

平 等 機 會 委 員 會

EQUAL OPPORTUNITIES COMMISSION

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18 September 2009

Ms Betty MA

Clerk to Subcommittee

Subcommittee to Study Issues Relating to Mainland-HKSAR Families

Legislative Council

Legislative Council Building

8 Jackson Road

Central

Dear Ms. MA,

Subcommittee to Study Issues Relating to Mainland-HKSAR Facilities

**Implementation of the obstetric service arrangements
for non-eligible persons**

I refer to your letter of 24 August 2009 to the Chairperson of the Equal Opportunities Commission (EOC) requesting us to provide written views on the suggestion of a two-tier obstetric service charge for non-eligible persons (NEPs) with different rates for NEPs who are spouses of Hong Kong residents on the one hand and NEPs with no marital ties in Hong Kong on the other hand. I have been asked to deal with the matter on behalf of the EOC.

1. The obstetric charge for NEPs, when compared to eligible persons (EPs), was considered by the High Court in *Fok Chun Wa and Another v. The Hospital Authority and the Secretary for Food and Health*, HCAL 94/2007. The judgment of the Court indicated that:-
 - (a) Although spouses of Hong Kong residents who are not Hong Kong residents in their own right were classified as EPs before 1 April 2003, changes since that date mean that the distinction between EPs and NEPs is now only based on a person's own residency status in Hong Kong

(non-Hong Kong residents are not EPs even if their spouses are Hong Kong residents).

- (b) People who are Hong Kong residents and people who are not Hong Kong residents are materially different when it comes to subsidized public healthcare services including obstetric services in public hospitals (even if the spouses of the latter are Hong Kong residents). The equality provisions in the Basic Law and the Bills of Rights are not engaged in classifying the former as EPs and the latter as NEPs
- (c) The Government is entitled to prescribe the appropriate charges for EPs and NEPs for various services in public hospitals, having regard to all relevant factors including costs, market rates, priority and access to the relevant services by residents.
- (d) In the relevant circumstances, the different rates charged for Hong Kong residents (EPs) and people who are not Hong Kong residents (NEPs) (even if they are spouses of Hong Kong residents) are not in breach of the equality provisions under the Basic Law.

2. As regards the suggestion of a two-tier obstetric charge, our understanding is that it is intended to distinguish between NEPs whose spouses are Hong Kong residents on the one hand and NEPs whose spouses are not Hong Kong residents. **On the reasoning in the *Fok* case and on available information, we take the view that the distinction between NEPs whose spouses are Hong Kong residents and NEPs whose spouses are not Hong Kong resident does not engage anti-discrimination ordinances.**

- (a) Anti-discrimination ordinances are concerned with discrimination on the grounds of gender, marital status, pregnancy, disability, family status and race.

NEPs whose spouses are Hong Kong residents v NEPs whose spouses are not Hong Kong residents

- (b) The difference between NEPs whose spouses are Hong Kong residents and NEPs whose spouses are not Hong Kong residents relates to the residency status of a person's spouse.

- (c) In a judgment on an application to strike out in *Wong Lai Wan v Prudential Assurance*, DCEO3/08, the District Court held that marital status discrimination extends to discrimination based on the identity of the spouse. It is not clear whether this extends to residency status of the spouse. If so, discrimination based on the spouse's residency status may be regarded as discrimination on the ground of marital status. However, the *Wong* case concerns the employment situation of a person, where, generally speaking, the personal characteristics of her spouse are not relevant.
- (d) On the other hand, the underlying reason in the *Fok* case is that a person's connection to Hong Kong is relevant to subsidized public healthcare services. Her spouse's residency status may reasonably be considered as relevant to the closeness of this connection. In other words, a NEP whose spouse is a Hong Kong resident is materially different from a NEP whose spouse is not a Hong Kong resident when it comes to subsidized public healthcare services.

Spouses v *de facto* spouses

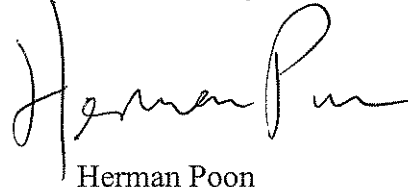
- (e) While NEPs whose spouses are Hong Kong residents can show a connection to Hong Kong through family linkage, in the discourse on family and personal relationships, there is room to argue that two people who are not formally married may also form a relationship which is materially similar to a formal marriage in terms of intimacy and commitment.
- (f) In some jurisdictions, discrimination law explicitly defines the fact of being in a *de facto* marriage as a legally recognized marital status to be protected from discrimination. In Hong Kong, *de facto* marriage is not a recognized marital status. In the *Wong* case, the District Court stated that this meant that the law did not intend *de facto* spouses to be protected from discrimination in the same way as formally married spouses. On the reasoning of the *Wong* case, discrimination law does not protect a Hong Kong resident's *de facto* spouse if she is treated differently from a Hong Kong resident's formally married spouse.
- (g) However, there is an argument that a person who is single (a recognized marital status under the law in Hong Kong) may be in a *de facto*

relationship which is materially similar to a formal marriage. If this is accepted, then different treatments for people who are formally married and people who are not formally married (but are in a relationship materially similar to a marriage) may be regarded as discrimination on the ground of marital status, even if the law does not explicitly recognize *de facto* relationship as a marital status. That said, such an argument in fact is very hard to prove because there is no workable line on what is required for a relationship to be materially similar to a formal marriage. In any event, as the case law presently stands, the *Wong* case is not in favour of such an argument.

Other grounds

- (h) On available information, the other protected grounds do not appear to be relevant to the present discussion

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Herman Poon', written in a cursive style.

Herman Poon

Chief Legal Counsel

Equal Opportunities Commission