

立法會
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Paper for the Panel on Welfare Services
Meeting on 19 July 2004

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

Purpose

This paper reports on the deliberations of the Subcommittee to study issues relating to the Comprehensive Social Security Assistance and Social Security Allowance Schemes (the Subcommittee).

Background

2. On 3 June 2003, the Executive Council endorsed the proposal to revise the residence requirement for the Comprehensive Social Security Assistance (CSSA) Scheme and the Social Security Allowance (SSA) Scheme from one year to seven years from 1 January 2004. This is in line with the "principle of seven-year residence requirement" for providing social benefits heavily subsidised by public funds as recommended by the Task Force on Population Policy, the main purpose of which is to ensure that there is a rational basis for providing heavily subsidised social services. Under the new arrangements, children below 18 are exempted from any residence requirement. In cases of genuine hardship, discretion would be exercised to exempt the residence requirement for social security benefits.

3. On 9 June 2003, the Panel on Welfare Services (the Panel) was briefed on the Administration's proposal to revise the residence requirement for the CSSA and SSA Schemes from one year to seven years for adoption from 1 January 2004. The proposal was approved by the Finance Committee of the Legislative Council on 27 June 2003.

4. The Panel held a special meeting on 18 December 2003 to listen to the views of deputations on the new seven-year residence requirements for the CSSA and SSA Schemes which would be implemented on 1 January 2004. At the conclusion of the meeting, members agreed to set up a subcommittee to

study the following issues relating to the CSSA and SSA Schemes, among others -

- (a) operation of discretion under the CSSA Scheme to waive the seven-year residence rule; and
- (b) compliance of the new seven-year residence requirement for the CSSA and SSA Schemes with the Basic Law.

The Subcommittee

5. The terms of reference and the membership list of the Subcommittee are set out in **Appendices I and II** respectively.

6. Under the chairmanship of Hon LEE Cheuk-yan, the Subcommittee has held a total of six meetings, including five with the Administration. The Subcommittee has also met with nine individual/deputations as listed in **Appendix III**.

Deliberations of the Subcommittee

Operation of discretion under the CSSA Scheme to waive the seven-year residence rule

7. Members note that although there are no internal guidelines for granting waiver of the seven-year residence rule, on the ground that each case has to be considered on its own merits, assistance may be granted at the discretion of the Director of Social Welfare (DSW) to a person who does not meet the residence requirement in exceptional circumstances. In determining whether a discretion should be exercised to exempt a person from the residence rule, DSW will take into account all relevant factors of the case to establish whether there is genuine hardship. The main factors that will be considered include -

- (a) means of the applicant's livelihood since arrival;
- (b) cause of the present hardship;
- (c) resources available and possible sources of help in Hong Kong;
- (d) whether other forms of assistance are available; and
- (e) possibility of the applicant returning to his/her place of origin.

8. Members also note that in practice, the discretionary power to waive the

seven-year residence rule under the CSSA Scheme is delegated to officers of the Social Welfare Department (SWD) at a senior level, namely, Senior Social Security Officers (SSSOs).

9. Some members are concerned that the frontline staff of the Social Security Field Units (SSFUs) of SWD would automatically turn down an application for CSSA after they know the applicant concerned does not satisfy the seven-year residence requirement.

10. The Administration has explained that there is no question of the situation mentioned in paragraph 9 above, as the frontline SSFU staff are required to submit reports to their senior officers of all CSSA applications that could not satisfy the residence requirement. These reports would contain all the relevant information from the applicants to enable their senior officers to decide whether there is genuine hardship. If SSSOs are in doubt as to whether CSSA should be granted to persons who do not meet the residence requirement, they would confer with the Assistant Director of Social Welfare (Social Security).

11. The Administration has also advised that to ensure that the exercising of discretion under the CSSA Scheme to waive the residence rule is fairly, sensibly and consistently applied, all seven SSSOs meet regularly to share experience on the operation of such. Moreover, if a CSSA applicant is not satisfied with the decision made by SWD, he/she could lodge a complaint through different channels according to his/her preference. These channels include the SSFU supervisor, the District Social Welfare Officer and the Social Security Appeal Board (SSAB). The SSAB is an independent body whose members are appointed by the Chief Executive from outside the civil service. If the applicant chooses to lodge an appeal with SSAB, he/she has to do so within four weeks from being notified of the decision from SWD. The SSAB would normally hear the case within one month from the receipt of an appeal, and the appellant would be informed of the Board's decision in writing within three weeks after the hearing. There are precedents whereby the decisions made by SWD are overturned by the SSAB.

12. Members are of the view that the SSFU staff, in apprising potential applicants of the eligibility criteria for CSSA, should also inform them of the discretionary power given to DSW to waive a person in genuine hardship from meeting the residence requirement.

13. The Administration has advised that the frontline SSFU staff would not withhold from all potential CSSA applicants the fact that discretion would be exercised to waive the residence requirement in cases of genuine hardship. Such information would also be widely publicised through the "Guide to CSSA", the pamphlet on CSSA, the leaflet on the residence requirements for CSSA and SSA, as well as SWD's homepage, etc. SSFU staff would also

apprise the new arrivals of the factors to be considered for waiving the seven-year residence requirement under the CSSA Scheme as outlined in paragraph 7 above.

14. Members urge that SSFU staff should adopt a more understanding attitude towards the plight of CSSA applicants by finding out the causes of their difficulties, instead of asking the applicants to borrow money from relatives or friends in the first instance as reported by some deputations.

15. The Administration has explained that SWD is committed to providing quality customer service but to safeguard public funds, it is incumbent upon them to investigate all applications thoroughly to ensure that assistance went to people genuinely in need. As far as waiving the new residence requirement for CSSA is concerned, the Ombudsman has asked SWD in her Investigation Report on Prevention of Abuse on CSSA released in December 2003 to do so most sparingly in order to prevent fraud and abuse. The Administration has also confirmed that any loans or debts that needed to be repaid would not be treated as a CSSA applicant's income/resources.

16. Regarding the cases raised by deputations that SWD has failed to exempt battered spouses from the one-year residence requirement for CSSA despite the fact that these new arrivals are in genuine hardship, the Administration has advised that of the 11 cases that can be identified, 10 have been granted CSSA (nine of which were in fact granted before the meeting) and one has been rejected as the applicant is an able-bodied adult available for full-time employment. Nevertheless, staff of SSFUs have been reminded again to give more consideration to battered spouses who could not meet the seven-year residence requirement for CSSA.

17. The Administration has also pointed out that even if the battered spouse has not applied for CSSA, social workers of SWD/non-governmental organisations (NGOs) would refer the case to SSFUs if the person concerned is faced with imminent violent situation and has no income or other resources irrespective of whether he/she could satisfy the residence requirement for CSSA. For instance, if he/she has already left home and is residing in a refuge centre with his/her young child(ren) and has neither income nor other resources. Similarly, if staff of SSFUs know that the applicant is in such a predicament, action would be taken to refer the individual concerned to the social workers of the Family Services Centres/Integrated Family Service Centres of SWD/NGOs, as appropriate, for follow-up.

18. Members have raised queries as to who would decide it is in the best interest of the CSSA applicant to return to his/her place of origin. The Administration has advised that SSSOs would take that into consideration in exercising discretion but ultimately, it would be a decision for the CSSA applicant to make and his/her wish to stay in Hong Kong would be respected.

19. Members have also raised queries as to whether discretion will be exercised to treat a new arrival who works to support himself/herself and his/her families as an eligible member for the purpose of CSSA in recognition of the new arrival's efforts to become self-supporting; if so, whether the person concerned will be recognised as an eligible member for the purpose of CSSA if he/she subsequently becomes unemployed.

20. The Administration has advised that where a new arrival works to support himself/herself and his/her families, discretion will normally be exercised to treat him/her as an eligible member for the purpose of CSSA in recognition of the new arrival's efforts to become self-supporting. If the new arrival subsequently becomes unemployed through no fault of his/her own, he/she will still be treated as an eligible member for the purpose of CSSA. Nevertheless, if the person concerned is an able-bodied adult available for full-time work, he/she should actively work and participate in the Support for Self-reliance Scheme as a condition of receiving assistance.

21. A member has suggested that SWD should review the seven-year residence requirement for CSSA six months after its implementation.

22. The Administration has advised that it would not be appropriate for SWD to initiate such a review, as the adoption of a seven-year residence requirement for all heavily subsidised public services is part of the population policy as put forth by the Task Force on Population Policy chaired by the Chief Secretary for Administration. The Administration has also pointed out that the seven-year residence requirement applies only to CSSA applicants aged 18 and above and admitted into Hong Kong on or after 1 January 2004. Given the original one-year residence requirement, it will not have any impact on these new arrivals until one year after its implementation.

23. To better help interested parties to understand the operation of discretion under the CSSA Scheme to waive the seven-year residence rule, members have suggested that the Administration should develop and publicise a set of "Frequently Asked Questions" (FAQs) in this regard. The Administration agreed. A set of FAQs on the exercise of discretion to waive the seven-year residence requirement under the CSSA Scheme prepared by the Administration, taking into account members' views, is in **Appendix IV**.

Compliance of the new seven-year residence requirement for the CSSA and SSA Schemes with the Basic Law

24. Members have raised concern as to whether the implementation of the seven-year residence requirement for CSSA is in compliance with the Basic Law, having regard to the following provisions of the Basic Law -

- (a) Article 24 provides that "Residents of the Hong Kong Special Administrative Region ("Hong Kong residents") shall include permanent residents and non-permanent residents";
- (b) Article 25 provides that "All Hong Kong residents shall be equal before the law";
- (c) Article 36 provides that "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"; and
- (d) Article 145 provides that "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".

25. The Administration has advised that it is a well established legal principle that differences in treatment does not constitute discrimination, provided that there is reasonable and objective justification for such differences, and that the measures adopted are rational and proportionate for the pursuit of a legitimate aim. In the present case, the imposition of the seven-year residence requirement is justifiable on the following grounds -

- (a) the tightening of the eligibility criteria for CSSA and SSA (hereinafter referred to as 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;
- (b) many of the new arrivals do have the capacity to work. 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;
- (c) most developed countries require a prior period of residence as a

condition for the receipt of non-contributory welfare benefits;

- (d) 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, 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. Children under 18 are exempted from any prior residence requirement. In cases of genuine hardship, DSW may always exercise his discretion to exempt such residence requirement for social security benefits; and
- (e) the policy does not make any distinction between permanent and non-permanent residents. Even for those persons who have acquired permanent residence by status at 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 satisfy the new residence requirements before they could be eligible for social security benefits.

The Administration has, therefore, concluded that the new seven-year residence requirement does not result in unlawful discrimination under any circumstances.

26. Members, however, have pointed out that as there is nothing in the existing legislation demarcating Hong Kong residents on the length of their residence in Hong Kong, it is questionable whether the seven-year residence requirement for social security benefits is lawful having regard to Article 36 of the Basic Law.

27. The Administration has explained that the right guaranteed under Article 36 of the Basic Law to social welfare is not absolute and could be subject to certain restrictions, say, for the promotion of the general welfare of a democratic society under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Paragraph 10 of the General Comment No. 3 (5th session, 1990) of the Committee on Economic, Social and Cultural Rights (CESCR) stated that State 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. Article 145 of the Basic Law also provides that the Hong Kong Special Administrative Region 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. There is no question that the new policy is a development in the context of Article 145 of the Basic Law, having regard to the fact that the purpose of such is 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.

28. Responding to an enquiry raised by members for the words "in accordance with law" in Article 36 of the Basic Law, the Administration has explained that these words do not, of themselves, guarantee any particular type or level of social welfare protection. Nor is it considered to require that all social welfare benefits or services are provided by law or protected by law. Nevertheless, although the provision of social security benefits is, and has been, provided by administrative means and policies on the basis of the previous social welfare system, in the Department of Justice's view, there is no question that the system of social security benefits has a basis in domestic law and the system is subject to legal requirements and legal safeguards.

Compliance of the seven-year residence requirement for the CSSA and SSA Schemes with ICESCR as applied to Hong Kong

29. A member has raised query as to whether the seven-year residence requirement is also in breach of Article 39 of the Basic Law which reads -

"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".

30. The member has pointed out that although CESCR allows a State party to 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 allows a State party to introduce discriminatory measure on the grounds of resource constraints. Article 9 of ICESCR reads -

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

31. In this member's view, the Administration should adjust the levels of social security benefits, instead of introducing discriminatory measure against a particular group of people in order to save money. The imposition of the seven-year residence requirement also appears to infringe Article 2.2 of

ICESCR which reads -

"The State 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".

32. The Administration accepts that there is difference in treatment under the new eligibility criterion based on the length of residence in Hong Kong. The Administration, however, has reiterated that the enjoyment of rights and freedoms on an equal footing does not necessarily mean identical treatment in every instance. Not every differentiation of treatment would 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.

33. Another member considers that what CESCR allows is the use of positive discrimination, such as not allowing a pregnant employee to perform a certain task, and making length of residence in Hong Kong as an eligibility criterion for social security benefits is certainly not the case.

34. The Administration has explained that it has 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 is 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 is 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 are treated differently and that the differential treatment has no objective and reasonable justification. Such a test is also reflected in the international jurisprudence.

35. Some members have pointed out that as a State Party of ICESCR, Hong Kong has the obligation to implement measures gradually to fully realise the rights provided for under ICESCR in Hong Kong. The fact that this is not the case by the imposition of a seven-year residence requirement for social security benefits is a violation of Articles 9 and 2.1 of ICESCR. Article 2.1 of ICESCR reads -

"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".

36. The Administration has explained that 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 Administration accepts that it has a duty to consider its obligation under Article 9 of ICESCR in the formulation of social welfare policies. The actual realisation of the rights under ICESCR, however, 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.

37. The Administration has also pointed out 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 are part and parcel of the previous system. The residence criterion under the previous system, first established in 1948, was 10 years. It was reduced to five years in 1959 and then to one year in 1971. If Hong Kong residents have enjoyed rights on the basis of the previous system, then a variation of the benefits made in accordance with the previous system is not a restriction on that right. After the variation, there remains the same right to social security benefits on the basis of the previous system.

Advice sought

38. Members are invited to note the deliberations of the Subcommittee.

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Panel on Welfare Services

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

Terms of Reference

To study issues relating to the Comprehensive Social Security Assistance and the Social Security Allowance Schemes, taking into consideration the views of the public, service users and non-governmental organisations providing welfare services.

Council Business Division 2
Legislative Council Secretariat
2 January 2004

Panel on Welfare Services

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

Membership List

Chairman	Hon LEE Cheuk-yan
Members	Hon Cyd HO Sau-lan
	Hon CHAN Yuen-han, JP
	Hon LEUNG Yiu-chung
	Dr Hon LAW Chi-kwong, JP
	Hon LI Fung-ying, BBS, JP
	Hon Michael MAK Kwok-fung
	Hon WONG Sing-chi
	Hon Frederick FUNG Kin-kee, JP (up to 2.1.2004)
	 (Total : 8 Members)
Clerk	Miss Mary SO
Legal Adviser	Mr LEE Yu-sung
Date	1 July 2004

Panel on Welfare Services

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

List of individual/deputations

- Dr Fernando CHEUNG of the Hong Kong Polytechnic University
- Hong Kong Association for the Survivors of Women Abuse (Kwan Fook)
- Society for Community Organization
- New Immigrants' Mutual Aid Association
- New Arrival Women League
- Chinese Grey Power
- Hong Kong Council of Social Service
- Social Concern Group
- Hong Kong Social Security Society

**Frequently asked questions on the exercise of discretion to
waive the seven-year residence requirement
under the Comprehensive Social Security Assistance (CSSA) Scheme**

Q1 What are the factors to be considered for waiving the seven-year residence requirement under the CSSA Scheme?

A1 To determine whether discretion should be exercised to exempt a new arrival from the seven-year residence requirement under the CSSA Scheme, the Social Welfare Department (SWD) will take into account all relevant factors to establish whether there is genuine hardship. Each case is to be considered on its own merits. The main factors to be consider include:

- the applicant's means of livelihood since arrival;
- the cause of the present hardship;
- resources available and possible sources of help in Hong Kong;
- whether other forms of assistance are available; and
- the possibility of the applicant returning to his/her place of origin.

Q2 Will discretion be exercised to waive the seven-year residence rule for someone with neither income nor other resources who has been forced to move away from his/her spouse with his/her young children because of domestic violence or other reasons?

A2 Under these circumstances, discretion will normally be exercised to waive the seven-year residence requirement for that applicant.

Q3 Will money borrowed from friends, relatives or finance companies be treated as a CSSA applicant's income/resources?

A3 Under the CSSA Scheme, any loans or debts that have to be repaid can be disregarded.

Q4 Will SWD reject an application for CSSA made by a new arrival simply on grounds that the applicant can return to his/her place of origin?

A4 In deciding whether to exercise discretion to waive the seven-year residence requirement for a new arrival, SWD will consider many factors, including whether it is a better option for the applicant to return to his/her place of origin, having regard to the applicant's personal and family circumstances.

SWD will not reject an application for CSSA made by a new arrival applicant simply on grounds that the applicant can return to his/her place of origin.

Q5 Will discretion be exercised to treat a new arrival who works to support himself/herself and his/her family members as an eligible member for the purpose of CSSA in recognition of the new arrival's efforts to become self-supporting? If so, would he/she still be recognized as an eligible member for the purpose of CSSA if he/she subsequently became unemployed?

A5 Where a new arrival works to support himself/herself and his/her family members, discretion will normally be exercised to treat him/her as an eligible member for the purpose of CSSA in recognition of the new arrival's efforts to become self-supporting.

If the new arrival subsequently became unemployed through no fault of his/her own, he/she would still be treated as an eligible member for the purpose of CSSA. Nevertheless, if he/she is an able-bodied adult available for full-time work, he should actively seek work and participate in the Support for Self-reliance Scheme as a condition of receiving assistance.

Q6. What should I do if staff of SWD turn down my application for CSSA once they know that I cannot satisfy the seven-year residence requirement?

A6 Staff of SWD do not automatically turn down your application for CSSA when they know that you do not satisfy the seven-year residence requirement.

On receipt of your application, the officer to whom your application is assigned will obtain all relevant information and submit a report to his senior officers for a decision on your application. You will be informed of the result of your application in writing whether it is approved or rejected. If you are not satisfied with the decision made by SWD, you can lodge an appeal with the Social Security Appeal Board (see A7 below).

You can ask to see the supervisor of the Social Security Field Unit (SSFU) if you are not satisfied with the attitude of the officer handling your case or the way your case is being handled. Alternatively, you can lodge a complaint with the District Social Welfare Officer, whose name and contact telephone number are displayed at the reception area of the SSFU. All complaints, whether written or oral, will be dealt with expeditiously and impartially.

Q7 Is there an appeal mechanism against decisions made by SWD on the CSSA applications? If there is such a mechanism, how can an applicant lodge an appeal and how long will it take to process an appeal?

A7 A CSSA applicant who is not satisfied with the decision made by SWD can lodge an appeal with the Social Security Appeal Board within four weeks immediately following the date of notification of decision from SWD.

The Social Security Appeal Board is an independent body whose members are appointed by the Chief Executive from outside the civil service.

To lodge an appeal, the appellant should complete an appeal form and forward it to the SSFU concerned or SWD headquarters or the office of the Social Security Appeal Board. Appeal forms are obtainable

from these offices. The form can also be downloaded from SWD's homepage. The Board will normally hear the case within one month from the receipt of an appeal, and the appellant will be informed of the Board's decision in writing within three weeks after the hearing.

Q8 If waiver of the residence requirement is not granted to a new arrival, what other forms of assistance are available?

A8 Other forms of assistance and support are available to new arrivals irrespective of their length of residence in Hong Kong. These include 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.

Where necessary, the SSFU will refer a CSSA applicant to other service units or government departments for appropriate services.