultural Rights as applied to Hong Kong**

**Purpose**

This paper provides additional information on whether the revised residence requirement for Comprehensive Social Security Assistance (CSSA) and Social Security Allowance (SSA), (together referred to in this paper as “social security benefits”) was in conformity with the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) as applied to Hong Kong.

**Members’ concern**

2. Members requested an explanation as to whether the new residence requirement for social security benefits was in compliance with Article 2(2), Article 9 of the ICESCR and Article 39 of the Basic Law.

**The Administration’s position**

3. The Administration takes the view that the new residence requirement for social security benefits is in conformity with the provisions of the ICESCR as applied to Hong Kong and Article 39 of the Basic Law.

## **Article 2(2) and Article 9 of the ICESCR**

4. Article 2(2) of the ICESCR provides:

“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”.

5. The above provision which prohibits discrimination in the exercise of the rights recognised under ICESCR has to be considered in relation to the right to social security guaranteed under Article 9 of the Covenant. Article 9 reads:

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

## **Meaning of discrimination**

6. The term “discrimination” has not been defined in a General Comment by the Committee on Economic, Social and Cultural Rights (ESC Committee). However, the Human Rights Committee of the International Covenant on Civil and Political Rights (“ICCPR”) has provided an interpretation on its meaning in General Comment 18 (37<sup>th</sup> session, 1989):

“7. ...the Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

**8. The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance....**

**13. ...the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”** (Emphasis added.)

7. The legal principles relating to discrimination in the context of the

Hong Kong Bill of Rights (HKBOR) has been laid down by the Court of Appeal in Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service (1996) HKPLR 333. As stated by Bokhary JA (as he then was), at 351-2:

“Clearly, there is no requirement of literal equality in the sense of unrelentingly identical treatment always. For such rigidity would subvert rather than promote true even-handedness. So that, in certain circumstances, a departure from literal equality would be a legitimate course and, indeed, the only legitimate course. But the starting point is identical treatment. And any departure therefrom must be justified. To justify such a departure it must be shown: one, that sensible and fair-minded people would recognize 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.”

8. It is clear from the principles elicited above that not every difference in treatment will amount to discrimination. Discrimination will only take place if persons in analogous situations are treated differently and that the differential treatment has no objective and reasonable justification.

#### **Was there a difference of treatment?**

9. The Administration accepts that there is difference in treatment under the new eligibility criterion based on the length of residence of the Hong Kong residents. Members suggested that differentiation has also been made on the grounds of birth and national origin. Although the length of residence in a region is not the same as birth or national origin it may be regarded as being closely connected with a person’s place of birth or national origin. Thus it may be argued that any such difference in treatment based on length of residence could constitute discrimination unless there are reasonable and objective justifications for the distinction.

#### **Did the difference of treatment have an objective and reasonable justification?**

10. A difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The revised residence requirement has an objective and reasonable justification and is a proportionate measure for achieving the legitimate aim.

## **The pursuit of a legitimate aim**

11. The new residence requirement for social security benefits was recommended by the Task Force on Population Policy. Its aim was to provide a more rational basis for the allocation of public resources in the light of rising social expenditure and limited financial resources and to ensure the long term sustainability of the provision of social security benefits to the community<sup>1</sup>. The imposition of the new residence requirement is for the pursuit of a legitimate aim.

## **Proportionality between the means employed and the aim pursued**

12. The proportionality requirement involves the need to strike a fair balance between the demands of the interests of the community and the requirements of the protection of the individual's rights and freedoms guaranteed under the Covenant.

13. In Equal Opportunities Commission v Director of Education [2001] 2 HKLRD 690, at paragraph 117, Hartmann J referred to a "discretionary area of judgment" under which the court would defer to the considered opinion of the legislature or the executive particularly in issues involving questions of social or economic policy when making an assessment on proportionality<sup>2</sup>.

"...difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention...the area in which these choices may arise is conveniently and appropriately described as the "discretionary area of judgment". ...It will be easier for it [the discretionary area of judgment] to be recognised **where the issues involve questions of social or economic policy...**".  
[Emphasis added.]

14. The relevant considerations that may be taken into account in the balancing process for proportionality include the following:

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<sup>1</sup> See paragraphs 9 and 10 of Paper No. CB(2) 1063/03-04(01) submitted for information on 2 February 2004.

<sup>2</sup> The passage was quoted by Hartmann J from the House of Lords decision in R v DPP, ex p Kebilene & Others [2000] 2 AC 326 (at p.381).

“In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality, the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question<sup>3</sup>.”

15. In determining whether the new residence requirement is a proportionate means to achieve the legitimate aim, we have to examine the nature of the right to social security protected under Article 9 of the ICESCR.

### **The nature of the right to social security under ICESCR**

16. The ICESCR does not set out rights which are required to be implemented immediately but rather lists standards which are to be secured progressively, to the greatest extent possible, having regard to the resources available. The obligations are qualified rather than absolute in that they are limited to the maximum of the resources available to the State parties: see Chan Mei Yee v Director of Immigration HCAL 77/1099; Mok Chi Hung v Director of Immigration [2001] 2 HKLRD 125.

17. In Chan To Foon & Others v Director of Immigration & Another [2001] 3 HKLRD 109, Hartmann J took the view that the protection of the rights under ICESCR has to be subject to the existing social difficulties faced by Hong Kong:

“Hong Kong may therefore recognize the rights protected by the 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.**” (Emphasis added.)

18. As pointed out by the court in Mok Chi Hung v Director of Immigration (above), the ICESCR has not been incorporated into our domestic law and it is only binding under international law. However, the court took the view that the “ratification of an international covenant gives rise to a legitimate expectation, absent statutory or executive indications to the contrary, that

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<sup>3</sup> See paragraph 118 of Equal Opportunities Commission v Director of Education [2001] 2 HKLRD 690, citing the judgment of the Constitutional Court of South Africa in State v Makwanyane [1995] 1 LRC 269 (at pp.316-317).

administrative decision-makers will act in conformity with the international covenants”.

19. The Administration accepted that it has a duty to consider its obligation under Article 9 of the ICESCR in the formulation of social welfare policies. However, the actual realisation of the rights under ICESCR has to be subject to the availability of resources and to the existing social difficulties faced by the territory. It is 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.

20. As there are reasonable justifications (as specified in paragraph 11 of Paper No. CB(2)1063/03-04(01)) for the adoption of the new residence requirement, the difference in treatment based on length of residence for eligibility to social security benefits does satisfy the proportionality requirement and is not in breach of Article 2(2) of the ICESCR.

### **The existence of alternative measures**

21. Members of the Panel expressed the view that, although a State party was allowed to take into account the resource constraints when discharging its obligations under Article 9 of the Covenant, the Administration should adjust the levels of social security benefits in light of the budgetary constraints instead of introducing a discriminatory measure against a particular group of persons in order to save money<sup>4</sup>.

22. In this regard, the existence of alternative means of achieving the same goal does not necessarily mean that the measure adopted by the Government is not a proportionate means. Indeed, a State party is given a margin of appreciation in choosing between alternatives particularly in the implementation of social and economic policies. This indeed would fall within the “discretionary area of judgment” referred to in paragraph 14 above.

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<sup>4</sup> See paragraph 7 of the Minutes of Meeting of the Panel on Welfare Services of the Legislative Council held on 2 February 2004.

**Was the new residence requirement a permissible restriction on the right to social security protected under ICESCR?**

23. As explained in paragraph 20 of LC Paper No.CB(2)1616/03-04(01), the revised residence requirement is not a restriction on the right to social security enjoyed by Hong Kong residents. However, even if on the assumption that the requirement does amount to a restriction, for the reasons as specified below, such restriction is permissible under Article 4 of the ICESCR.

24. In this regard, Article 4 of the ICESCR provides:

“The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

25. The ESC Committee in General Comment 14 (22<sup>nd</sup> session, 4 July 2000), at paragraph 28, explained the purpose of Article 4 of the Covenant<sup>5</sup>:

“28. ...The Committee wishes to emphasize that the Covenant’s limitation clause, article 4, is primarily intended to protect the rights of individuals rather than to permit the imposition of limitation by States. ... Such restrictions must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society.”

26. The social security benefits provided under the current administrative scheme are, for the reasons as explained in LC Paper No.CB(2)1616/03-04(01), provided “in accordance with law”<sup>6</sup>. Even on the assumption that the new residence requirement is a restriction on the right to social security, a variation that is “in accordance with law” may, in this context, be considered to be “prescribed by law” or “determined by law”<sup>7</sup>.

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<sup>5</sup> The comments of the ESC Committee was made in the context of the right to health.

<sup>6</sup> See paragraph 14 of LC Paper No. CB(2)1616/03-04(01)

<sup>7</sup> See paragraph 17 of LC Paper No. CB(2)1616/03-04(01).

27. The new residence requirement (assuming that it is a restriction on the right to social security) is a limitation that is compatible with the nature of the right itself as, for the reasons as explained in paragraphs 16 to 20 above, the protection of the right to social security is to be subject to the existing social difficulties of the territory and to the availability of resources.

28. As the purpose of the new residence requirement is to provide a rational basis for allocation of limited public resources and to maintain the long-term sustainability of the provision of social services, the Administration considers that the measure is being adopted “for the purpose of promoting the general welfare in a democratic society”.

### **Did the new residence requirement comply with Article 39(2) of the Basic Law?**

29. Article 39(2) of the Basic Law provides that any restrictions on the rights and freedoms enjoyed by Hong Kong residents shall not contravene the provisions of the ICESCR as applied to Hong Kong.

30. The new residence requirement, for the reasons as stated in this Paper, does not infringe Article 2(2) or Article 9 of the Covenant. The revised eligibility criterion is therefore in conformity with Article 39(2) of the Basic Law.

**Health, Welfare and Food Bureau/Department of Justice  
March 2004**