

立法會 *Legislative Council*

LC Paper No. LS17/13-14

Note for the Bills Committee on Product Eco-responsibility (Amendment) Bill 2013 - Comment on the Administration's response to the follow-up issues arising from the fifth meeting

Background

At the Bills Committee meeting of the Product Eco-responsibility (Amendment) Bill 2013 on 8 October 2013, Members proposed some possible changes to the Bill that would involve a different treatment for certain retailers. In response, the Administration prepared a note¹ for the meeting on 22 October 2013 (the Note), casting doubts on whether the proposals may fully satisfy the justification test². At the meeting on 8 November 2013, the Committee requested our comment on the legal aspects of the Note.

The Justification Test

2. Paragraph 6 of the Note outlined the justification test for assessing the constitutionality of a different treatment. The test is stated as follows —

"in order for differential treatment to be justified, the difference in treatment must (i) pursue a legitimate aim. This would require that there be a genuine need for the difference in treatment; (ii) be rationally connected to the legitimate aim; and (iii) be no more than is necessary to achieve the legitimate aim."

Comments on the Note

3. As pointed out by the Administration in a previous note³, the test has to be considered in the light of Article 22 of the Hong Kong Bill of Rights

¹ Note prepared by the Environmental Protection Department dated October 2013 (LegCo Paper No. CB(1)112/13-14(01)).

² Paragraph 8 of the Note.

³ Note prepared by the Environmental Protection Department dated September 2012 (LegCo Paper No. CB(1) 2667/11-12(01)).

(HKBOR) in the Hong Kong Bill of Rights Ordinance (Cap. 383) and Article 25 of the Basic Law.

4. Article 22 of the HKBOR provides that —

"Article 22

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

whereas Article 25 of the Basic Law provides that —

"Article 25

All Hong Kong residents shall be equal before the law."

5. In *R(S) v Chief Constable of S Yorkshire Police*⁴ [2004] 1 WLR 2196, Lord Steyn has referred to *Kjeldsen, Busk Madsen and Pedersen v Denmark*⁵(1976)1 EHRR 711, a European Court of Human Rights decision in which the court has interpreted "other status" as "meaning a personal characteristic"⁶. The two cases were cited in the local case of *Re Financial Services and Systems Limited*⁷, where the Court of First Instance has to consider if the Certification for Employee Benefits (Chinese Medicine) (Miscellaneous Amendments) Ordinance (No. 16 of 2006) (the Amendment Ordinance) was in contravention of Article 22 of the HKBOR and Article 25 of the Basic Law. The case involves a judicial review on whether the different treatment between Registered Chinese Medicine Practitioners and Listed Chinese Medicine

⁴ Opinions of the Lords of Appeal for Judgment in the Cause, which concerns whether section 64(1A) of the Police and Criminal Evidence Act 1984 is compatible with Article 14 of the European Convention on Human Rights as scheduled to the Human Rights Act 1998 (see paragraph 6 of the Opinions).

⁵ The case concerns whether Denmark, in requiring sex education to be an integral and obligatory part of instructions in its elementary schools, has violated Article 14 of the European Convention on Human Rights and Article 2 of the Protocol (P1-2) of 20 March 1952 of the Convention. Article 14 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic by which persons or groups of persons are distinguishable from each other (see paragraph 56 of the judgment).

⁶ The case discussed "other status" in Article 14 of the European Convention on Human Rights as scheduled to the Human Rights Act 1998 and the term appears in Article 22 of HKBOR in the same context of prohibition of discrimination. Further, Article 1(2) of the HKBOR provides that "Men and women shall have an equal right to the enjoyment of all civil and political rights set forth in this Bill of Rights."

⁷ HCAL101/2006 (unreported decision).

Practitioners, where only the former were accorded a status comparable to practitioners registered under the Medical Registration Ordinance (Cap. 161) and dentists registered under Dentists Registration Ordinance (Cap. 156) in relation to medical functions performed and medical certificates issued in support of a claim for employee benefits under the law, is unconstitutional. The court held that there was no discrimination regarding the different treatment involved. Further, even if "by any stretch of imagination" that there would be any discrimination on any ground of ability, education, wealth or occupation, "the discrimination was not based on personal characteristics which an individual cannot change"⁸. As such, it was within the Government's power under Article 138⁹ of the Basic Law to formulate policies for the development of Chinese medicine and the court held that the Amendment Ordinance was not unconstitutional.

6. In the light of paragraph 5 above, it seems that "business turnover", "retail floor area of retail establishments" and "three or more business outlets in Hong Kong" stated in paragraph 1(a) of the Note as grounds for the proposed differential treatment are not personal characteristics of the retailers that would engage the justification test. Members may wish to request the Administration to clarify how those grounds relate to the personal characteristics of the retailers.

Prepared by

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⁸ Paragraph 48, HCAL 101/2006. See also Michael Ramsden and Oliver Jones, *Hong Kong Basic Law Annotations and Commentary*, Sweet and Maxwell, page 40, paragraph 25/5.

⁹ Article 138 provides that the Government of the HKSAR shall, on its own, formulate policies to develop Western and traditional Chinese medicine and to improve medical and health services. Community organisations and individuals may provide various medical and health services in accordance with the law.