



立法會秘書處 法律事務部  
LEGAL SERVICE DIVISION  
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF : FH CR 1/3822/13  
本函檔號 OUR REF : LS/B/15/17-18  
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By Fax (2840 0467)

18 May 2018

Food and Health Bureau  
Health Branch  
19/F, East Wing  
Central Government Offices  
2 Tim Mei Avenue, Tamar  
Hong Kong  
(Attn: Mr Bill LI, Principal Assistant Secretary (Health) 4  
Ms Iris YICK, Assistant Secretary for Food & Health (Health)4A)

Dear Mr LI/Ms YICK,

### **Inland Revenue (Amendment) (No. 4) Bill 2018**

To assist my scrutiny of the above Bill, I should be grateful for your clarification of the following issues in relation to the definition of "specified relative" under the proposed section 26J of the Inland Revenue Ordinance (Cap. 112):

- (a) Section 2(1) of Cap. 112 defines "spouse" as a husband or wife, i.e. a married man or woman whose marriage is recognized by the law of Hong Kong or, whether or not so recognized, was entered into outside Hong Kong according to the law of the place where it was entered into and between persons having the capacity to do so;
- (b) Paragraph 5 of the *Departmental Interpretation and Practice Notes No. 18 (Revised)* issued by the Commissioner of Inland Revenue ("CIR") in January 2005 states that "marriage" in the context of Cap. 112 is intended to refer to a heterosexual marriage between a man and a woman and that parties in a same-sex marriage would be incapable of having a "spouse"; and

- (c) In *Leung Chun Kwong v Secretary for the Civil Service and Commissioner of Inland Revenue* (HCAL 258/2015), CIR's decision that a same-sex marriage was not a "marriage" was upheld by Mr Justice Chow as correct *as a matter of construction* of Cap. 112. However, his Lordship pointed out that whether the equality provisions in the Basic Law ("BL") or the Hong Kong Bill of Rights ("HKBOR") would require that word to be construed differently, or the relevant provisions in Cap. 112 to be struck down or amended, did not arise for determination in that case because the applicant and his same-sex partner's total tax liabilities would have been the same whether they had been jointly assessed as a married couple or not, and as such CIR's decision did not engage the right to equality under BL or HKBOR: see paragraphs 82 to 88 of the Judgment.

Insofar as the interpretation of "marriage" and "spouse" referred to in (b) above would allow a taxpayer in a heterosexual marriage (but not one in a same-sex marriage entered into outside Hong Kong according to the law of the place where it was entered into) to claim concessionary deductions in respect of qualifying premiums paid by the taxpayer for his or her partner, or the partner's grandparent, parent, child or sibling, under VHIS policies, please explain whether such differential treatment under the Bill would be ruled by the court(s) as contravening the equality provisions under BL 25 and/or HKBOR 22 and, if not, why not. In this connection, it is noted that paragraph 19 of the Legislative Council Brief (File Ref.: FH CR 1/3822/13) issued by the Food and Health Bureau on 16 May 2018 states that the proposals are in conformity with BL, including the provisions concerning human rights.

Your early reply to the above in both languages would be greatly appreciated.

Yours sincerely,



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