

# Discrimination Law Review

*For Public Consultation*

You are invited  
to give your comments in writing to the  
Equal Opportunities Commission  
by 7 October 2014



平等機會委員會  
EQUAL OPPORTUNITIES COMMISSION

July 2014

This document is issued by the Equal Opportunities Commission for the purpose of public consultation on the Discrimination Law Review.

Please forward your comments on this document in writing to the Equal Opportunities Commission by 7 October 2014:

Address: 19/F, Cityplaza Three  
14 Taikoo Wan Road, Taikoo Shing  
Hong Kong

Tel: 2511 8211

Fax: 2511 8142

Email: [eoc@eoc.org.hk](mailto:eoc@eoc.org.hk)

Website: [www.eoc.org.hk](http://www.eoc.org.hk)

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# FOREWORD

We are pleased to launch the Equal Opportunities Commission (EOC) public consultation on the Discrimination Law Review.

It is now more than 17 years since Hong Kong's first discrimination law was introduced and we can be proud to have better protection from discrimination than many jurisdictions in Asia. However, it is clear from our experience at the EOC that discrimination in relation to sex, disability, family status, and race is continuing and remains a significant concern. In addition, in our view the current discrimination laws are increasingly outdated and do not sufficiently prevent discrimination or promote equality in society. This affects people's ability to achieve their potential in life, whether in gaining a good education, or succeeding in their work.

As a result, for the first time the EOC is conducting a comprehensive review of all the existing discrimination laws to consider how they can be modernized to meet Hong Kong's present needs. This consultation document examines a wide range of possible improvements: protection from harassment in common workplace; developing a requirement to make reasonable accommodation for persons with disabilities; and introducing a duty on public bodies to promote equality in all their work.

The public consultation is your opportunity to provide views on our ideas, as well as your own views on how you think the discrimination laws can be modernized and improved. We invite you to send us written submissions, and will also be holding a series of public forums and meetings with stakeholders over the coming months to engage with you.

We look forward to hearing from you.

**York Y. N. Chow**

**Chairperson, Equal Opportunities Commission**

# INTRODUCTION

1. Hong Kong is a world city with a unique society blending the best of Eastern and Western cultures. Its economic success has been founded not only on its free market economy, but also on a constitutional system in which the protection of everyone's human rights are fundamental. The right to be free from discrimination and other core civil and political human rights are protected under the Basic Law and the Hong Kong Bill of Rights Ordinance. Those rights are greatly valued by people across all walks of society in encouraging values of respect, tolerance and diversity.
2. Over the last 17 years, the Government has enacted a series of four Ordinances to better promote equality and prevent discrimination against different groups. The Sex Discrimination Ordinance (SDO) and the Disability Discrimination Ordinance (DDO) came into force in December 1996; the Family Status Discrimination Ordinance (FSDO) came into force in November 1997; and the Race Discrimination Ordinance (RDO) came into force in July 2009.
3. The Government also established the Equal Opportunities Commission (EOC) in 1996 as Hong Kong's statutory body with responsibility for promoting equality and eliminating discrimination. It has duties and powers to:
  - work towards the elimination of discrimination, harassment and vilification;
  - promote equality of opportunity between persons with protected characteristics (sex, disability, family status and race) and those that do not;
  - seek conciliation between parties relating to alleged unlawful acts under the Ordinances; and
  - keep under review the working of the Ordinances and where it thinks necessary, draw up and submit to the Chief Executive proposals for amending the Ordinances.<sup>1</sup>

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<sup>1</sup> Sections 64 SDO, [http://www.legislation.gov.hk/blis\\_pdf.nsf/6799165D2FEE3FA94825755E0033E532/A15C32BE97DAFAA6482575EF000D6CA2/\\$FILE/CAP\\_480\\_e\\_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/A15C32BE97DAFAA6482575EF000D6CA2/$FILE/CAP_480_e_b5.pdf); 62 DDO, [http://www.legislation.gov.hk/blis\\_pdf.nsf/6799165D2FEE3FA94825755E0033E532/D72F7A7DE6892E](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/D72F7A7DE6892E)

4. In establishing detailed domestic frameworks to protect everyone's human rights, promote equality and eliminate discrimination, the Hong Kong Government has provided leadership in Asia by linking economic prosperity with respect for human rights, equality of opportunity and eliminating discrimination in society.
5. However, in our view it is an appropriate moment to review how the discrimination laws can be modernized, harmonized and simplified to meet the particular needs of the 21<sup>st</sup> century society in Hong Kong. A number of factors support the need for a comprehensive review of the discrimination laws.
6. Firstly, after 17 years of operational experience at the EOC we have recognized a number of deficiencies in the current provisions in the Discrimination Ordinances. For example, there is no express and distinct requirement to provide reasonable accommodation for persons with disabilities. This adversely affects their ability to fully participate in key aspects of life.
7. Secondly, there have been significant social and demographic changes in Hong Kong over the last decade to meet the changing needs of Hong Kong. For example, there has been a rapid increase in the numbers of mainland Chinese immigrating to Hong Kong to work and live here; there are now more than 300,000 foreign domestic workers most of which are women; and the demographics of the population is shifting dramatically with many more older persons who are more likely to also be disabled. These developments have often linked to issues of discrimination, prejudice and tolerance against particular groups in society. As a result there is a need to consider whether the discrimination laws should be improved to meet those challenges.
8. Thirdly, since the Discrimination Ordinances were introduced, at international level there has been significant modernization and evolution

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in the concepts of promoting equality and eliminating discrimination. For example, some jurisdictions have placed greater emphasis on developing tools for addressing systemic inequality rather than only focusing on individual claims of discrimination. It is therefore appropriate to consider whether any of those international developments are suitable to be adapted to the needs of Hong Kong.

9. In light of these factors, in March 2013 the EOC decided to conduct for the first time a comprehensive review of all four discrimination ordinances (Discrimination Law Review “DLR”). The EOC will draw on a number of sources to inform its position including: our own experience of how the existing discrimination laws have operated in practice (whether that is through our legal, policy, research, education or other work); the experience of key stakeholders that are affected by or have an interest in the discrimination laws; as well as the experience of international developments in other jurisdictions which have modernized their discrimination laws.
10. The DLR is not intended to be a consultation on developing comprehensive discrimination legislation for new protected characteristics, such as sexual orientation, gender identity, intersex status, or age. The EOC believes that it would be preferable to conduct separate consultations on developing discrimination laws in new areas. We note, however, that where the scope of the existing protected characteristics raises an issue directly connected to new characteristics, we do broadly discuss that issue. An example of this is the possibility of protecting people from discrimination where they are in de facto relationships and whether that should apply to same-sex relationships. This links to a characteristic of sexual orientation. However we also note this is not a consultation on whether we believe same-sex marriage should be legalized.
11. In relation to developing discrimination legislation for new protected characteristics, we are currently conducting two studies. The first study is examining the feasibility of developing sexual orientation, gender identity and intersex status discrimination legislation. This involves examining lesbian, gay, bisexual, transgender and intersex people’s experiences of discrimination as well as the public’s attitudes to introducing such legislation. The second study is examining the feasibility of developing age

discrimination legislation in the field of employment. It is anticipated that the results of the studies will be published at the end of 2014 or early in 2015.

12. The DLR consists of the following phases:
  - Phase 1: An internal review by the EOC of the discrimination laws and its operation in practice;
  - Phase 2: A public consultation with all stakeholders and the general public on their views as to how the discrimination laws should or could be modernized;
  - Phase 3: an assessment of all the submissions and views expressed during the public consultation;
  - Phase 4: drafting submissions and recommendations to the Government on how the discrimination laws should be modernized; and
  - Phase 5: advising the Government on how the recommendations can be implemented.
13. The EOC has conducted an internal review in developing this consultation document. We have identified areas for possible changes, but have not formed definitive positions. We are now moving to Phase 2 of the DLR and the EOC is pleased to launch this public consultation document. It is aimed at all key stakeholders that have an interest in the discrimination laws in Hong Kong, including the Government and public authorities, Legislative Council members, the general public, employers and employees, non-governmental organizations, academics, and lawyers.
14. The EOC believes that consultation with the public is crucial for a number of reasons. Firstly, it will improve awareness among the general public and key stakeholders why and how the current discrimination laws can be improved. Secondly, it will act as a mechanism to take into account all stakeholders suggestions, evidence and concerns. Thirdly, it will hopefully encourage the public and stakeholders to engage directly with the Government on the issues as part of a democratic dialogue.
15. The consultation document is structured as follows:  
Chapter 1: The rationale and principles of the review  
Chapter 2: The goals of the legislation and protected characteristics

Chapter 3: Forms of prohibited conduct  
Chapter 4: Fields of prohibited conduct  
Chapter 5: Promoting and mainstreaming equality  
Chapter 6: Aspects of court proceedings, powers and constitution of the  
EOC  
Chapter 7: Exceptions  
Appendix: List of Consultation Questions

16. In Chapter 1 we examine the rationales for conducting the DLR and the key principles which we believe should be followed in reviewing and reforming the discrimination laws.
17. Chapters 2 to 7 consider the different elements of discrimination laws including the key concepts, such as the categories of protected characteristics, forms and fields of prohibited conduct, and the powers of the EOC. The discussion of the issues broadly follows what we believe to be the logical sequence in setting out the provisions in the reformed discrimination laws.
18. Chapter 2 examines whether the goals of the legislation should be expressly set out, as well as how the protected characteristics should be reformed. Chapter 3 examines the manner in which the forms of prohibited conduct should be reformed. Chapter 4 examines the scope of the fields in which discrimination is prohibited. Chapter 5 examines the current and possible new methods by which equality can be better promoted and mainstreamed. Chapter 6 examines aspects of court proceedings to enforce the discrimination laws, as well as the powers and constitution of the EOC. Chapter 7 examines the current exceptions and how they should either be reformed or repealed.
19. You are invited to send written submissions to the EOC within three months by 7 October 2014 which respond to any or all of the consultation questions. A list of consultation questions is attached at the end of this consultation document. For details please visit our website: <http://www.eoc.org.hk>
20. A Chinese version, as well as versions in six ethnic minority languages of Hindi, Indonesian, Nepalese, Tagalog, Thai and Urdu are also available on

the above website.

21. In relation to persons with disabilities, a Braille version is available upon request, as well as easy read and audio versions being available on the above website.
22. If you consider it appropriate, you can provide submissions on any additional issue not discussed in the consultation document where you believe there is evidence for the need for reform.
23. The EOC will also be holding a series of public forums (details can be found on the above website). In addition we will arrange meetings with stakeholders to explain the key issues in the consultation.
24. After the consultation period has closed, the EOC will reflect on the issues and the submissions by stakeholders. In doing so, the EOC will also produce and publish a report summarizing the general nature of submissions and views expressed in response to the consultation. Details of individuals or organizations which send submissions may be published in the report. If you do not wish your details to be published, please inform us in the submission.
25. The EOC will then draft and send a written submission to the Government as to how we believe the discrimination laws should be reformed and modernized.
26. For any queries relating to the public consultation and DLR generally, please contact the EOC by:
  - Mailing Address: 19/F., Cityplaza Three, 14 Taikoo Wan Road, Taikoo Shing, Hong Kong
  - Telephone: (+852) 2511 8211
  - Fax No.: (+852 2511 8142)
  - Email: [eoc@eoc.org.hk](mailto:eoc@eoc.org.hk)
  - SMS service: 6972566616538 for people with hearing impairment / speech difficulties.

# CHAPTER 1: RATIONALE AND PRINCIPLES OF THE REVIEW

- 1.01 Part I sets out the context and rationale for conducting the DLR. Part II sets out the key principles by which the EOC is conducting the review and will make submissions to the Government.

## Part I: Rationale for the Review

- 1.02 There are a number of reasons why the EOC believes that it is an appropriate time to conduct a comprehensive review and make proposals to the Government on reforming the discrimination laws. Our reasons for the DLR are based on: the EOC's statutory duty to review discrimination laws and the experience of previous reviews; ongoing evidence of inequality and discrimination in Hong Kong society; the experience of developing discrimination laws in Hong Kong and international jurisdictions; and Hong Kong's international and domestic human rights obligations. Each of these issues is examined below.

### A. Statutory duty and previous reviews of the discrimination laws

- 1.03 As stated in the introduction, the EOC has a statutory duty to keep under review and, where it thinks appropriate, make submissions to the Government to amend the Discrimination Ordinances.<sup>2</sup>
- 1.04 The EOC has previously made submissions to the Government to amend provisions in the SDO and the DDO in 1999 and most recently in 2011. The proposals related to a wide range of aspects in the Ordinances, including the scope of protection from sexual harassment; the amendment of the definition of an associate for the purposes of disability discrimination; providing express protection for discrimination between disabilities; the exceptions; improving the enforcement provisions; and amending the

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<sup>2</sup> See for example section 64(1)(e) of the SDO.

provisions relating to the EOC's powers. In 2000, the Government agreed in principle with a number of the 1999 proposals and in 2003 developed a draft Bill to implement the amendments with which it agreed.<sup>3</sup>

1.05 However, despite this the Bill was never passed and the only accepted major proposal that was legislated for was the extension of the sexual harassment provisions in the field of education.<sup>4</sup>

1.06 In 2011, the EOC wrote to the Government to reiterate the call for their implementation. In 2014 the Government introduced the Statute Law (Miscellaneous Provisions) Bill to make some of the proposed amendments. The Government also introduced the Sex Discrimination (Amendment) Bill 2014 on 25 June 2014 to amend the Sex Discrimination Ordinance in relation to providing protection from sexual harassment by customers of service providers. The proposals for amendments to the SDO and DDO which have been previously made to the Government are discussed in the relevant section of this consultation document concerning the particular issue.

## **B. Evidence of continuing inequality and discrimination**

1.07 Another important rationale and argument for the Discrimination Law Review is that the operational experience of the EOC indicates continuing inequality and discrimination for which there is sometimes inadequate provision in the current discrimination laws. Such inequality and discrimination takes a variety of forms. For example, sexual harassment of women in the service industries, and direct discrimination and prejudice against persons with disabilities in education. At the institutional and structural level, inequalities also persist, such as the low numbers of women in senior positions in major corporations.

1.08 Some examples of continuing inequalities and discrimination are described below.

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<sup>3</sup> Discrimination Legislation (Miscellaneous Amendments) Bill 2003.

<sup>4</sup> This amended the application of section 2(5)(b) of the SDO to apply to education. Section 2(5)(b) provides that sexual harassment occurs where a person engages in conduct of a sexual nature which creates a hostile or intimidating environment for a woman. The amendment was legislated for in the Racial Discrimination Bill in 2007.

**(i) Women**

- 1.09 Women in Hong Kong continue to face a number of barriers in society to fulfilling their potential in life. These barriers range from direct discrimination, pregnancy discrimination, sexual harassment and prejudices, to structural problems associated with a lack of women in senior leadership roles.
- 1.10 Pregnancy discrimination and sexual harassment of women remain some of the main areas of complaints received by the EOC. In 2012/ 13 the EOC received 309 complaints relating to employment discrimination under the SDO. Out of these, 40% (124 cases) involved pregnancy discrimination, while 43% involved sexual harassment (133 cases).<sup>5</sup> The number of sexual harassment complaints increased significantly from 94 in 2011/12.<sup>6</sup> Women are disproportionately affected by sexual harassment with an average of 94% of sexual harassment complaints from January 2010 to June 2013 being made by women. The EOC also recently conducted a study into sexual harassment in primary, secondary and tertiary education which found that 50% of students had experienced various forms of sexual harassment in the preceding year.<sup>7</sup>
- 1.11 Discrimination and sexual harassment violate the dignity of women but also greatly inhibit the ability of women to fully participate in the economic and social sectors of society.
- 1.12 The EOC regularly receives complaints relating to sexual harassment which are currently not prohibited under the discrimination laws. This is most common in workplace situations without an employer/ employee situation, or where customers sexually harass service providers. Such complaints support arguments that the sexual harassment provisions should be strengthened in relation to workplaces, as well as the provision of goods and services, housing and clubs. This is discussed further in Chapter 4.

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<sup>5</sup> EOC Annual report 2012/13, page 38,  
[http://www.eoc.org.hk/EOC/Upload/AnnualReport/201213/EOC\\_AR2012\\_13.pdf](http://www.eoc.org.hk/EOC/Upload/AnnualReport/201213/EOC_AR2012_13.pdf)

<sup>6</sup> EOC Annual report 2011/12, page 43,  
[http://www.eoc.org.hk/EOC/Upload/AnnualReport/201112/EOC\\_AR2011\\_12.pdf](http://www.eoc.org.hk/EOC/Upload/AnnualReport/201112/EOC_AR2011_12.pdf)

<sup>7</sup> EOC Study on Students' Sexual Attitudes and Views on Sexual Harassment, March 2013,  
[http://www.eoc.org.hk/EOC/Upload/ResearchReport/SH\\_eExecutive%20Summary.pdf](http://www.eoc.org.hk/EOC/Upload/ResearchReport/SH_eExecutive%20Summary.pdf)

- 1.13 Structural concerns such as the number of women in positions of leadership relate to possible measures to promote and mainstream gender equality.
- 1.14 There is evidence that significant progress remains to be made in both public and private sectors to ensure that women are better and more proportionately represented in positions of leadership.<sup>8</sup> For example in the current 5<sup>th</sup> Legislative Council (2012-2016), only 11 of the 70 members are women representing 15.7%. This is proportionately worse than the previous Legislative Council (2008-2012) where 11 of the 60 members were women, representing 18.3%.<sup>9</sup> In Government as at May 2012 only 20% of Secretaries of Bureaux or Directors of Departments were women.<sup>10</sup>
- 1.15 A possible provision to address such structural inequality would be a public sector equality duty as has been developed in the United Kingdom. This would require public authorities to assess the impact of their policies and practices on women, and where there is evidence of sex discrimination or lack of equality of opportunity, take steps to reduce that inequality. This is explored in Chapter 5 below.

## **(ii) Persons with disabilities**

- 1.16 Despite the DDO being in force for more than 15 years, a survey commissioned by the EOC and published in 2011 indicated that there remain significant prejudices and stereotypes against persons with disabilities in many aspects of life including employment, education and social situations.<sup>11</sup> For example, the survey found that 47% and 33% of people would avoid contact with or want to keep out of Hong Kong people with mental illnesses or HIV/AIDS respectively.<sup>12</sup> In relation to the education of persons with disabilities, over 40% of people disagreed that

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<sup>8</sup> Women and Girls in Hong Kong, Current Situations and Future Challenges, Hong Kong Institute of Asia Pacific Studies, the Chinese University of Hong Kong, 2012, Chapter 8 Women in Power and Decision Making.

<sup>9</sup> Ibid page 194.

<sup>10</sup> Ibid page 203, Table 7.

<sup>11</sup> Baseline survey on Public Attitudes towards persons with a disability 2010, Policy 21 Limited, 2011, [http://www.eoc.org.hk/EOC/Upload/UserFiles/File/ResearchReport/201109/DisabilityReport\(eng\).pdf](http://www.eoc.org.hk/EOC/Upload/UserFiles/File/ResearchReport/201109/DisabilityReport(eng).pdf)

<sup>12</sup> Ibid page vi.



for students with disabilities, integrative schooling was more preferable than a special school, with much higher percentages expressed for persons with intellectual disability (75%) or mental illness (69%).

- 1.17 The statistics on disability discrimination also indicate continuing concern. In 2012/13 there were 522 complaints of disability discrimination handled by the EOC, which is significantly higher than the figures for any of the other protected group and was 54% of all the complaints.<sup>13</sup>
- 1.18 The research and investigations of the EOC have also highlighted the current gaps in the disability discrimination laws. For example, the EOC conducted a formal investigation into the degree to which a range of public premises were accessible to persons with disabilities.<sup>14</sup> The investigation found that although there were some improvements, progress has been extremely slow in ensuring accessibility for all and following the principle of universal design of products.<sup>15</sup> The report also concluded that one of the problems with the current system under the DDO is that there is no proactive duty to provide reasonable accommodation for persons with disabilities, but instead an “unjustifiable hardship defense” for owners and managers of premises. This is not consistent either with the requirements of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), or with current international best practice in other similar jurisdictions with disability discrimination legislation.
- 1.19 A recent study commissioned by the EOC into Equal Learning Opportunities for Students with Disabilities has also highlighted the concerns with achieving a more integrated education system.<sup>16</sup> The report found that there were significant barriers in resources and attitudes to achieving inclusive education. For example, nearly 40% of interviewed teaching staff lack knowledge about inclusive education and 10-20% of staff do not agree that students with disabilities or special needs can participate in all types of activities and should be provided with reasonable

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<sup>13</sup> EOC Annual Report 2012/13, pages 36-37 ,

[http://www.eoc.org.hk/EOC/Upload/AnnualReport/201213/EOC\\_AR2012\\_13.pdf](http://www.eoc.org.hk/EOC/Upload/AnnualReport/201213/EOC_AR2012_13.pdf)

<sup>14</sup> Formal Investigation Report: Accessibility in Publicly Accessible Premises, June 2010,

[http://www.eoc.org.hk/EOC/Upload/UserFiles/File/FI\\_Ass\\_e.pdf](http://www.eoc.org.hk/EOC/Upload/UserFiles/File/FI_Ass_e.pdf)

<sup>15</sup> Ibid page 144.

<sup>16</sup> Study on Equal Learning Opportunities for Students with Disabilities under the Integrated Education System, Centre for Special Educational Needs and Inclusive Education, The Hong Kong Institute of Education, 2012, [http://www.eoc.org.hk/EOC/Upload/ResearchReport/IE\\_eReport.pdf](http://www.eoc.org.hk/EOC/Upload/ResearchReport/IE_eReport.pdf)

accommodation measures.<sup>17</sup> These findings highlight the need for a duty to make reasonable adjustments for students with disabilities or special needs in education, as exists in a number of other international jurisdictions.

### **(iii) Racial Groups**

- 1.20 There is evidence that particular racial groups in Hong Kong face greater discrimination and do not have equal opportunities in key aspects of life such as employment and education.
- 1.21 In 2012, the EOC published a report on racial discrimination experienced by South Asians.<sup>18</sup> It found that seeking employment was a key area where South Asians faced discrimination and prejudice, for example by requiring written Chinese language capabilities even for manual jobs.
- 1.22 A further ongoing concern relating to equality of opportunity for ethnic minorities is the public education system. In 2010, the EOC set up a working group to examine the issues and held sharing sessions with the key stakeholders such as teachers, ethnic minority parents and students, and NGOs working on the issues. In April 2011, the EOC published a report which highlighted concerns with the system such as Chinese language proficiency requirements; the existence of schools where the vast majority of students were ethnic minorities; and the lack of a Chinese as a second language curriculum.<sup>19</sup> Another organization's research has highlighted the low attainment and high dropout rates for ethnic minorities in education, linked to the above education system.<sup>20</sup>
- 1.23 In addition, there is evidence that the current scope of who is protected from racial discrimination may not be broad enough to suit the particular

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<sup>17</sup> Ibid page ii, Executive Summary.

<sup>18</sup> Study on Racial Encounters and Discrimination Experienced by South Asians, Centre for Civil Society and Governance, University of Hong Kong and Policy 21 Limited, 2012, [http://www.eoc.org.hk/EOC/Upload/UserFiles/File/ResearchReport/201203/Race\\_eFull%20Report.pdf](http://www.eoc.org.hk/EOC/Upload/UserFiles/File/ResearchReport/201203/Race_eFull%20Report.pdf)

<sup>19</sup> Education for all: Report of the EOC Working Group on Education for Ethnic Minorities, April 2011.

<sup>20</sup> Study on Educational Inequality and Child Poverty Among Ethnic Minorities in Hong Kong, Hong Kong Institute of Education, October 2013, <http://www.ied.edu.hk/media/news.php?id=20131029&glang=en>

needs of Hong Kong. Currently there is no protection from discrimination based on Hong Kong residency status, immigration status or regional origin in China.

- 1.24 There is some evidence that new immigrants and tourists from mainland China are discriminated against. For example, the Society for Community Organisation has done several studies analyzing the issues. In a joint NGO submission to the Bill Committee on the Race Discrimination Bill in 2007 it was stated :

*“In a survey conducted by Society for Community Organization in 2001, where 90% of the 100 respondents came from Guangdong Province, it was found that over 80% complained that they have experienced discrimination because of their new immigrant identity, behaviour or appearance. This figure has now risen to be more than 91% in 2004. Regarding discrimination nearly 30% of them were rejected for employment when the employer saw that their identity card did not show permanent residence status or because their dialect was different from that of Hong Kong people. Nearly 40% of them received lower wages than that of local people. Nearly 60% of them received inferior service or treatment than that of local people when the service provider recognized them as a new immigrant. 60% of them had been racially vilified in public area. Over 90% of them felt that local Hongkongers racially discriminated against new immigrants. It was also found that over 60% of them encountered racial discrimination when they sought help from the Government Department concerned.”<sup>21</sup>*

- 1.25 This highlights the need for consideration of how the race discrimination laws should be amended in terms of the scope of groups protected. This is explored in **paragraph 2.61 to 2.86** of Chapter 2.

## **C. The experience of developing discrimination laws in Hong Kong and international jurisdictions**

- 1.26 The four Discrimination Ordinances were based in large part on the

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<sup>21</sup> Views on the Race Discrimination Bill, Hong Kong Human Rights Commission and others, February 2007, pages 3-4.

discrimination legislation that existed in the United Kingdom and Australia at the time the SDO was enacted. The SDO was based on a combination of Sex Discrimination Act 1975 in the United Kingdom and the Sex Discrimination Act 1984 in Australia. In addition the DDO, FSDO and the RDO were modeled similarly to the SDO in terms of the key concepts of discrimination.

- 1.27 These factors raise a number of justifications for a comprehensive review. Firstly, the Discrimination Ordinances are based on concepts of discrimination that are at least 18 years old. Since that time the discrimination laws in the United Kingdom and Australia have been modernized considerably. For example, amendments were made to the existing legislation in the United Kingdom to improve the protections from discrimination, and introduce new provisions on promoting equality in the public sector with a public sector duty. In addition, new provisions or new legislation was introduced to protect other groups defined for example by sexual orientation, gender identity, age, and religion or belief.
- 1.28 Secondly, the current Discrimination Ordinances in a number of respects fail to take into account the particularities of certain groups and how the discrimination laws should be explicitly tailored to those groups. This is of particular relevance to persons with disabilities, for example with the concept of a duty to make reasonable accommodation for them at work, in education, or in providing services to them.
- 1.29 Thirdly, the Discrimination Ordinances were (similarly to the development of discrimination laws in the United Kingdom and Australia) drafted in a piecemeal fashion without looking at the totality of protection from discrimination. This means there are some inconsistencies between the scope of protection from discrimination between the Ordinances, as well as there being repetition of common provisions across the Ordinances.
- 1.30 It is also significant to note that in both the United Kingdom and Australia, all the existing discrimination laws have been reviewed on a number of occasions and major reforms have been made or proposed.
- 1.31 In Britain, most recently the Government conducted a Discrimination Law Review of all the existing separate pieces of discrimination legislation. This

eventually led to the introduction of the Equality Act 2010.<sup>22</sup> The Equality Act 2010 modernized and consolidated into one Act all the existing discrimination legislation in Britain. It provides protection from discrimination on grounds of sex, pregnancy and maternity, gender reassignment, marital and civil partnership status, race, disability, religion or belief, sexual orientation and age.

1.32 In Australia, most recently in 2011 the Federal Government conducted a public consultation on modernizing and consolidating all the existing Federal discrimination laws.<sup>23</sup> In November 2012, the Federal Government published the draft Human Rights and Anti-discrimination Bill 2012.<sup>24</sup> The Bill was also recently the subject of an inquiry by the Senate Legal and Constitutional Affairs Committee and a further public consultation.<sup>25</sup> The Federal Government has indicated that further work is required on the proposal to consolidate all the Federal discrimination laws. However, it is also relevant to note that at State level all the discrimination legislation is consolidated into single pieces of legislation.

1.33 Taken together, these factors and developments support the argument for the Discrimination Ordinances to be modernized and preferably consolidated. This would significantly simplify and minimize repetition in the current discrimination legislation, making the legislation easier to apply by all.

## **D. International and domestic human rights obligations**

1.34 The rationale for the DLR is also based on Hong Kong's international and domestic human rights obligations which include ensuring the enjoyment of everyone in Hong Kong to the right to equality and non-discrimination.

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<sup>22</sup> See the United Kingdom Government response to the Discrimination Law Review Consultation, July 2008,

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/238707/7454.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238707/7454.pdf)

<sup>23</sup> There are also discrimination laws at State level in the different States of Australia.

<sup>24</sup> See the Discussion Paper and Draft Bill

<http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx>

<sup>25</sup> Senate Committee Report, Exposure Draft Human Rights and Anti-Discrimination Bill 2012, 21 February 2013,

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/antidiscrimination2012/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/report/index)

**(i) International human rights obligations**

1.35 At international level, the right to equality and non-discrimination is a fundamental human right and is essential to protect the more vulnerable or marginalized groups in societies. The 1948 Universal Declaration of Human Rights declares:

*“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>26</sup>*

1.36 Since then and over the last six decades, the United Nations agreed a series of Treaties which provide further human rights protections for everyone as well as particular groups. The core seven Treaties are: the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Rights of Persons with Disabilities (CRPD), the Convention on the Rights of the Child (CRC) and the Convention Against Torture (CAT). The People’s Republic of China has signed and ratified all of those Treaties apart from the ICCPR which it has only signed to date. China has also indicated in communications with the United Nations that all of the seven Treaties apply to Hong Kong.

1.37 State Parties to the Treaties must implement and regularly review their progress on the implementation of the provisions. In practice, the Hong Kong Government reports on and monitors its progress in Hong Kong given the principle of “one country, two systems” by which Hong Kong retains a high degree of autonomy with a distinct executive, legislative and judicial system from mainland China.

1.38 As the right to equality and non-discrimination is a fundamental human

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<sup>26</sup> Article 2 Universal Declaration of Human Rights, <http://www.un.org/en/documents/udhr/>

right, apart from CAT all of the Treaties contain provisions requiring State Parties to eliminate discrimination and promote equality of all. A number of the Treaties are dedicated to protecting the rights of particular groups: women, racial groups, persons with disabilities and children. Since 1997, the relevant United Nations Committees have monitored progress in relation to the implementation of the Treaties in Hong Kong as part of the examinations of China. Significantly, the Committees have made a number of recommendations to the Hong Kong Government to better promote equality and eliminate discrimination. These have included recommendations to reform existing discrimination laws, or introduce protection for groups not currently protected from discrimination.

- 1.39 Compliance with international human rights obligations, and relevant recommendations made by the United Nations Committees relating to equality and non-discrimination, therefore provide a direct justification for the DLR and for the Government to reform the existing discrimination laws.

**(ii) The Basic Law and Hong Kong Bill of Rights Ordinance**

- 1.40 The Basic Law of Hong Kong was signed in 1990 and came into force on 1 July 1997. It and the Bill of Rights are Hong Kong's constitutional documents. The Basic Law includes protection of the fundamental human rights of residents and others in Hong Kong. Chapter 3 of the Basic Law provides that the provisions of the United Nations International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are in force and shall be implemented through domestic laws (article 39).
- 1.41 The Hong Kong Bill of Rights Ordinance was enacted in 1991. It incorporates the ICCPR into the Hong Kong domestic law and names it the Bill of Rights ("BOR"). The BOR has constitutional effect as it has supremacy over other laws and prohibits the Government from acting in any way which destructs or unlawfully limits the rights and freedoms in the BOR.<sup>27</sup> It is binding on the Government and all public authorities including

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<sup>27</sup> Section 2(4) Hong Kong Bill of Rights Ordinance,  
[http://www.legislation.gov.hk/blis\\_pdf.nsf/6799165D2FEE3FA94825755E0033E532/AE5E078A7CF8E8](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/AE5E078A7CF8E8)

any person acting on behalf of the Government or a public authority. The BOR incorporates all the key civil and political rights in the ICCPR, including those relating to equality and non-discrimination. They include:

- all persons are equal before the law and are entitled without discrimination to the equal protection of the law: article 22;
- a requirement that the law prohibits any discrimination on any ground “such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”: article 22;

1.42 Article 22 of the BOR requires the Government to prohibit any discrimination on “any” ground and then goes on to provide examples of such grounds but includes an open ended “other status”. This formulation is important as it is broader than the domestic discrimination laws. It recognizes there may be an evolution in the types of groups that warrant protection from discrimination depending on the changing values and needs of societies.

1.43 This is relevant as to how the existing discrimination laws can be improved, for example in relation to race discrimination by considering whether there is the need to provide protection in relation to nationality, citizenship, Hong Kong residency or related status.

## **Part II: Principles of the Review**

1.44 The EOC has developed a set of principles to conduct the review. We believe these should also guide the Government in reforming and modernizing all the discrimination laws.

1.45 Similar principles were developed by the United Kingdom Government during its Discrimination Law Review which led to the Equality Act 2010, and the Australian Government in reviewing all the existing Federal discrimination laws in Australia in 2012.



## **A. Modernization**

- 1.46 The EOC believes that it is vital for the existing discrimination laws to be modernized. This is appropriate for several reasons. Firstly, operational experience of the EOC demonstrates that there are a number of areas where the current discrimination laws are not sufficient to protect people from discrimination. See the following example:

### **Example 1: Insufficient protection of existing discrimination laws**

The EOC regularly receives complaints where a service provider is sexually harassed by a customer. For example, currently there is no protection where an air hostess is sexually harassed by a customer on a flight of a Hong Kong based airline.<sup>28</sup>

- 1.47 Secondly, the discrimination laws should evolve to take into account improvements in the discrimination laws in similar international jurisdictions. The current Discrimination Ordinances are based on provisions and concepts of equality that have been improved in many respects in other jurisdictions including: developing clearer definitions of key concepts such as the different forms of discrimination and harassment; including express protection from discrimination by association and perception for all protected characteristics; and removing exceptions that are not justifiable.

## **B. Simplification and preferable consolidation**

- 1.48 A second key principle the EOC believes should be followed is that the current discrimination laws should be greatly simplified. Many provisions are common across the current four Discrimination Ordinances (for example forms of prohibited conduct, exceptions, enforcement of the discrimination laws and the functions and powers of the EOC). This makes the current discrimination laws repetitive, and more difficult for stakeholders to navigate as they need to refer to four separate pieces of

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<sup>28</sup> We note however the Government introduced the Sex Discrimination (Amendment) Bill 2014 on 25 June 2014 to make amendments to the Sex Discrimination Ordinance to provide protection from sexual harassment by customers of service providers.

legislation.

- 1.49 For example, the meaning of direct discrimination has a similar construction across all the four existing Discrimination Ordinances. The consolidation of all the Discrimination Ordinances into one Discrimination Ordinance could simplify the law and avoid unnecessary repetition by having a uniform and single definition of direct discrimination which applies to all protected characteristics.
- 1.50 Consolidation also relates to a principle of harmonization of provisions (discussed in **paragraph 1.53 to 1.54** below) in order that there is greater consistency across the different protected characteristics.
- 1.51 In other jurisdictions where there were a number of pieces of discrimination laws, there has been a trend of consolidation. As stated in Part 1 of Chapter 1, this has already occurred in Britain with the Equality Act 2010, in all the State level discrimination legislation in Australia, and was being considered at Federal level in Australia with the Draft Human Rights and Anti-Discrimination Bill 2012.
- 1.52 A possible alternative would be for the Government to make consistent changes to all the common concepts in the existing Discrimination Ordinances without consolidation. Whilst this would be possible, we do not believe this would be the most efficient approach. Consolidation would reduce repetition of common concepts and involve the harmonization of similar provisions. Further if additional protected characteristics were to be added in the future, it would be much easier to make amendments to a single Discrimination Ordinance.

## **C. Harmonization**

- 1.53 A third principle is that where possible and appropriate, the provisions regarding protection from discrimination should be harmonized upwards to the same levels. This is important as there are currently a number of inconsistencies between the protections of the different groups across the Discrimination Ordinances. The need for harmonization is discussed throughout the consultation document wherever it is relevant.

**Example 2: Inconsistency in protections across Discrimination Ordinances**

Currently under the Race Discrimination Ordinance, there is no protection from race discrimination by the Government in the exercise of their functions. This is not consistent with the position in relation to the protected characteristics of sex, pregnancy, marital status, disability and family status under the SDO, DDO and FSDO. The EOC believes there should be protection from race discrimination by the Government in the exercise of their Government functions.

- 1.54 Several qualifications to the principle of harmonization should also be maintained. Firstly, any changes to the current discrimination laws should not result in a reduction in the protections from discrimination for any protected group, unless the reduction is for a legitimate aim and is proportionate. Secondly, any changes should not result in a breach of domestic or international human rights obligations. Thirdly, appropriate concepts designed to meet the needs of particular group should be maintained or developed. This is of particular relevance to persons with disabilities and concepts such as reasonable accommodation which may require persons with disabilities to be treated differently to other groups.

**D. Promoting and mainstreaming equality**

- 1.55 A final principle is that the review will consider measures for promoting and mainstreaming equality, as well as addressing systemic inequality.
- 1.56 A key problem with the existing discrimination laws are that it is primarily reactive and focused on achieving redress for individuals and their claims of discrimination. However, many of the issues in society relating to equality concern institutional issues and the ways in which public and private bodies are managed. It is for this reason that the “special measures” or positive action provisions of the Discrimination Ordinances are important as they recognize that it may be appropriate to provide disadvantaged groups with particular facilities, services and training to help them achieve substantive equality with other groups.

- 1.57 Several other similar common law jurisdictions have developed proactive duties in their discrimination laws for public and private bodies to consider equality issues in the development and implementation of new policies and practices. In this way, the consideration of equality issues is mainstreamed into the work of organizations, and possible concerns relating to equality are more likely to be identified in planning and implementing policies.
- 1.58 In Chapter 5, we consider some of those models which could be adopted to the particular needs of Hong Kong and how they relate to existing Hong Kong practices.

**Consultation Question 1**

**Do you think that, in reforming the current discrimination laws, the Government should consolidate all the existing Discrimination Ordinances into a single modernized Discrimination Ordinance?**

## CHAPTER 2: GOALS OF THE LEGISLATION AND PROTECTED CHARACTERISTICS

- 2.01 This chapter examines two issues. Part I examines whether the broad goals of the legislation should be set out at the commencement of the Discrimination Ordinances or a consolidated Discrimination Ordinance. Part II considers the definitions and scope of the existing protected characteristics in the Discrimination Ordinances and how they should be reformed.

### Part I: Goals of the legislation

- 2.02 The EOC believes that it is important to consider including at the commencement of the discrimination legislation a clause which states its purpose. This could assist all the stakeholders that need to understand the legislation, as well as assist courts in interpreting and applying the legislation in particular cases.
- 2.03 In Australia the current Age Discrimination Act 2004, Disability Discrimination Act 1992 and the Sex Discrimination Act 1984 all contain purpose or objects clauses. The Draft Human Rights and Anti-Discrimination Bill 2012 which proposed to consolidate all the existing Federal discrimination laws contained the following provision:

*“(1) The objects of this Act are as follows:*

- (a) to eliminate discrimination, sexual harassment and racial vilification, consistently with Australia’s obligations under the human rights instruments and the ILO (International Labour Organization) instruments (see subsections (2) and (3));*
- (b) in conjunction with other laws, to give effect to Australia’s obligations under the human rights instruments and the ILO instruments (see subsections (2) and (3));*
- (c) to provide for the continued existence of the Australian Human Rights Commission as Australia’s national human*

- rights institution;*
- (d) *to promote recognition and respect within the community for:*
    - (i) *the principle of equality (including both formal and substantive equality); and*
    - (ii) *the inherent dignity of all people;*
  - (e) *to recognise that achieving substantive equality may require the taking of special measures or the making of reasonable adjustments;*
  - (f) *to enable complaints alleging unlawful conduct to be resolved in a way that emphasises alternative dispute resolution, promotes just outcomes for all parties and is low-cost and accessible to all; and*
  - (g) *to encourage and facilitate compliance with the Act.”<sup>29</sup>*

2.04 This model is important not only in explaining the key goals of the legislation, but also highlighting the key elements of equality: being treated with dignity; respect; and both formal and substantive equality.

2.05 A number of elements could be drawn from the Australian model and adapted to suit the particular system of discrimination legislation in Hong Kong. A provision at the outset of the legislation could, for example, state it has purposes of:

- “(a) *eliminating discrimination, harassment and vilification, and other unlawful acts consistently with the Hong Kong Special Administrative Region’s obligations under the Basic Law, Hong Kong Bill of Rights Ordinance and international human rights instruments;*
- (b) *promoting recognition and respect within society for:*
  - (i) *the principle of equality (including both formal and substantive equality); and*
  - (ii) *the inherent dignity of all people;*
- (c) *recognizing that achieving substantive equality may require the taking of special measures or the making of reasonable*

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<sup>29</sup> Clause 3, Human Rights and Anti-Discrimination Bill 2012, <http://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Human%20Rights%20and%20Anti-Discrimination%20Bill%202012%20-%20Exposure%20Draft%20.pdf>

- adjustments;*
- (d) encouraging compliance with this Ordinance;*
  - (e) enabling complaints alleging unlawful conduct to be resolved in a way that emphasizes conciliation, promotes just outcomes for all parties and is low-cost and accessible to all;*
  - (f) setting out the functions and powers of the Equal Opportunities Commission, including to:*
    - (i) work towards the elimination of discrimination, harassment and vilification;*
    - (ii) promote equality of opportunity for all;*
    - (iii) promote mutual respect and harmony between different groups within society;*
    - (iv) conciliate complaints alleging unlawful conduct; and*
    - (v) where appropriate, and bearing in mind the purposes (a) to (d) above, provide legal assistance in proceedings relating to the Ordinance.”*

## **Consultation Question 2**

**Do you think that a clause at the commencement of the discrimination legislation should be incorporated to set out its purpose or goals?**

## **Part II: Reforming the definitions and scope of the protected characteristics**

2.06 This part examines whether the current definition and scope of the existing protected characteristics of sex, pregnancy, marital status, disability, family status or race should be reformed in any way, for example to improve their effectiveness and clarity. Each of the current protected characteristics is examined below.

### **A. Protected characteristics of sex, pregnancy and marital status**

2.07 Currently under the SDO the protected characteristics are sex, pregnancy and marital status. Discrimination is prohibited against these groups across

all key sectors such as employment, education, the provision of goods and services, and premises.

- 2.08 In relation to sex discrimination and marital status both women and men are protected from discrimination. Pregnancy provisions only protect women since they are biologically the only sex able to become pregnant and give birth.

**(i) Protected characteristics of sex**

- 2.09 The EOC believes that gender neutral language should be used for all the sex discrimination provisions. This would make it easier for people to immediately recognize that protection from sex discrimination applies both to women and men.

- 2.10 Currently under the SDO, the provisions relating to direct and indirect discrimination, as well as sexual harassment refer to discrimination or sexual harassment of women by men.<sup>30</sup> The provisions then go on to clarify that references to the treatment of women apply equally to the treatment of men.<sup>31</sup>

- 2.11 The language used in other similar jurisdictions such as the United Kingdom under the Equality Act 2010 and in Australia under the current Sex Discrimination Act 1984 is gender neutral. The sex discrimination provisions refer to “a person” that is discriminated against on the grounds of sex which applies to both women and men. We believe that the same gender neutral language of “person” should be used for all the sex discrimination provisions.

**Consultation Question 3**

**Do you think that in relation to the protected characteristic of sex, neutral language of “a person” should be used?**

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<sup>30</sup> Sections 5 and 2(5) SDO.

<sup>31</sup> Sections 6 and 2(8) SDO.



**(ii) Protected characteristic of pregnancy**

2.12 There are two issues that arise in relation to the scope of protection from pregnancy discrimination: protection from discrimination during the maternity period; and protection from discrimination relating to a potential pregnancy.

**(a) Providing express protection from discrimination during maternity period**

2.13 In Hong Kong the scope of protection from pregnancy discrimination has been interpreted quite broadly. Despite there being no express reference in the SDO to protection from pregnancy discrimination, including the period women are on maternity leave (from when they give birth to when they return to work) or after they return to work, the Hong Kong courts have given a liberal interpretation of pregnancy discrimination to include less favourable treatment during these periods. The crucial factor will be whether there is a causal connection between the less favourable treatment and the fact that a woman was pregnant.<sup>32</sup>

2.14 However, to provide greater clarity and assist the public in understanding the legal obligations, it would be preferable to make express reference to a woman being protected from discrimination during maternity leave. Maternity leave should be defined in the same way as under the Employment Ordinance.<sup>33</sup> This approach has been taken in the United Kingdom in the Equality Act 2010 in the fields of employment, the provision of goods and services, education and associations.<sup>34</sup>

**(b) Protection from discrimination relating to potential pregnancy**

2.15 A second issue in relation to the scope of protection is whether a person

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<sup>32</sup> See for example *Lam Wing Lai v YT Cheng (Chingtai) Ltd* DCEO 6/2004

<sup>33</sup> Section 12, Employment Ordinance Cap 57,  
[http://www.legislation.gov.hk/blis\\_pdf.nsf/6799165D2FEE3FA94825755E0033E532/277C0DAA6FCB2973482575EE00348F4E/\\$FILE/CAP\\_57\\_e\\_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/277C0DAA6FCB2973482575EE00348F4E/$FILE/CAP_57_e_b5.pdf)

<sup>34</sup> Sections 17 and 18 of the Equality Act 2010,  
<http://www.legislation.gov.uk/ukpga/2010/15/contents>

must actually be pregnant in order to be protected from pregnancy discrimination.

2.16 A woman may be less favourably treated where she is perceived to be pregnant (but is not), or it is believed that she may in the future be likely to become pregnant (potential pregnancy).

2.17 We advocate the need for express protection from discrimination based on perception across all the protected characteristics in Chapter 3 (**see paragraph 3.121 to 3.125**). In relation to potential pregnancy, in Australia there is express protection from discrimination in such circumstances. “Potential pregnancy” is defined as:

- the fact that a woman is or may be capable of bearing children;
- a woman has expressed a desire to become pregnant; or
- a woman is likely, or perceived to be likely to become pregnant.<sup>35</sup>

**Example 3: Discrimination on grounds of potential pregnancy**

A female applicant for a job is asked at an interview whether she intends to or has a desire to have children in the near future. She answers that she would like to have children. The company decides not to appoint the woman as if she became pregnant that she will need to take maternity leave. This would likely to be direct potential pregnancy discrimination.

2.18 We believe that, as in relation to protection from discrimination by perception, there should be express protection from potential pregnancy discrimination.

**Consultation Question 4**

**Do you think there should be express reference to protection from discrimination during maternity leave?**

**Consultation Question 5**

**Do you think there should be protection from discrimination on grounds of potential pregnancy?**

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<sup>35</sup> Section 4B of the Sex Discrimination Act 1984,  
[http://www.austlii.edu.au/au/legis/cth/consol\\_act/sda1984209/](http://www.austlii.edu.au/au/legis/cth/consol_act/sda1984209/)

**(iii) Protected characteristic of marital status**

2.19 Currently, the SDO provides protection from discrimination and other prohibited conduct on grounds of marital status, which is defined as *“the state or condition of being:*

*(a) Single;*

*(b) Married;*

*(c) Married but living separately and apart from one’s spouse;*

*(d) Divorced; or*

*(e) Widowed”<sup>36</sup>*

2.20 An example of marital status discrimination can be seen in the court case below:

**Example 4: A case of marital status discrimination**

The Plaintiff and her husband worked in an agency relationships for the defendant insurance company. The Defendant decided to terminate the agency relationship with the husband and informed the plaintiff that they would also have to terminate the agency relationship with her as she was his wife.

The Defendant brought an application to strike out the claim arguing that marital status discrimination concerns the general status of being married, single and so on but not discrimination relating to being married to a particular person. The District Court disagreed and held that a broad interpretation should be adopted to apply to situations where discrimination results from the particular identity of a Plaintiff’s spouse.<sup>37</sup>

2.21 In relation to the state of being “single”, it is yet to be definitely determined by the courts in Hong Kong as to whether it would include those persons who are not married but are either in heterosexual or homosexual de facto relationships.

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<sup>36</sup> Section 2 SDO.

<sup>37</sup> *Wong Lai Wan Avril v The Prudential Assurance Company Limited (1st Defendant) & Shum Wang Chiu Louis (2nd Defendant)* [2009] HKEC 1291, DC

2.22 In the *Prudential* case above the Judge made passing comments about the scope of protection on marital status discrimination. She stated that in her view as:

*“...the Hong Kong legislation did not adopt the definition of ‘marital status’ to include the ‘de facto spouse’ of any person in Hong Kong which was provided in Australia and the UK, this clearly meant the Hong Kong legislature did not intend ‘de facto’ spouses to be protected in the same way that ‘married’ spouses are under the legislation. The exclusion is based on local customs and traditional values where a ‘common law wife’ does not receive any protection under the Hong Kong matrimonial legislation.”<sup>38</sup>*

2.23 It can be argued however, that a person who is not married has the marital status of being single. A person in a de facto relationship still therefore has the legal status of being single and may be protected from discrimination.

2.24 In some other jurisdictions there is express protection from discrimination where persons are in relationships that are similar to marriage. In Australia, the Sex Discrimination Act 1984 currently provides for protection from discrimination not only for those that are or have been married, but also for those that are in heterosexual or homosexual de facto relationships.<sup>39</sup> This is only intended to provide protection to persons that are in relationships with similar mutual commitments to a marriage. Initially only heterosexual de facto relationships were protected, but protection for same-sex de facto relationships was added in 2013.

2.25 The protection to persons in homosexual de facto relationships was recently introduced by the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013. The protection is now formulated as “marital or relationship status” and is defined as:

*“(a) single;  
(b) married;  
(c) married, but living separately and apart from his or her spouse;  
(d) divorced;*

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<sup>38</sup> Ibid, paragraph 64.

<sup>39</sup> Section 4, Sex Discrimination Act 1984

- (e) the de facto partner of another person;*
- (f) the de facto partner of another person, but living separately and apart from that other person;*
- (g) the former de facto partner of another person;*
- (h) the surviving spouse or de facto partner of a person who has died.”*

2.26 A de facto partner is defined in the Acts Interpretation Act 1901 as relating to a person in a de facto relationship or registered relationship.<sup>40</sup> A de facto relationship is defined as:

*“(1) For the purposes of paragraph 2D (b), a person is in a **de facto relationship** with another person if the persons:*

- (a) are not legally married to each other; and*
- (b) are not related by family (see subsection (6)); and*
- (c) have a relationship as a couple living together on a genuine domestic basis.*

*(2) In determining for the purposes of paragraph (1)(c) whether 2 persons have a relationship as a couple, all the circumstances of their relationship are to be taken into account, including any or all of the following circumstances:*

- (a) the duration of the relationship;*
- (b) the nature and extent of their common residence;*
- (c) whether a sexual relationship exists;*
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support between them;*
- (e) the ownership, use and acquisition of their property;*
- (f) the degree of mutual commitment to a shared life;*
- (g) the care and support of children; or*
- (h) the reputation and public aspects of the relationship.”<sup>41</sup>*

2.27 In the United Kingdom, a slightly different and narrower approach has been taken as homosexual couples in the United Kingdom have the rights to either form civil partnerships (which provide similar rights to marriage), or more recently to marry.<sup>42</sup> Protection is provided from discrimination on

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<sup>40</sup> Registered relationships concern same-sex couples. The registration creates some legally binding rights but is not the same as marriage.

<sup>41</sup> Section 2F(1) and (2) Acts Interpretation Act 1901.

<sup>42</sup> See the Civil Partnerships Act 2004 and the Marriage (Same Sex Couples) Act 2013.

the basis of being either married or in a civil partnership. No protection is provided for those that are single, no longer married or no longer in civil partnerships, as well as those heterosexual or homosexual couples in de facto relationships.<sup>43</sup>

- 2.28 It is to be noted however that the discrimination provisions in Australia and the United Kingdom relating to relationship status did not automatically require the legalization of same-sex marriages or civil partnerships. The discrimination legislation does not extend to the fields of marriage or similar relationships.<sup>44</sup> Rather, the legislation prohibits discrimination on the basis of relationship status in existing areas such as employment, and the provision of goods and services.
- 2.29 Further and in any event, there is an exception under the SDO that stipulates that acts done under statutory authority are not within the scope of the SDO.<sup>45</sup> In other words, requirements under the Marriage Ordinance that a marriage be between a man and a woman could not be challenged under discrimination laws.<sup>46</sup>
- 2.30 In Hong Kong as in other jurisdictions, the attitude towards relationships is evolving. Not everyone believes in becoming married, but nevertheless are in stable long-term relationships with another person.
- 2.31 As stated above, the scope of the current protection from discrimination on the basis of the status of being “single” is not clear. The EOC therefore believes, consideration should be given as to whether there is a need for express protection from discrimination on the grounds of being in genuine de facto relationships. Consideration could also be given as to whether this protection should be extended to persons from former de facto relationships, as has been done in Australia.

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<sup>43</sup> Section 8 Equality Act 2010.

<sup>44</sup> For example in Australia, although the Sex Discrimination Act 1984 prohibits discrimination on grounds of relationship status including being in a de facto homosexual relationship, it does not affect legislation relating to marriage which currently in Australia can only be between a man and woman.

<sup>45</sup> Section 58 of the SDO.

<sup>46</sup> Section 40 of the Marriage Ordinance refers to marriage between a man and woman.

**Example 5: Express protection for de facto relationships**

Currently under the SDO, if an employer decides to provide medical benefits for the spouses of employees but not to the de facto partners of employees, it is not clear whether this would constitute direct marital status discrimination. The proposed amendment to the law would make it clear that in such circumstances, they would also need to provide them to de facto partners in genuine relationships to avoid direct marital or relationship status discrimination.

- 2.32 Finally, if such legislation were introduced, it would also be important to define the meaning of a de facto relationship to provide clarity to the law, as has been done in the Australian legislation.

**Consultation Question 6**

**Do you think that the protected characteristic of marital status should be amended to apply to “relationship status” and expressly protect persons in de facto relationships? If so, how should de facto relationships be defined? Should it be defined to include protection for both heterosexual relationships and same-sex relationships? Should this also be extended to protection from discrimination relating to former de facto relationships?**

**B. Protected characteristic of disability**

- 2.33 A crucial issue in relation to persons with disabilities is the scope of what constitutes a disability in order to be protected from discrimination.
- 2.34 In Hong Kong, the scope of who is protected from disability discrimination is defined in section 2 of the Disability Discrimination Ordinance (DDO). The definition is based on the definition of disability used in the Australian Disability Discrimination Act 1992.
- 2.35 Disability is defined broadly to include both physical and mental disabilities, as well as disabilities that presently exist, previously existed, may exist in the future or are imputed to a person:

*“Disability in relation to a person means-*

- (a) total or partial loss of the person's bodily or mental functions;*
- (b) total or partial loss of a part of the person's body;*
- (c) the presence in the body of organisms causing disease or illness;*
- (d) the presence in the body of organisms capable of causing disease or illness;*
- (e) the malfunction, malformation or disfigurement of a part of the person's body;*
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or*
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour, and includes a disability that-*
  - (i) presently exists;*
  - (ii) previously existed but no longer exists;*
  - (iii) may exist in the future; or*
  - (iv) is imputed to a person;”<sup>47</sup>*

2.36 The approach in the United Kingdom to the definition of disability is somewhat different from the approach in Hong Kong and Australia. Under the Equality Act 2010, a person only has a disability if they have a physical or mental impairment which has a “substantial and long-term adverse effect on the person’s ability to carry out normal day to day activities”.<sup>48</sup> This reflects the intention of the United Kingdom legislation that it only protects those persons from discrimination where an impairment significantly affects their lives, rather than impairments that have a minor or short-term effect.

2.37 Significantly the impairment must have a long-term effect which is defined as one which has lasted 12 months, likely to last at least 12 months or is likely to last the rest of the person’s life.<sup>49</sup> This can be contrasted from the provisions in Hong Kong and Australia which do not require that the impairment has a long-term effect. So for example, a person suffering from influenza for a period of several weeks who fully recovers would be classified under the DDO as having a disability during that period. Under the United Kingdom law the person would not be considered to have a

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<sup>47</sup> Section 2 DDO.

<sup>48</sup> Section 6 Equality Act 2010.

<sup>49</sup> Schedule 1 Part 1 paragraph 2 Equality Act 2010.



disability.

- 2.38 It is also relevant to consider the current scope of the definition of disability under the DDO in light of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), to which the Hong Kong Government is a party. It states:

*“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>50</sup>*

- 2.39 The CRPD defines disabilities as including “long-term” physical or mental impairments. The emphasis on long-term is similar to the approach in the United Kingdom Equality Act. However by using the words “include”, the definition does not restrict the meaning of disability only to long-term impairments.

- 2.40 The EOC receives a number of complaints relating to minor and short term illnesses and conditions such as influenza or stomach viruses.

- 2.41 This raises issues concerning the proportionality of the scope of definition of disability and whether it would be appropriate to refine the definition in any way, for example to require substantial and/or longer term impairments similar to the United Kingdom Equality Act 2010. “Long term” could be defined as lasting or likely to last a particular period. Such an approach would also be consistent with the definition of disability under the CRPD which places emphasis on “long-term” impairments.

- 2.42 There may be concerns with this approach though. For example, there are some situations where short-term conditions should be protected from discrimination. If a person suffers from depression for a period of two months because a family member has died but then recovers, it would seem appropriate that they are protected from discrimination during that period. Another alternative may therefore be to only amend the definition by requiring that the impairment be substantial.

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<sup>50</sup>Article 1 of the Convention on the Rights of Persons with Disabilities,  
<http://www.un.org/disabilities/convention/conventionfull.shtml>

- 2.43 Finally, some may consider that any limitation on the current definition of disability would be a reduction in the levels of current protection from discrimination, and as a result no change should be made.

#### **Consultation Question 7**

**Do you think that the current definition and scope of what constitutes a disability is appropriate and proportionate? Or should it be amended in any way, for example by qualifying that the physical or mental impairment must be substantial and/ or likely to last a certain period?**

### **C. Protected characteristic of family status**

- 2.44 The protected characteristic of family status under the Family Status Discrimination Ordinance (FSDO) protects people from discrimination who are responsible for the care of immediate family members. Immediate family members are defined as where a person is related by “blood, marriage, adoption or affinity.”<sup>51</sup> It also protects persons with a particular family status, compared to how persons with another family status may be treated.<sup>52</sup>
- 2.45 Affinity is not defined in the FSDO and has not been the subject of interpretation to date in the Hong Kong courts. However, it is often defined as relationships with the blood relatives of a spouse (e.g. in laws).<sup>53</sup>
- 2.46 There are three issues that we believe arise in relation to the definition and scope of protection regarding family status: the term of “family status”; the protection relating to de facto relationships and former relationships; and clarifying that protection extends to breastfeeding women.

#### **(i) Changing the term “family status” to “family responsibilities”**

- 2.47 We firstly believe that the term of “family status” discrimination is not

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<sup>51</sup> Section 2, Family Status Discrimination Ordinance.

<sup>52</sup> See the definitions of direct and indirect discrimination in relation to family status under section 5(a) and (b) of the FSDO.

<sup>53</sup> See for example, <http://legaldictionary.lawin.org/affinitas/>

sufficiently clear. We believe that as the protection concerns situations where a person has the responsibility for the care of immediate family members, it would be more appropriate to use the term “family responsibilities”. In Australia, the equivalent protection involving care of immediate family members uses the term “family responsibilities”.<sup>54</sup> We therefore believe that the term “family responsibilities” should be used.

## **(ii) Care arising from de facto relationships and former relationships**

2.48 The current definition of family status does not cover care arising from being in a de facto relationship. It also does not include care of immediate family members from former relationships (ie former spouses or former de facto partners).

2.49 The definition under the Australian legislation has evolved and sets out in more detail the persons that fall within the scope of the legislation in terms of caring responsibilities. It also now provides in some respects broader protection.

Family responsibilities:

*“means responsibilities of the person to care for or support:*

*(a) a dependent child of the person; or*

*(b) any other immediate family member who is in need of care and support.”<sup>55</sup>*

Immediate family members are defined as including:

*“(a) a spouse of the person; and*

*(b) an adult child, parent, grandparent, grandchild or sibling of the person or of a spouse of the person.”<sup>56</sup>*

2.50 “Spouse” is also defined to include former spouses and de facto partners or former de facto partners. De facto partners are defined as both heterosexual or homosexual partners.<sup>57</sup>

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<sup>54</sup> See the Sex Discrimination Act 1984

<sup>55</sup> Section 4A Sex Discrimination Act 1984

<sup>56</sup> Ibid Section 4A.

<sup>57</sup> Ibid Section 4A and Section 2D Acts Interpretation Act 1901.

2.51 The definition under the Australian legislation is much clearer as to who constitute immediate family members. The EOC also believes that it is appropriate to consider extending protection consistent with the approach in Australia in relation to:

- caring in de facto relationships;
- caring associated with former spouses or de facto partners.

2.52 Firstly, the protection should reflect current developments in Hong Kong society where people in de facto relationships may need to care for immediate family members. What should be relevant is whether or not someone has the care of an immediate family member, not whether there is a relationship of marriage.

**Example 6: Impact of proposed amendment to include de facto relationships**

A woman is in a de facto relationship with a man for many years and is required to care for the elderly father of her partner. She is less favourably treated at work because of that care, and would be protected from family status (responsibility) discrimination if the law was amended.

2.53 Secondly, in relation to former relationships, many people are required to care for immediate family from former relationships. In our view, consideration should be given to providing protection in such circumstances whether from former marriages or former de facto relationships.

**Example 7: Impact of proposed amendment to include former spouse**

A woman continues to provide care for her former parent-in-law after a divorce and is less favourably treated at work because of that care. If the law is amended, she would be protected from family status (responsibility) discrimination.

2.54 The definition of “immediate family member” could be amended to include elements of the Australian formulation:

*“in relation to a person, means a person who is related to the person by*

*blood, marriage, de facto relationship, adoption or affinity and includes:*

- (a) A dependent child of the person;*
- (b) A spouse, former spouse, de facto partner or former de facto partner of the person; and*
- (c) A child, parent, grandparent, grandchild or sibling of the person, or of a spouse, former spouse, de facto partner or former de facto partner of the person."*

2.55 It would also be important to define the meaning of a de facto partner which could for example be adapted from the Australian formulation.

### **(iii) Protection from discrimination relating to breastfeeding women**

2.56 Currently in the SDO, there is no express reference to there being protection from discrimination for breastfeeding women. It is likely however that a claim could be brought under the Family Status Discrimination Ordinance on the basis of having the care of an immediate family member (a son or daughter related by blood).<sup>58</sup> The EOC has received a number of complaints of discrimination relating to breastfeeding and have conciliated those complaints using the FSDO provisions.

2.57 In Australia there is express protection from discrimination against women who are breastfeeding.<sup>59</sup> In the United Kingdom, the Equality Act 2010 also makes it clear that discrimination in relation to childbirth and maternity includes discrimination on grounds of breastfeeding.<sup>60</sup>

2.58 The EOC believes that for reasons of clarity, there should be express reference in the definition of family status that it includes breastfeeding women.

### **Consultation Question 8**

**Do you think that the protected characteristic of family status should be**

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<sup>58</sup> See section 2 of the Family Status Discrimination Ordinance for the meaning of family status.

<sup>59</sup> Section 7AA Sex Discrimination Act 1984.

<sup>60</sup> Section 17(4) Equality Act 2010.

redefined as “family responsibilities” in order to clarify that it relates to persons who have responsibility for the care of immediate family members?

#### **Consultation Question 9**

Do you think that the scope of family status discrimination should be expanded to include protection where persons in de facto relationships care for immediate family members? If so, how should de facto relationships be defined? Further, do you think the protection should be extended to situations where a person cares for an immediate family member from a former marriage or de facto relationship?

#### **Consultation Question 10**

Do you think that there should be express reference in the definition of family status to include breastfeeding women?

### **D. Protected characteristic of race**

2.59 This section considers whether the scope of who is protected from race discrimination needs to be reformed in any way. In particular it considers whether the characteristics of nationality, citizenship, Hong Kong residency or related status should be added and how these relate to the current exceptions to the principle of non-discrimination.

2.60 The Race Discrimination Ordinance (RDO) provides protection from racial discrimination in relation to “race, colour, descent or national or ethnic origin” of a person.<sup>61</sup> This definition is based on the former definition of race under the Australian Racial Discrimination Act 1975 and on the definition of race under the United Nations Convention on the Elimination of all forms of Racial Discrimination (CERD).

### **Nationality, citizenship, and Hong Kong residency or related status**

2.61 There is currently no protection from discrimination based on nationality, citizenship, or Hong Kong residency or related status. In fact, there are

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<sup>61</sup> Section 8 RDO.

express exceptions that make clear that several of those attributes are not within the protected characteristic of race. Section 8(3)(b) to (d) states that the following do not constitute discriminatory acts on the grounds of race:

*“(b) that the person—*

*(i) is or is not a Hong Kong permanent resident;*

*(ii) has or has not the right of abode or the right to land in Hong Kong;*

*(iii) is or is not subject to any restriction or condition of stay imposed under the Immigration Ordinance (Cap 115); or*

*(iv) has or has not been given the permission to land or remain in Hong Kong under the Immigration Ordinance (Cap 115);*

*(c) the length of residence in Hong Kong of the person; or*

*(d) the nationality, citizenship or resident status of the person under the law of any country or place concerning nationality, citizenship, resident status or naturalization of or in that country or place.”*

2.62 The RDO also states that nothing in the Ordinance is to be construed as affecting in any way law concerning nationality, citizenship, resident status or naturalization, or renders unlawful acts done by any person in connection with the operation of such law.<sup>62</sup>

2.63 The position in a number of other international jurisdictions such as the United Kingdom and Australia is different as they do provide some express protection from nationality, citizenship or immigration status discrimination.

2.64 In Australia the Racial Discrimination Act 1975 defines race as “race, colour, descent, national or ethnic origin”.<sup>63</sup> However it also provides that there is protection for anyone that is or has been an immigrant to Australia.<sup>64</sup>

2.65 In addition, under the Draft Human Rights and Anti-Discrimination Bill 2012 it was proposed that protection be extended in the employment field to discrimination on grounds of nationality or citizenship.<sup>65</sup>

2.66 In the United Kingdom the Equality Act 2010 defines race to include colour,

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<sup>62</sup> Section 54 RDO.

<sup>63</sup> Section 9 Racial Discrimination Act 1975, <http://www.comlaw.gov.au/Details/C2013C00013>

<sup>64</sup> Section 5 Ibid.

<sup>65</sup> Clause 22(3) Draft Human Rights and Anti-Discrimination Bill 2012.

ethnic or national origins, as well as nationality. However, there is no discrete protection from discrimination relating to citizenship, residency or related status. There is also an exception to race discrimination relating to nationality, ethnic or national origins where it concerns the exercise of immigration functions pursuant to relevant legislation.<sup>66</sup>

2.67 Some other common law jurisdictions also provide protection from discrimination in relation to nationality and citizenship. For example, in New Zealand the Human Rights Act 1993 provides protection from discrimination on grounds of ethnic and national origins which are defined to include nationality or citizenship.<sup>67</sup>

2.68 In 2009 at the last examination of the Peoples' Republic of China on its compliance with CERD, the Committee on the Elimination of Racial Discrimination made a specific recommendation to the HKSAR Government for it to include in the RDO "immigration status and nationality" as prohibited characteristics of discrimination.<sup>68</sup>

2.69 Reference was made to the requirements of General Recommendation 30 of the Committee to all State Parties concerning discrimination against non-citizens.<sup>69</sup> This indicates that while Article 1, paragraph 2 of CERD permits distinctions to be made between citizens and non-citizens (e.g. for immigration functions concerning rights of entry), it should be construed consistently with the general prohibition on racial discrimination. In other words, differences in treatment of non-citizens should be for a legitimate aim and proportionate.<sup>70</sup> The General Recommendation also states that State Parties should ensure there are legislative guarantees against racial discrimination for non-citizens and that the implementation of the legislation does not have a discriminatory effect on non-citizens.

2.70 The above recommendation by the CERD Committee and General

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<sup>66</sup> Equality Act 2010, Schedule 3 Paragraph 17.

<sup>67</sup> Section 21 Human Rights Act 1993,

<http://www.legislation.govt.nz/act/public/1993/0082/latest/DLM304212.html>

<sup>68</sup> Concluding Observations, Committee on the Elimination of Racial Discrimination, CERD/C/CHN/CO/10-13, 15 September 2009, paragraph 27.

<sup>69</sup> General Recommendation 30 CERD, 1/10/2004,

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f59%2f18&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f59%2f18&Lang=en)

<sup>70</sup> Ibid paragraphs 1 to 5.



Recommendation 30 highlight the fact that it is important to protect people from discrimination based on nationality, citizenship and residency status as it is often closely linked to a person's race. This does not however mean that there cannot be legitimate and proportionate exceptions in these areas.

2.71 For example, it is legitimate and proportionate to have an exception (as currently contained in RDO) concerning immigration functions and legislation relating to those immigration functions.<sup>71</sup> States are entitled to manage the numbers and types of immigrants and visitors to its territory as part of their national sovereignty.

2.72 In our view however, the current exceptions under the RDO are too broad. In particular, section 8(3)(b)(i) and (ii), (c) and (d) completely excludes nationality, citizenship or residential status from the scope of the RDO. This can be contrasted for example with jurisdictions such as the United Kingdom where nationality discrimination is unlawful, except where it relates to immigration functions.

2.73 The EOC is also concerned with the exception under section 8(3)(c) regarding the length of residence in Hong Kong which is discussed in the context of Hong Kong residency or related status below: **see paragraph 2.76 to 2.86.**

#### **(i) Nationality and citizenship**

2.74 The EOC believes that both nationality and citizenship should be included in the definition of race under section 8(1)(a) of the RDO, based on the above international human rights obligations, recommendations and experience in other jurisdictions.

2.75 The open ended exception in section 8(3)(d) could be repealed while retaining the specific exceptions relating to nationality and citizenship laws,<sup>72</sup> and immigration legislation.<sup>73</sup>

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<sup>71</sup> Section 8(3)(b)(iii) and (iv) and section 55 RDO.

<sup>72</sup> Section 54 RDO.

<sup>73</sup> Section 55 RDO.

**Example 8: Impact of proposed amendment to include citizenship discrimination**

The effect of an amendment relating to nationality and citizenship would be that if a company stated only persons of United States citizenship were entitled to apply for a certain position it would be unlawful. Currently under the RDO the exception relating to nationality and citizenship would mean such treatment is not unlawful.

**(ii) Hong Kong residency or related status**

- 2.76 The EOC also believes that consideration could be given to whether it is appropriate to have protection from discrimination relating to Hong Kong residency status or related concepts of immigration status. This relates to differences of treatment based on whether persons are permanent or other types of residents; or their immigration status as being immigrants to Hong Kong.
- 2.77 This issue also links to the exceptions under section 8(3)(b)(i) and (ii), (c) and (d) of the RDO relating to residency in Hong Kong.
- 2.78 Tensions have on occasion arisen between Hong Kong residents and mainland Chinese people in Hong Kong, whether they are tourists or new immigrants.
- 2.79 There is evidence that new immigrants from mainland China are discriminated against. For example, the Society for Community Organisation has done several studies analyzing the issues.<sup>74</sup>
- 2.80 Most recently, a survey conducted by The University of Hong Kong School of Public Health into social harmony interviewed approximately 1,000 new immigrants from mainland China that had been living in Hong Kong for 10 years or less.<sup>75</sup> Approximately 25% of the immigrants reported that they had been discriminated against since arriving because of their immigration status, ranging from situations of being refused services, being treated

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<sup>74</sup> Views on the Race Discrimination Bill, Hong Kong Human Rights Commission and others, February 2007, page 3-4.

<sup>75</sup> A social barometer for HK: from family harmony to social cohesion, December 2012, <https://www.med.hku.hk/v1/media/4723.pdf>

unfairly, to their family being discriminated against.

2.81 The existing racial discrimination legislation is not able to address such discrimination, as the reason for the less favourable treatment is not the race of the person, but rather their residency status, immigration status, or mainland China origin.

2.82 In considering a new provision to address discrimination based on residency, immigration status or mainland China origin, one option could be to define the protection as applying to any person based on any of the following:

- whether or not they are Hong Kong residents;
- length of residence in Hong Kong;
- whether or not they are visiting Hong Kong on a tourist visa; or
- whether they are immigrants to Hong Kong.

2.83 This formulation would for example cover a broad range of situations. For example, it could cover a scenario where a new immigrant from mainland China is treated less favourably than a Hong Kong permanent resident. It could also cover a scenario where a Hong Kong permanent resident is treated less favourably than a mainland Chinese person visiting Hong Kong on a holiday. The examples below illustrate how this could operate.

**Example 9: New immigrant from mainland China treated less favourably**

A real estate agent refused to provide services to a mainland Chinese person who moved to work here one year ago, but does provide its services to all permanent Hong Kong residents. This is because they dislike mainland Chinese. This could be made unlawful discrimination based on residency status or related status under the amended law.

**Example 10: Hong Kong permanent resident treated less favourably**

A retail shop which caters for mainland Chinese tourists visiting Hong Kong on holidays decides it will only provide discounts for mainland Chinese customers and not Hong Kong permanent residents. This could be made unlawful discrimination against Hong Kong permanent residents under the amended law.

2.84 The formulation could also cover discrimination against new immigrants

and tourists not just from mainland China, but any other countries.

- 2.85 In relation to residency status, it is also important to consider the effect of the current exceptions under section 8(3)(b)(i) and (ii), (c) and (d) of the RDO regarding right of abode; length of residence; and other resident status etc. The EOC believes that these blanket exceptions should be repealed as they completely exclude residency status from the operation of the RDO. However, the EOC believes consideration may be given to specific exceptions relating to benefits associated with residency status and length of residence such as in relation to housing, education and social security. An important element of the test however would need to be that the exception is for a legitimate aim and proportionate.
- 2.86 The recent decision in December 2013 by the Court of Final Appeal in *Kong Yunming v The Director of Social Welfare*<sup>76</sup> illustrates an example of differences in treatment of new immigrants from mainland China which were not for a legitimate aim or proportionate. The Court found that the Government policy requiring all recipients of Comprehensive Social Security Assistance to have been a Hong Kong resident for at least seven years was unconstitutional and in breach of the right to social welfare under article 36 of the Basic Law. The policy had a direct adverse impact on new immigrants from mainland China such as the appellant who was refused social security shortly after her husband died. The Court also decided that a proportionate time limit on receiving social security was the previous limit of living in Hong Kong for one year.

#### **Consultation Question 11**

**In relation to the protected characteristic of race, do you think that any or all of the characteristics of nationality, citizenship, residency or related status should be added as protected characteristics?**

#### **Consultation Question 12**

**In relation to residency status or related status, if you think there should be protection, how should it be defined?**

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<sup>76</sup> FACV No 2 of 2013.

**Consultation Question 13**

**Do you think that the exception to race discrimination on the grounds of permanent residency and right of abode in Hong Kong under section 8(3)(b)(i) and (ii) should be repealed?**

**Consultation Question 14**

**Do you think that the exception to race discrimination on the grounds of length of residence in Hong Kong under section 8(3)(c) should be repealed?**

**Consultation Question 15**

**Do you think that the exception to race discrimination on the grounds of nationality, citizenship or resident status of a person in another country under section 8(3)(d) should be repealed?**

**Consultation Question 16**

**Do you think that consideration should be given to an exception to discrimination on grounds of residency status, but only where the relevant requirement is for a legitimate aim and is proportionate?**

## CHAPTER 3: FORMS OF PROHIBITED CONDUCT

- 3.01 This chapter examines:
- the forms of discrimination or other conduct that should be prohibited under the discrimination laws in Hong Kong;
  - to which protected characteristics such forms of discrimination or other conduct should apply; and
  - how the forms of discrimination or other prohibited conduct should be defined.
- 3.02 Part I explains the current forms of prohibited conduct and Part II makes proposals to reform the prohibited conduct.

### Part I: Current prohibited conduct

- 3.03 Currently under the Discrimination Ordinances there are a number of categories of prohibited conduct which apply to the protected characteristics in varying ways. The core prohibited conduct is:
- Direct and indirect discrimination<sup>77</sup>;
  - Harassment<sup>78</sup>;
  - Sexual harassment<sup>79</sup>;
  - Victimization<sup>80</sup>;
  - Vilification<sup>81</sup>;
- 3.04 In relation to disability only, there is express protection from discrimination for matters related to having a disability, for example when using auxiliary aids or interpreters.<sup>82</sup> This is discussed further below in relation to our

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<sup>77</sup> This applies to all the protected characteristics of race, sex, marital status, pregnancy, disability and family status.

<sup>78</sup> This applies to the protected characteristics of race and disability but not sex, pregnancy, marital status or family status.

<sup>79</sup> This is a particular form of harassment that is of a sexual nature and only applies to the protected characteristic of sex.

<sup>80</sup> This applies to all the protected characteristics of race, sex, marital status, pregnancy, disability and family status.

<sup>81</sup> This only applies to the protected characteristics of race and disability.

<sup>82</sup> Sections 9 and 10 of the Disability Discrimination Ordinance.

proposals to introduce a new category of “discrimination arising from disability”: see **paragraph 3.62 to 3.70**.

3.05 There is also some protection from discrimination by association with a person that has a protected characteristic in relation to disability, and to a more limited extent race.<sup>83</sup> Protection from discrimination by association is also discussed further below in the section on discrimination by association: see **paragraph 3.112 to 3.120**. In relation to disability only there is also protection where someone is imputed to have a disability.<sup>84</sup> This is also discussed further below in the section on discrimination by perception: see **paragraph 3.121 to 3.125**.

3.06 Across all the Discrimination Ordinances there are additional categories of prohibited conduct concerning:

- Discriminatory practices;
- Discriminatory advertisements;
- Instructions to discriminate;
- Pressure to discriminate;
- Liability of employers and principals; and
- Aiding unlawful acts.

3.07 In relation to the protected characteristic of disability only, there is also an express prohibition on persons with disabilities being required to provide information (for example medical information) where there would be unlawful disability discrimination, harassment or victimization.<sup>85</sup>

## **Part II:Proposals to reform prohibited conduct**

3.08 This part analyzes the following existing or possible new forms of prohibited conduct: direct and indirect discrimination; pregnancy discrimination; equal pay for equal value provisions ; discrimination

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<sup>83</sup> See section 5 of the RDO which concerns discrimination because of a “near relatives” race and section 6(c) of the DDO which refers to disability discrimination by association with a person with a disability.

<sup>84</sup> Section 2 DDO.

<sup>85</sup> Section 42 DDO. It will not however be unlawful to request information of a medical nature to determine whether a person can do the inherent requirements of a job: section 42(3).

relating to having an assistance animal; discrimination arising from disability; a duty to make reasonable accommodation for persons with disabilities; harassment including sexual harassment; intersectional discrimination; discrimination by association; discrimination by perception; and other unlawful conduct.

## **A. Direct discrimination**

3.09 All the Discrimination Ordinances prohibit direct discrimination which is a core concept of discrimination and human rights law in other international jurisdictions.

3.10 The same formulation for direct discrimination exists under all four Discrimination Ordinances. Direct discrimination occurs where a person, on the grounds of the protected characteristics (sex, pregnancy, marital status, race, disability or family status) of another person, treats that other person less favourably than the discriminator treats or would treat other persons. For example, if an employer advertises that he will only employ a man in a particular role that will be direct sex discrimination unless the employer can demonstrate that the requirement for men only is a genuine occupation qualification.

3.11 The current model of direct discrimination in Hong Kong is based on the United Kingdom and Australian models of discrimination legislation, but is more closely aligned with the Australian model. This involves a comparator test by comparing how a person was or would be treated with a person who did not have the protected characteristic.

3.12 There are two issues that we believe need addressing in the formulation of direct discrimination.

### **(i) Treatment on grounds of a protected characteristic**

3.13 One problem with the current model of direct discrimination is that all the Discrimination Ordinances refer to discrimination on grounds of the particular characteristic of *the person*. This contrasts with the formulation



in the United Kingdom which refers to less favourable treatment on grounds (because) of the characteristic rather than the person.<sup>86</sup> For example, the current formulation does not cover situations where a person is treated less favourably not because of his or her own race, but nevertheless on racial grounds.

**Example 11: Discrimination on racial grounds**

A Chinese manager of an amusement game centre was dismissed because of his refusal to carry out a racially discriminatory instruction to exclude young Nepalese people from entry.

Under the current formulation of direct discrimination, the manager would not be protected from the racial discrimination as he was not less favourably treated because of his race (Chinese). In the United Kingdom a similar situation would be protected: see the *Showboat* case<sup>87</sup>.

3.14 As a result, the EOC believes that the formulation of direct discrimination for all the protected characteristics should be amended to state “...on the grounds of the protected characteristic” a person is treated less favourably. This also links to the proposals to introduce express provisions of discrimination by association or perception for all the protected characteristics which is discussed further below: see **paragraph 3.112 to 3.125**.

**(ii) Comparator in direct disability discrimination claims**

3.15 In our previous submissions to the Government on the reform of the DDO we raised a concern with the direct discrimination provisions as they apply to disability.<sup>88</sup> We are concerned with the language of the provision which requires a comparison to be made between a person with a disability and another person without a disability. This may be interpreted as excluding comparison with persons who have another disability, which we believe is

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<sup>86</sup> See section 13(1) of the Equality Act 2010 (UK)

<sup>87</sup> *Showboat Entertainment Centre v Owens* [1984] 1 All ER 836.

<sup>88</sup> See Item 10 of the Annex to the Submission of the EOC on the reform of the SDO and the DDO 2011, Attachment 1.

not the correct interpretation of disability discrimination legislation.

- 3.16 The current definition does not clearly say that it is direct disability discrimination where a person with disabilities is less favourably treated than another person with a different disability (e.g. a difference in treatment between a person with mental disabilities and a person with physical disabilities). We do not believe such an approach would be desirable as there may be situations where persons with particular types of disabilities are less favourably treated than persons with other disabilities in similar circumstances, and may be regarded as disability discrimination.
- 3.17 This approach is not consistent with the approach under the Australian or United Kingdom disability discrimination laws. In Australia, the comparison is made with a person without “the disability” which could include a person having a different disability.<sup>89</sup>
- 3.18 In the United Kingdom, a comparison is made between the treatment of someone on grounds of a protected characteristic and the treatment of “others”.<sup>90</sup> Again this could include the treatment of a person having a different disability. Previously the direct disability discrimination provisions referred to less favourable treatment of persons with disabilities compared to persons without that “particular disability”.<sup>91</sup> As an example, this has been interpreted as including where a person with a bipolar disorder is treated less favourably than persons without that disability because of stereotypes about persons with mental disabilities.<sup>92</sup>
- 3.19 As a result the EOC believes that the United Kingdom model of direct discrimination should be adopted which makes reference to the treatment of “others”.<sup>93</sup>
- 3.20 The direct discrimination provision could therefore read:

*“A person (A) discriminates against another (B) if, on grounds of a*

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<sup>89</sup> Section 5 Disability Discrimination Act 1992, Commonwealth Australia.

<sup>90</sup> Section 13(1) Equality Act 2010.

<sup>91</sup> Section 3A Disability Discrimination Act 1995, United Kingdom.

<sup>92</sup> *Aylott v Stockton on Tees Borough Council* [2010] EWCA Civ 910.

<sup>93</sup> The United Kingdom model refers to treatment on grounds of protected characteristics, not the protected characteristic of “the person”.

*protected characteristic, A treats B less favourably than A treats or would treat others.”*

- 3.21 For the avoidance of doubt, a provision could also be added that states for the purpose of direct disability discrimination, the comparison with other persons is with those without the particular disability of “A”.

#### **Consultation Question 17**

**Do you think that the definition of direct discrimination should be amended to:**

- **include any less favourable treatment on grounds of a protected characteristic; and**
- **made clear that for direct disability discrimination a comparison can be made with persons without that particular disability (including persons with a different disability)?**

### **B. Direct pregnancy discrimination**

- 3.22 Currently, direct and indirect discrimination apply to the protected characteristic of pregnancy in the same way as other protected characteristics. However, one of the key aspects of reforming discrimination laws is that it should be tailored to the needs of the particular characteristic. There are two issues that arise in relation to direct pregnancy discrimination: removing the requirement of a comparator; and incorporating into the definition aspects that arise from the pregnancy such as sickness, or when the female staff is dismissed after returning from maternity leave.

- 3.23 Pregnancy discrimination is a unique form of sex discrimination given that only women can give birth. In the European Union, the case law of the Court of Justice has established that as only women can become pregnant, it is not appropriate to require a comparator for direct pregnancy discrimination.<sup>94</sup>

- 3.24 In the United Kingdom, the Equality Act 2010 reflects this by having a distinct and different definition of direct pregnancy discrimination:

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<sup>94</sup> *Webb v EMO Air Cargo (UK) Ltd* [1994] ICR 770.

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*“A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —*

*(a) because of the pregnancy, or*

*(b) because of illness suffered by her as a result of it.”<sup>95</sup>*

3.25 The test does not require comparator, and it refers to being treated “unfavourably” rather than “less favourably” as the latter relates to notions of a comparison being made.

3.26 Secondly, the current definition of direct pregnancy discrimination does not take into consideration aspects that may arise from pregnancy such as sickness, taking leave, and being replaced after maternity leave.

3.27 For example, many women experience morning sickness or other forms of sickness as a result of being pregnant and may need to take sick leave. In some cases we have dealt with at the EOC, respondent employers have dismissed these women who have taken sick leave. They have argued that they did not discriminate against the women on grounds of pregnancy as they would have dismissed any non-pregnant worker that took sick leave in the same circumstances.

3.28 Furthermore, some women in Hong Kong are dismissed after returning from maternity leave on the alleged basis that the replacement worker performed better than the worker taking maternity leave. Employers have argued that the dismissals were on grounds of performance, not pregnancy.

3.29 The EOC believes that pregnant women who are treated less favourably as a result of sickness or other characteristic arising from the pregnancy (e.g. taking maternity leave), should be protected from discrimination in such circumstances.

3.30 In the United Kingdom, the Equality Act 2010 includes in the definition of direct pregnancy discrimination not only treatment on grounds of pregnancy but also on grounds of *“illness suffered by her as a result of*

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<sup>95</sup> Section 18(2) Equality Act 2010.

it.”<sup>96</sup>

3.31 In Australia, the definition of direct pregnancy discrimination also includes treatment on grounds of *“a characteristic that appertains generally to women who are pregnant or potentially pregnant.”*<sup>97</sup>

3.32 We therefore believe that there should be a discrete and different definition of direct pregnancy discrimination which states:

**“on the ground of her pregnancy, sickness or other characteristic that appertains generally to women who are pregnant or potentially pregnant a person treats her unfavourably ”**

#### **Consultation Question 18**

**Do you think that there should be a different test for direct pregnancy discrimination which states:**

**“on the ground of her pregnancy, sickness or other characteristic that appertains generally to women who are pregnant or potentially pregnant a person treats her unfavourably ”?**

#### **Consultation Question 19**

**How to protect pregnant staff from dismissal after maternity leave on the pretext that the temporary replacement performed better?**

### **C. Indirect discrimination**

3.33 Indirect discrimination relates to policies or practices that are neutral in their application but have the effect of disadvantaging a group with a protected characteristic and cannot be demonstrated to be justifiable. The concept of indirect discrimination is particularly important in situations of structural discrimination as opposed to overt direct discrimination.

3.34 The same formulation for indirect discrimination exists under all four Discrimination Ordinances, which are based on the United Kingdom and Australian discrimination laws. Currently, the key elements of the test for indirect discrimination are:

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<sup>96</sup> Section 18(2) Equality Act 2010.

<sup>97</sup> Section 7(1)(b) Sex Discrimination Act 1984.

- A requirement or condition is applied to persons;
- The proportion of persons with a protected characteristic that cannot meet the requirement or condition is considerably smaller than the proportion of people without the protected characteristic;
- Which is to the detriment of the person with the protected characteristic as he/she cannot comply with it; and
- The requirement or condition cannot be shown to be justifiable.

3.35 The EOC considers that the definition of indirect discrimination should be revised to reflect developments in other jurisdictions. There are two issues that the EOC believes need addressing: the scope of the test with respect to a “requirement or condition”; and making it clear in the legislation what needs to be established for indirect discrimination to be justified.

#### **(i) Requirement or condition**

3.36 In relation to the element of “a requirement or condition”, the United Kingdom courts previously interpreted it narrowly, making it difficult to establish indirect discrimination. Courts interpreted it as requiring the establishment of an “absolute bar” to accessing employment or services.<sup>98</sup>

3.37 Since then the United Kingdom legislation has been amended and now has a broader definition of a “provision, criterion or practice”. This is also the same definition used in the European Union anti-discrimination Directives and applies across all 27 EU Member States. The terms are construed broadly and include policies, procedures, rules, arrangements, and requirements, whether mandatory or discretionary.<sup>99</sup>

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<sup>98</sup> *Perera v Civil Service Commission and Department of Customs and Excise (No 2)* [1983] IRLR 166; and *Meer v London Borough of Tower Hamlets* [1988] IRLR 399.

<sup>99</sup> *British Airways Plc v Starmar* [2005] IRLR 862.

**Example 12: Provisions, criterion or practices**

An employer states that as part of their criteria for appointment as a legal assistant, candidates who are able to work full-time would be given preference.

Under the existing test of indirect discrimination, this criterion would not constitute a “requirement” or “absolute bar” to employing persons who could not work full-time. As a result it would not be possible to establish indirect discrimination. However, under a broader test the preferential criterion would be capable of being a relevant criterion which could put women at a particular disadvantage as they are more likely to work part-time.

3.38 In the current Australian anti-discrimination legislation the test for indirect discrimination is also wider than under the Hong Kong legislation as it stipulates a “condition, requirement or practice” in the case of sex, marital status and pregnancy discrimination;<sup>100</sup> or a “term, condition or requirement” in the case of race discrimination.<sup>101</sup>

3.39 The EOC believes that the current test of a “requirement or condition” is too restrictive and no longer consistent with international practice. As a result, it is in our view appropriate to use the United Kingdom terminology of a “provision, criterion or practice” as it takes a broader and more consistent approach than the Australian legislation.

**(ii) Justification**

3.40 The last element of the test of indirect discrimination is that a respondent cannot establish the policy is “justifiable”. The EOC believes that this element should be modified to more clearly set out on the face of the legislation what is required.

3.41 In the United Kingdom, the test requires that the respondent cannot show that the condition requirement or practice is a “proportionate means of

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<sup>100</sup> See sections 5(2), 6(2), 7(2) of the Sex Discrimination Act 1984.

<sup>101</sup> Section 9A(1) Race Discrimination Act 1975.

achieving a legitimate aim". In other words, the test spells out clearly that there are two elements to establishing that the policy was justified or reasonable: a legitimate aim and that the measures used to achieve that aim were proportionate.

3.42 The Australian model refers to the "reasonableness" of the condition, requirement or practice. The Sex Discrimination Act 1984 provides further explanation of the factors to be taken into account in determining reasonableness:

- "(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice;*
- (b) the feasibility of overcoming or mitigating the disadvantage; and*
- (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice."*<sup>102</sup>

3.43 In Hong Kong, the Race Discrimination Ordinance is the only Discrimination Ordinance that expressly defines the meaning of "justifiable". Section 4(2) states that a requirement or condition is justifiable "if it serves a legitimate objective and bears a rational and proportionate connection to the objective".

3.44 The EOC believes that for reasons of clarity and harmonization, the indirect discrimination provisions for all the protected characteristics should set out the elements of when indirect discrimination is justified. Our preference would be to adopt the RDO model for all the protected characteristics.

#### **Consultation Question 20**

**Do you think that the definition of indirect discrimination should be amended to:**

- refer to a "provision, requirement or practice"; and**
- set out the meaning of "justifiable" as where a provision, requirement or practice "serves a legitimate objective and bears a rational and proportionate connection to the objective"?**

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<sup>102</sup> For example section 7B Sex Discrimination Act 1984.



## **D. Equal Pay for work of equal value for women and men**

- 3.45 Eliminating discrimination in pay between women and men is particularly important to achieving gender equality and dignity for women. Equal pay in employment is also a fundamental human right of women as recognized in the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (“CEDAW”).<sup>103</sup>
- 3.46 There is some evidence in Hong Kong of pay gaps between women and men for work of equal value. In relation to issues of equal pay, although Hong Kong made advances in reducing the gender pay gap between men and women from the 1980s to approximately 2000, those advances have reversed to an extent and a pay gap exists across most occupations.<sup>104</sup> For example in 2009 the medium monthly earnings for men and women were \$12,000 and \$8,500 respectively which equates to women earning 70.8% of men. This represents an improvement on the ratio from 1986 (66.7%), but there has been a reduction in the ratios from a high in 1996 (80%), to lower figures in 2001 (73.3%) and 2006 (69.6%).<sup>105</sup>
- 3.47 The Government’s most recent statistics indicate that in 2011 the median monthly employment earnings across all sectors was \$9,300 for women and \$13,000 for men. Whilst these differences can be attributed to a range of factors such as the nature of the industries, work experience, nature of the work, differences in average pay remain within most sectors and there are greater pay gaps in low skilled and low paid work.<sup>106</sup> Despite the fact that on average men were paid more than women in most sectors, it should be noted that in two sectors women were paid more than men (associate professional and clerical support workers).<sup>107</sup>
- 3.48 There are two concepts of equal pay. Firstly, women should be paid the

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<sup>103</sup> Article 11 CEDAW.

<sup>104</sup> Women and Girls in Hong Kong, Current Situations and Future Challenges, Edited by Susanne YP Choi and Fanny M Cheung, Hong Kong Institute of Asia Pacific Studies, The Chinese University of Hong Kong, 2012.

<sup>105</sup> Ibid pages 53-54.

<sup>106</sup> Women and men in Hong Kong, Key statistics 2012, pages 211-12 and Table 5.4, <http://www.statistics.gov.hk/pub/B11303032012AN12B0100.pdf>

<sup>107</sup> Ibid Table 5.4.

same as men when they are doing equal work (i.e. it is the same or very similar job with similar responsibilities). Secondly, women should be paid the same as men when they are doing different jobs but they are of equal value as the men's jobs.<sup>108</sup>

**Example 13: Equal work with similar responsibilities and equal value**

A man is employed as a sales assistant for a company selling mobile phones. A female is employed by the same company as a promotion assistant. Although the title of her role is different, her responsibilities are very similar to the responsibilities of the man working as a sales assistant. The two roles would be "like" work and they should be paid the same.

**Example 14: Equal work with different responsibilities but equal value**

A man and a woman both work in the same café. The man works as a bar attendant and the woman works as a waiter. The roles have quite different responsibilities and some differences in the prerequisites to be employed. However, the employer conducts a job evaluation for all positions in the organization and determines that the two roles are of equal value. As a result, the man and the woman should be paid the same.

3.49 In many international jurisdictions it has been considered necessary to develop specific discrimination laws provisions on equal pay. In the European Union all 27 Member States are required to prevent direct and indirect sex discrimination in relation to pay.<sup>109</sup> Specific legislation relating to sex discrimination and equal pay has been developed in many jurisdictions including Canada<sup>110</sup>, the United States<sup>111</sup>, the United Kingdom<sup>112</sup> and Australia<sup>113</sup>.

3.50 Direct and indirect discrimination claims rely on the identifying of an individual comparator or a comparator group which can often be complex in equal pay claims. As a result, equal pay provisions provide details as to

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<sup>108</sup> See the EOC Guide to Employers on Equal Pay between men and women: <http://www.eoc.org.hk/EOC/Upload/UserFiles/File/EPEV/MainGuideWeb-e.pdf>

<sup>109</sup> Recast Directive 2006/54/EC.

<sup>110</sup> See for example at Federal level section 11 of the Canadian Human Rights Act.

<sup>111</sup> At Federal level see the Equal Pay Act 1963.

<sup>112</sup> In the United Kingdom there has been discrete equal pay legislation since the Equal Pay Act 1970.

<sup>113</sup> Australia's Federal equal pay legislation is contained in the Workplace Relations Act 1996.

how comparators should be determined and what constitutes work of equal value.

- 3.51 The United Kingdom legislation provides a good example of how equal pay legislation operates within anti-discrimination legislation. Equal pay provisions are contained in the Equality Act 2010.<sup>114</sup> They provide that a woman doing equal work with a man in the same employment is entitled to equality in pay and other contractual terms, unless the employer can show that there is a material reason for the difference which does not discriminate on the basis of her sex.
- 3.52 Work will be considered to be equal with the work of a male comparator where the work is:
- the same or broadly similar, provided that where there are any differences in the work, these are not of practical importance (known as '**like work**'),
  - different, but which is rated under the same job evaluation scheme as being work of equal value (known as '**work rated as equivalent**')
  - different, but of equal value in terms of factors such as effort, skill and decision-making (known as '**work of equal value**').<sup>115</sup>
- 3.53 In Hong Kong, the Government has to date indicated it does not believe there is a need to develop specific anti-discrimination legislation relating to equal pay between men and women. In their view the current direct and indirect sex discrimination provisions are sufficient to deal with equal pay claims.<sup>116</sup>
- 3.54 In 1997-98 the EOC commissioned an independent study on Equal Pay for Equal Value (EPEV).<sup>117</sup> It concluded that at that time it was not appropriate or necessary to adopt specific equal pay legislation. In 2000, the EOC established a taskforce on EPEV and proceeded with a study conducted by an independent consultancy on EPV into two public sector employers (the Civil Service and the Hospital Authority). The taskforce was made up of relevant Government bodies. The study was published in 2004.

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<sup>114</sup> See Chapter 3 of Part 5 on Work, sections 64 to 80 Equality Act 2010.

<sup>115</sup> Section 64 Equality Act 2010.

<sup>116</sup> [http://www.eoc.org.hk/EOC/Upload/UserFiles/File/publication/research/epev\\_part\\_IV\\_e.pdf](http://www.eoc.org.hk/EOC/Upload/UserFiles/File/publication/research/epev_part_IV_e.pdf)

<sup>117</sup> Feasibility Study on Equal Pay for Equal Value,  
[http://www.eoc.org.hk/EOC/Upload/UserFiles/File/publication/research/epev\\_part\\_II\\_e.pdf](http://www.eoc.org.hk/EOC/Upload/UserFiles/File/publication/research/epev_part_II_e.pdf)

- 3.55 The EOC later examined the results of the study which were not unequivocal in their conclusions regarding gender pay gaps in those sectors. It also noted that it had received no complaints relating to equal pay. It therefore decided that there was insufficient evidence at that time for equal pay legislation. Instead the EOC produced a series of practical guidance for employers on how to implement the principles of EPEV.<sup>118</sup>
- 3.56 The EOC believes that as it is now a number of years since the issues relating to legislation on EPEV have been considered, it is appropriate to reassess the evidence.

#### **Consultation Question 21**

**Do you think that there is a need for introducing specific equal pay for equal value provisions?**

### **E. Disability discrimination**

- 3.57 A crucial element of modernizing the current discrimination legislation is the need to tailor the provisions to the needs of the particular groups. This is particularly important for persons with disabilities and is recognized in many jurisdictions by an “asymmetrical approach” to persons with disabilities. For example, this may involve the development of discrete provisions which permit more favourable treatment of persons with disabilities and target the particular discrimination or disadvantages they face.
- 3.58 The EOC believes there are three key areas where the current discrimination laws as they apply to persons with disabilities should be reformed: having an express provision that it is unlawful to discriminate on grounds of having an assistance animal; providing a discrete category of discrimination arising from disability; and providing a duty to make reasonable accommodation for persons with disabilities.

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<http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=preventing%20sex%20discrimination%20in%20pay>

**(i) Discrimination on grounds of having an assistance animal**

3.59 The EOC receives complaints from persons with visual impairment that they have been discriminated against because of having a guide dog.

3.60 Currently there is no express provision specifying that discrimination against a person who has a guide dog or other animal providing assistance is disability discrimination. Such discrimination would need to be dealt with as an indirect disability discrimination claim. This can be contrasted with Australia where the legislation does provide such express protection in relation to an “assistance animal”.<sup>119</sup> The definition is broad enough to include guide dogs for people who have visual impairment, other dogs that provide assistance to persons with disabilities, and other types of animals.<sup>120</sup> This protection is in the same category of discrimination as disability aids or carers.

3.61 The EOC believes that express protection from discrimination on grounds of an assistance animal should be added to the provisions prohibiting disability discrimination for similar aids such as carers.<sup>121</sup>

**Consultation Question 22**

**Do you think that discrimination due to being accompanied by assistance animal should be added as a category of disability discrimination?**

**(ii) Discrimination arising from disability**

3.62 There are certain forms of discrimination relating to persons with disabilities that may not conform to the elements of direct or indirect discrimination.

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<sup>119</sup> Section 9 of the Disability Discrimination Act 1992 defines an assistance animal or a dog or other animal accredited or trained to assist a person with a disability to alleviate the effects of the disability.

<sup>120</sup> For example in *Sheehan v Tin Can Bay Country Club* [2002] FMCA 95 the Federal Magistrates Court found a dog which made its owner, a man with an anxiety disorder, feel more confident in social interactions, to be an assistance dog, and to be a trained animal because its owner had trained it. It was unlawful discrimination to prevent the dog being into public premises.

<sup>121</sup> Sections 9 and 10 DDO.

**Example 15: Discrimination arising from a disability**

A person with a disability of a brain tumor needs to take four weeks unpaid leave over the period of one year in order to have chemotherapy used to treat the tumor. The employer has a policy that staff who take more than three weeks unpaid leave per year will not have their contract renewed. The employer decides to end the employment of the person because they cannot afford to have employees take four weeks unpaid leave as it adversely affects the productivity of the company.

- 3.63 It may be argued that this would not be a case of direct disability discrimination as the person with disabilities was not being less favourably treated on grounds of the disability, but for taking significant amount of unpaid leave.
- 3.64 It may also be argued that this was not indirect disability discrimination. The employer applied a requirement that if employees take three weeks unpaid leave per year, they will not have their contract renewed. A comparison would need to be made between the effect of the requirement on the person with a disability of a brain tumor and other employees without a disability. As all staff who took three weeks unpaid leave would be treated in the same way, it may not be clear that there is indirect discrimination.
- 3.65 In the current Disability Discrimination Ordinance, there is some recognition of such discrimination that arises from a disability by prohibiting discrimination in relation to a person with disabilities using palliative, therapeutic devices, auxiliary aids or where they are accompanied by an interpreter, reader, assistant or carer.<sup>122</sup>
- 3.66 However this protection is limited to those particular areas. It does not provide general protection from any discrimination which may arise from disability. In practice, this has resulted in some situations (such as example 15 above) where it is unclear whether a complaint of disability discrimination could be pursued.
- 3.67 In the United Kingdom, the Equality Act 2010 contains a specific category

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<sup>122</sup> Sections 9 and 10 of the DDO.

of discrimination arising from disability which is in addition to direct and indirect disability discrimination provisions. This was introduced to address the gap in protection of the direct and indirect disability discrimination provisions. Discrimination arising from disabilities is defined to occur where:

- A person (e.g. employer, education or housing provider) treats the person with disabilities unfavourably;
- this treatment is because of something arising in consequence of the disability; and
- the person cannot show that this treatment is a proportionate means of achieving a legitimate aim,
- unless the person does not know, and could not reasonably be expected to know, that the person has a disability.<sup>123</sup>

3.68 There is no requirement as in direct and indirect discrimination to compare how persons without disabilities would have been treated. However, a person will only be liable for discrimination where they had knowledge or could be reasonably expected to know that the person has a disability; and the treatment was not a proportionate means of achieving a legitimate aim.

3.69 Further, unlike sections 9 and 10 of the DDO, the prohibition of discrimination arising from disability is open ended which ensures that it is flexible to deal with any situation where someone is treated unfavourably on grounds of something arising from a disability.

3.70 The EOC therefore believes that it would be appropriate to introduce a new category of discrimination arising from disability, based on the United Kingdom definition, in order to address discrimination arising from disabilities which do not fall within sections 9 and 10 of the DDO. This would be distinct from and in addition to the direct and indirect disability discrimination provisions. Further, it believes that the specific categories of disability discrimination in sections 9 and 10 of the DDO should be retained for reasons of clarity.

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<sup>123</sup> Section 15 Equality Act 2010.

### Consultation Question 23

**Do you think that a new category of discrimination arising from disability should be introduced?**

#### **(iii) A duty to make reasonable accommodation**

3.71 Internationally, the requirement or duty to make reasonable accommodation or adjustments for persons with disabilities is critical for advancing their human rights to be treated with dignity, respect and to fully participate in society.

3.72 The United Nations Convention on Rights of Persons with Disabilities (“CRPD”) defines reasonable accommodation as:

*“necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”<sup>124</sup>*

3.73 The Convention also states:

*“In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.”<sup>125</sup>*

3.74 In the European Union, the discrimination legislation relating to disability discrimination in employment specifically requires employers to provide reasonable accommodation for persons with disabilities to have access to, participate in or advance in employment unless such measures would impose a disproportionate burden.<sup>126</sup> The denial of reasonable accommodation is also defined as a form of discrimination.<sup>127</sup>

3.75 In many international domestic jurisdictions there are also specific duties to make reasonable accommodation for persons with disabilities in a range

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<sup>124</sup> Article 2 CRPD.

<sup>125</sup> Article 5(3) CRPD.

<sup>126</sup> Article 5, Framework Directive, 2000/78/EC

<sup>127</sup> Article 2, Framework Directive 2000/78/EC.



of fields. For example in the United Kingdom, the Equality Act 2010 requires reasonable adjustments to be made for physical features, auxiliary aids and provisions criterion or practices in a broad range of fields (work, services, premises, education and associations). A failure to comply with the duty is a form of discrimination.<sup>128</sup>

3.76 In the Australian Disability Discrimination Act 1992, the requirement to make reasonable accommodation is part of the elements of direct or indirect disability discrimination.<sup>129</sup> A failure to make reasonable accommodation constitutes discrimination, subject to the defence of unjustifiable hardship.<sup>130</sup>

3.77 The Hong Kong model is based on the former Australian model. In the current DDO, there is no express statement in the direct and indirect discrimination provisions that there is a requirement to make reasonable accommodation. Rather, the provisions are formulated as exceptions to liability for direct or indirect discrimination in the fields covered by the legislation.<sup>131</sup> For example in relation to education, there is no disability discrimination in refusing admission where an education provider can establish that the provision of services or facilities for students with disabilities would impose unjustifiable hardship on the educational establishment.

3.78 The EOC believes that the approach in the United Kingdom Equality Act 2010 of having an express duty to make accommodation is preferable in order to ensure that persons with disabilities are better able to participate in key aspects of life such as employment, education and accessing services. A duty would:

- be more consistent with the proactive obligations under the CRPD for States to introduce measures to ensure reasonable accommodation for persons with disabilities is provided;
- make it clearer to those with obligations that they must make

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<sup>128</sup> Sections 20 and 21 Equality Act 2010.

<sup>129</sup> Section 5 and 6 Disability Discrimination Act 1992.

<sup>130</sup> Section 11 Disability Discrimination Act 1992.

<sup>131</sup> See sections 12(2) of the DDO in relation to genuine occupational qualifications, section 24(4) in relation to education, section 26(2) in relation to goods services and facilities, and section 28(4) in relation to premises.

reasonable accommodation for persons with disabilities;

- still only require “reasonable” accommodation such that changes which would be disproportionate and create unjustifiable hardship would not be required;
- only apply where the relevant person (e.g. employer or education provider) knows or ought reasonably to know that a person is disabled and may need reasonable accommodation; and
- unlike the existing legislation, make the failure to make reasonable accommodation an express form of discrimination as in the United Kingdom and Australia.

3.79 It would also be preferable as it would disconnect the reasonable accommodation provisions from direct and indirect discrimination provisions. This is important as the obligations relating to reasonable accommodation are different from the elements of direct or indirect discrimination.

3.80 The reasonableness of accommodation would depend on a number of factors as is currently the case in assessing whether services or facilities would cause undue hardship. In relation to employment, these factors could include:

- whether providing the services or facilities would be effective in preventing the substantial disadvantage;
- the practicability of the services or facilities;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer’s financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment; and
- the type and size of the employer.

3.81 Where a person becomes disabled or their disability worsens while in a position, a reasonable accommodation may also be providing a suitable alternative post if reasonable accommodation to the existing position is not possible.

**Example 16: Reasonable accommodation by employer**

A male employee of a large furniture removal company in Hong Kong was working as a removalist. However, after he was diagnosed with cancer and requires chemotherapy, he is physically weaker and cannot work in the same role. As the employee has previous experience working in administrative roles, the employer appoints him to a new office position dealing with bookings. This is likely to be a reasonable accommodation for the employee.

**Example 17: Unreasonable requests for accommodation**

A small company with only three employees has one employee with a physical disability and is in a wheelchair. The company is given notice to vacate its previous office and decides to move to a new office which is in an old walk up building as it is of cheaper rent. The employee with the disability requests that the company pay for the installation of a lift in the building in order that she can reach the office. She claims that this would be a reasonable accommodation for her. This is unlikely to be a reasonable accommodation by the employer given the small size of the company which has limited financial resources, the considerable costs that would be involved in installing a lift, and she is the only employee with a disability. It is to be noted however that, depending on the resources of the building owner or manager, it may be a reasonable accommodation for them.

- 3.82 Finally, if a system of a duty to provide reasonable accommodation were introduced, it is proposed that current provisions regarding undue hardship would become unnecessary and can be repealed as the reasonable accommodation concept would take into consideration issues of undue hardship.

**Consultation Question 24**

**Do you think that new distinct duty to make reasonable accommodation for persons with disabilities should be introduced in the discrimination legislation and that it should be based on the United Kingdom model?**

## **F. Harassment**

3.83 Harassment is a particular form of direct discrimination that involves humiliating, intimidating or degrading a person and as a result offends their dignity. It is therefore vital that the discrimination laws adequately protect people from harassment in a range of environments including employment, education, the provision of goods and services, and premises.

3.84 There is currently protection from harassment in relation to the protected characteristics of race, disability and sex. Protection from racial or disability harassment extends to all the fields in which discrimination is prohibited under the RDO and DDO. With respect to sex, sexual harassment is a discrete form of harassment involving conduct of a sexual nature and is discussed separately.

3.85 There are two main issues that arise in relation to harassment:

- The scope of protected characteristics where harassment is prohibited; and
- The definitions of race, disability and sexual harassment.

3.86 In relation to broadening the fields in which harassment is prohibited, this is discussed in Chapter 4 on fields of prohibited conduct: see **paragraph 4.38 to 4.79**.

### **(i) The characteristics where harassment is prohibited**

3.87 There is currently no protection from harassment in relation to the characteristics of sex, pregnancy, marital status, or family status. The EOC believes that there is evidence of harassment in Hong Kong in relation to each of those characteristics and therefore provisions should be introduced.

3.88 In the United Kingdom the Equality Act 2010 provides protection from harassment not only for the characteristics of race and disability but also sex. This is distinct from sexual harassment as it concerns situations where someone is harassed for reasons relating to their sex, but it is not of a

sexual nature.

**Example 18: Sex harassment**

A woman who works in a bank is mocked and humiliated by her male colleagues for taking a training course offered by the bank for female staff to improve their management skills. The training course is offered as there are low numbers of women in management positions and they want to increase those numbers as a special measure under section 48 of the SDO. This is likely to be sex harassment but not sexual harassment as the treatment is not of a sexual nature (e.g. making sexual advances).

- 3.89 The EOC believes that as sex harassment is distinct from sexual harassment, sex harassment should be prohibited.
- 3.90 In relation to family status, the EOC has received complaints of persons being harassed because of needing to care for an immediate family member such as their child, parent, or grandparent.

**Example 19: Family status harassment**

A female employee applies for annual leave to attend her son's annual sports day at his school. The woman is mocked and humiliated by her employer for wanting to take time off, being told she should just be a housewife and look after her child. This is likely to be harassment on grounds of family status.

- 3.91 In relation to marital status, there is some evidence of people in Hong Kong being harassed on the basis of their marital status (e.g. being married or single).

**Example 20: Marital status harassment**

A female employee who is in her late 30s, single and without a partner is humiliated by her colleagues who label her as a spinster and mock her saying she will never find someone to marry at her age. This may be harassment on grounds of marital status.

### Consultation Question 25

**Do you think that harassment should be prohibited in relation to the protected characteristics of sex, pregnancy, family status and marital status?**

#### **(ii) The definition of harassment**

3.92 There are currently three forms of harassment: race, disability and sexual harassment. There are two major concerns with the current definitions: they are not consistent and they are not sufficiently clear.

#### **(a) Race and disability harassment**

3.93 There is currently inconsistency between the definitions of race and disability harassment. In relation to race, protection from harassment under the Race Discrimination Ordinance extends to two situations:

- On the grounds of race a person engages in unwelcome conduct that a reasonable person would think another person would be offended, humiliated or intimidated: section 7(1); or
- On the grounds of race a person alone or together with other persons engages in conduct that creates a hostile or intimidating environment for a person: section 7(2).<sup>132</sup>

3.94 The current definition of harassment under the RDO is repetitive by having similar forms of harassment under section 7(1) and (2), as well as being inconsistent by only requiring an objective test of reasonableness in section 7(1). In contrast, in relation to disability the DDO only provides protection from harassment in relation to the first category of harassment covered by the RDO. The EOC believes that it is appropriate for the definition of harassment to be harmonized for all forms of harassment, including sexual harassment: see below **paragraph 3.98 to 3.100**.

3.95 The EOC considers that the current model for harassment could be

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<sup>132</sup> Section 7 RDO.

simplified in line with developments in the United Kingdom and Australia which provide clearer models. Our preference is the United Kingdom model as it is in our view the clearest. It defines harassment as:

*“A person (A) harasses another (B) if—*

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and*
- (b) the conduct has the purpose or effect of—*
  - (i) violating B’s dignity, or*
  - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”<sup>133</sup>*

3.96 The Equality Act also states that in determining what effect the conduct had, the following should be taken into account:

- The perception of B;
- The other circumstances of the case; and
- Whether it is reasonable for the conduct to have that effect.<sup>134</sup>

3.97 This model avoids the repetitive nature of the test under sections 7(1) and (2) of the RDO and applies an objective requirement of reasonableness to the whole definition of harassment. The definition is also consistent with the test for harassment in the EU discrimination Directives.<sup>135</sup>

## **(b) Sexual harassment**

3.98 Sexual harassment is a particular form of harassment involving engaging in conduct of a sexual nature with another person. This can include a wide range of conduct such as making sexual advances to a person, inappropriately touching a person in a sexual manner, and emailing pornographic pictures to colleagues at work. It applies to anyone that sexually harasses another irrespective of their sex or sexual orientation. In other words, the provisions can apply to men sexually harassing women, women harassing men or persons sexually harassing someone of the same sex.

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<sup>133</sup> Section 26(1) Equality Act 2010.

<sup>134</sup> Section 26(4) Equality Act 2010.

<sup>135</sup> The Race Directive 2000/43/EC and the Framework Directive 2000/78/EC.

3.99 Sexual harassment is defined under section 2(5) of the SDO as:

*“...a person (howsoever described) sexually harasses a woman if-*

*(a) the person-*

*(i) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to her; or*

*(ii) engages in other unwelcome conduct of a sexual nature in relation to her,*

*in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that she would be offended, humiliated or intimidated; or*

*(b) the person, alone or together with other persons, engages in conduct of a sexual nature which creates a hostile or intimidating environment for her.”*

3.100 The EOC believes that the same test should be used for sexual harassment and other forms of harassment, other than defining sexual harassment as concerning unwanted conduct of a sexual nature to distinguish it from sex harassment. The United Kingdom model in the Equality Act 2010 takes this approach. It defines sexual harassment as:

*“A also harasses B if A engages in unwanted conduct of a sexual nature; and*

*the conduct has the purpose or effect of:*

- Violating B’s dignity; or*
- Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”<sup>136</sup>*

### **Consultation Question 26**

**Do you think that the definition for harassment for all protected characteristics should be “A person (A) harasses another (B) if—**

**(a) A engages in unwanted conduct related to a relevant protected characteristic, and**

**(b) the conduct has the purpose or effect of—**

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<sup>136</sup> Sections 26(1) and (2) of the Equality Act 2010.



- (i) violating B's dignity, or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

#### **Consultation Question 27**

**Do you think there should be protection from harassment for all protected characteristics?**

#### **Consultation Question 28**

**In relation to sexual harassment, do you think that the definition should be the same as other forms of harassment, other than stating in addition that it is unwanted conduct of a sexual nature?**

### **G. Intersectional discrimination**

- 3.101 The reality of people's identities is that they are not defined by one characteristic such as their sex, race, age, disabilities and so on, but by a combination of characteristics. This shapes our personal experiences of the world, including the way in which others treat us.
- 3.102 The concept of intersectional discrimination relates to the fact that persons may be treated less favourably not on the basis of one characteristic, but on the basis of the combination or intersection of several characteristics such as sex and age, sex and race, disability and age. In such situations, it may be difficult to establish that a protected characteristic is a reason for less favourable treatment.
- 3.103 Internationally, concerns about intersectional discrimination have been raised in a number of different contexts. For example, the United Nations Committee on Eliminating Discrimination Against Women has noted the close links between discrimination and human rights abuses of women, and racial discrimination and intolerance of particular groups in society including female migrant workers.<sup>137</sup>
- 3.104 Given these concerns about intersectional discrimination, a number of

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<sup>137</sup> Preparatory report of the Committee on the Elimination of Discrimination Against Women to the World Conference Against Racism, 29 January 2001, CEDAW/C/2001/I/CRP.3/Add.9.

jurisdictions have introduced provisions that expressly prohibit intersectional discrimination.

- 3.105 In the United Kingdom, the Equality Act 2010 provides protection from intersectional discrimination where there is direct discrimination on the basis of two protected characteristics.<sup>138</sup> It defines this as combined discrimination where:

*“A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.”*

- 3.106 The provisions also state that it is not necessary to prove that there was direct discrimination in relation to each of the protected characteristics taken separately.<sup>139</sup>

- 3.107 In Australia the Draft Human Rights and Anti-Discrimination Bill 2012 proposed that direct discrimination, (including harassment) and indirect discrimination includes situations of intersectional discrimination where it relates to “a particular combination of two or more protect attributes”.

- 3.108 There is also express protection from intersectional discrimination in Canada where the relevant provision provides that “a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.”<sup>140</sup>

- 3.109 In light of the above factors, the EOC believes that it would be appropriate to consider whether there is a need to prohibit intersectional discrimination as a discrete form of prohibited conduct. Consideration is also appropriate as to whether this should apply to direct discrimination, indirect discrimination, as well as harassment.

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<sup>138</sup> Section 14(1) Equality Act 2010.

<sup>139</sup> This addresses the effect of a previous decision relating to a claim of the combined effect of being a Black woman. The Court of Appeal held that the claimant would need to establish separately claims of direct sex discrimination and direct race discrimination rather than considering the combined effect of being a Black woman: *Bahl v The Law Society* [2004] EWCA Civ 1070.

<sup>140</sup> Section 3.1, Canadian Human Rights Act.

- 3.110 The example below illustrates what benefit intersectional discrimination provisions could provide.

**Example 21: Direct intersectional discrimination**

A bank manager decides to refuse a Southeast Asian woman who is a foreign domestic worker from opening a bank account. The bank manager states to her that female foreign domestic workers do not earn much so it would not be worth the bank opening accounts for them. The bank generally allows females to open bank accounts so it may not be sex discrimination. It also generally allows Southeast Asian to open bank accounts so it may not be race discrimination. This may be intersectional direct race and sex discrimination where the combination of being a female Southeast Asian was the basis on which she was discriminated against.

- 3.111 The EOC believes consideration should be given to intersectional discrimination applying to discrimination on the basis of two or more protected characteristics as applied in Canada.

**Consultation Question 29**

**Do you think that there should be provisions on intersectional direct and indirect discrimination, as well as harassment? If so, do you think that there should be protection from intersectional discrimination on the basis of two or more protected characteristics?**

**H. Discrimination by association**

- 3.112 Discrimination by association concerns the fact that it is not only people with protected characteristics that can be treated less favourably, but also their partners, friends, carers and other associates of them. In such situations, it is just as important to ensure that such discrimination is prohibited.
- 3.113 Currently under the Discrimination Ordinances there is only protection from discrimination by association in relation to disability, and to a limited extent race. In relation to disability discrimination this applies to both

direct discrimination and disability harassment.<sup>141</sup> In relation to race, discrimination by association also applies to direct discrimination and racial harassment, but only by association with a near relative of a particular race.<sup>142</sup>

**Example 22: Disability harassment by association**

A student at school is harassed by other students because one of his best friends at school is a student with disabilities. This is unlawful disability harassment by association.

**Example 23: Race discrimination on the ground of race of near relative**

A married couple ask to stay in a small hotel. The wife is Chinese and the husband is Indian. The hotel owner does not like Indians as previously he had an experience of an Indian not paying the hotel bill. The couple are refused a hotel room. This is unlawful race discrimination against both the husband and the wife as she is a near relative to her husband.

- 3.114 The race discrimination provisions do not apply to other associates such as friends, carers, work colleagues. The EOC has received some complaints relating to race discrimination by association which it has not been able to act on because of this limitation.
- 3.115 There is also no protection from discrimination by association in relation to sex, pregnancy, marital or family status.
- 3.116 The United Kingdom Equality Act 2010 provides protection from association across all the protected characteristics. This applies to direct discrimination and harassment.
- 3.117 In Australia, all State discrimination legislation has protection from discrimination by association in relation to a range of protected

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<sup>141</sup> Section 2(6) and (7) DDO.

<sup>142</sup> Sections 5 and 7 RDO. "Near relative" is defined as the person's spouse, parent of the person or the spouse, child of the person or the spouse of such a child, a brother or sister of the person or of the spouse or of the spouse of such a brother or sister, a grandparent of the person or spouse, a grandchild of the person or the spouse of such a grandchild: section 2 RDO.

characteristics wider than in Hong Kong.<sup>143</sup> This applies to direct discrimination and in some States indirect discrimination. For example in New South Wales, there is protection from direct and indirect discrimination by association in relation to race, sex, marital status, disability and age.

- 3.118 At federal level, the Draft Human Rights and Anti-Discrimination Bill 2012 proposed to provide protection from direct and indirect discrimination and harassment by association across all the protected characteristics. Associate was proposed to be defined as:

*“(a) a member of the person’s immediate family, or other relative of the person; and  
(b) Another person with whom the person has a care, business or social relationship.”<sup>144</sup>*

- 3.119 The EOC believes that a similar model should be adopted in Hong Kong to ensure that all persons that are directly or indirectly discriminated against, or harassed by association with people possessing any of the protected characteristics are protected. This would close the current gap in protection where the concept only applies to disability and a limited extent race. We also believe that association should be broadly defined, similarly to the proposal in Australia at Federal level.

- 3.120 The examples below illustrate what types of discrimination by association would become unlawful.

**Example 24: Racial harassment by association**

A school girl is harassed and bullied by other students because she has a friend who is a Southeast Asian girl. The other students make derogatory jokes to her saying she is going to become a domestic worker. This would likely be racial harassment by association.

<sup>143</sup> There is protection from discrimination by association under the Anti-Discrimination Act 1977 New South Wales, South Australia Equal Opportunity Act 1984, Equal Opportunity Act 1984 Western Australia, Anti-Discrimination Act 1998 Tasmania, Equal Opportunity Act 2010 Victoria, Anti-Discrimination Act 1991 Queensland.

<sup>144</sup> Section 6 Draft Human Rights and Anti-Discrimination Bill 2012.

**Example 25: Direct pregnancy discrimination by association**

A woman who works in a factory becomes pregnant, and it was medically certified that she should not lift boxes. She asks to change duties for the period she is pregnant but is refused. Her male friend also works at the factory and tries to help by lifting boxes for the woman. The male employee is dismissed for helping the pregnant woman. This would be likely to be direct pregnancy discrimination against the male employee by association.

**Consultation Question 30**

**Do you think that:**

- **there should be protection from direct and indirect discrimination, and harassment by association across all the protected characteristics;**
- **and if so, do you think “association” should be broadly defined to include association by immediate family, other relatives, caring responsibilities, friendships or working relationships?**

**I. Discrimination by perception**

3.121 Discrimination by perception concerns less favourable treatment where a person is perceived, assumed or imputed to have a protected characteristic. For example, a person may be discriminated against because he is perceived to have a disability such as HIV even when he does not. Currently there is only express protection for discrimination by perception under the DDO which includes protection where someone is imputed to have a disability.<sup>145</sup>

3.122 Other similar jurisdictions do provide protection from discrimination by perception across the protected characteristics.

3.123 The United Kingdom Explanatory Notes and the Statutory Codes of Practice on the Equality Act 2010 make it clear that direct discrimination or harassment can include situation of discrimination by perception.<sup>146</sup>

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<sup>145</sup> Section 2 DDO.

<sup>146</sup> See for example paragraph 3.21 of the Employment Code of Practice, Equality and Human Rights

- 3.124 In Australia, a number of the States' discrimination legislations expressly prohibit direct and indirect discrimination by perception or imputation.<sup>147</sup>
- 3.125 The EOC believes that it is appropriate for the discrimination legislation to expressly provide that direct and indirect discrimination, and harassment by perception and imputation across all the protected characteristics is unlawful. Several examples of the protections that such provisions would provide are described below.

**Example 26: Direct race discrimination by perception**

A woman marries a Muslim man from Pakistan and adopts a Muslim first name and her husband's surname. The woman applies for a job in a shop. The woman is refused an interview even though she has excellent previous experience, because she is perceived to be of South Asian racial origin by her name. This would be unlawful direct race discrimination.

**Example 27: Family status discrimination by perception**

A woman's father who was previously healthy is seriously injured in an accident. The woman informs her employer of the accident. The employer assumes without discussing it with her that she is going to need to take care of her father and will want to reduce her hours or take leave. She is then immediately dismissed by the employer as they have concerns the productivity of the company would be affected. This may be unlawful direct discrimination by perception that the woman will in future have the protected characteristic of family status and caring for her father.

**Consultation Question 31**

**Do you think that there should be express protection from direct and indirect discrimination, and harassment by perception and imputation across all the existing protected characteristics?**

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Commission,

<http://www.equalityhumanrights.com/sites/default/files/documents/EqualityAct/employercode.pdf>

<sup>147</sup> See the Anti-Discrimination Act 1977 New South Wales, South Australia Equal Opportunity Act 1984, Equal Opportunity Act 1984 Western Australia, Anti-Discrimination Act 1998 Tasmania, Equal Opportunity Act 2010 Victoria, Anti-Discrimination Act 1991 Queensland.

## **J. Other unlawful conduct**

- 3.126 All the Discrimination Ordinances provide several other forms of prohibited conduct: discriminatory practices; discriminatory advertisements; instructions to discriminate; pressure to discriminate; and aiding discrimination. The Discrimination Ordinances also provide provisions on the liability of employers and employees, principals and their agents. In addition under the DDO only, it is also unlawful to require or request information for discriminatory purposes.
- 3.127 There are two areas that the EOC currently believe may need reform: liability of principals and agents; and requesting and requiring information for a discriminatory purpose.

### **(i) Liability of employers and employees, principals and agents**

- 3.128 All the Discrimination Ordinances provide that anything done by persons as employees shall be treated as being done by them as well as the employers.<sup>148</sup> All the Ordinances also provide that anything done by agents of principals (e.g. employment agencies), shall also be treated as acts done by the principals.<sup>149</sup>
- 3.129 Currently under the provisions relating to liability of employers, there is a defence whereby they will not be liable if they prove they took reasonably practicable steps to prevent the employee from doing the unlawful acts.<sup>150</sup> There is however no such defence in relation to principals' liability for the actions of agents. This can be contrasted with the position in Australia where there is also a defence for principals in the same manner as for employers.<sup>151</sup>
- 3.130 The EOC believes that consideration should be given as to whether there should be the same defence for principals as for employers where they took reasonably practicable steps to prevent discrimination. The example

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<sup>148</sup> See section 46(1) SDO; section 48(1) DDO; section 34(1) FSDO; and section 47(1) RDO.

<sup>149</sup> See section 46(2) SDO; section 48(2) DDO; section 34(2) FSDO; and section 47(2) RDO.

<sup>150</sup> See for example section 46(3) SDO.

<sup>151</sup> See for example section 106(2) Sex Discrimination Act 1984.



below illustrates the effect of such a change in the law.

**Example 28: Reasonably practicable steps taken by principals to prevent discrimination**

A hospital (principal) wishes to enter into a contract for a contractor to provide cleaning services in the hospital. The cleaners will be employed by the contractor not directly by the hospital. The hospital uses the services of a recruitment agency to identify and put forward contractor candidates. The hospital provides the recruitment agency with its equal opportunities policy and instructs the agency that it should ensure that it in no way discriminates on grounds of sex, disability or race. Despite this, the recruitment agency decides not to put forward for interview a contractor whose staff were mostly South Asians, whom the recruitment agency believes are more likely to steal. This is despite the fact that the contractor has a record of high quality contracts and endorsements. The contractor who is a South Asian brings a claim of racial discrimination against the recruitment agency. The recruitment agency is likely to be liable for direct race discrimination, however if the law is changed to include the defence for the principals, the hospital may have a good defence as it took reasonable steps to prevent the discrimination.

**Consultation Question 32**

**Do you think that there should be a defence for principals to liability from unlawful conduct of agents, where the principal took reasonably practicable steps to prevent the unlawful conduct?**

**(ii) Requesting or requiring information for a discriminatory purpose**

3.131 Currently, there is only a prohibition on requesting or requiring information for a discriminatory purpose in relation to disability.<sup>152</sup> In Australia, the current Disability Discrimination Act 1992, Age Discrimination Act 2004 and the Sex Discrimination Act 1984 provide an analogous prohibition.

3.132 The EOC believes that the current prohibition on requesting or requiring information for a discriminatory purpose should be extended to all the

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<sup>152</sup> Section 42 DDO.

existing protected characteristics. This would ensure that there are harmonized and consistent levels of protection. The example below illustrates the benefits of extending the provisions to other protected characteristics other than disability.

**Example 29: Requesting information for a discriminatory purpose relating to family status**

An employer informs a female candidate for a position during an interview that she will need to complete a form that includes personal information as part of the interview. The form includes questions on whether the woman has children and if so what their ages are. The employer uses the questions to determine whether the woman is likely to have caring responsibilities for children as he does not want to employ such women. An expansion of the provisions relating to requesting information to all protected characteristics would ensure that this would be an unlawful form of family status discrimination.

**Consultation Question 33**

**Do you think that the prohibition on requesting information for a discriminatory purpose relating to disability discrimination should be extended to all existing protected characteristics?**

## CHAPTER 4: FIELDS OF PROHIBITED CONDUCT

- 4.01 This chapter examines the fields or sectors in which conduct is or should be prohibited. The related issue of specific exceptions is examined in the Chapter 7.
- 4.02 The EOC believes that the starting point for determining which fields or sectors discrimination should be prohibited is all areas of public life that affects people's ability to participate in society, fulfill their potential and interact with others.
- 4.03 The Discrimination Ordinances currently prohibit discrimination to varying degrees in defined fields: employment and related areas of partnerships, trade unions, qualifying bodies, vocational training, employment agencies, commission agents, barristers, election and voting to advisory bodies; the Government and Government functions; education; the provision of goods facilities and services; premises; clubs; and sporting activity. This approach is similar to the approach in the United Kingdom and Australia in terms of the sectors covered by discrimination laws.
- 4.04 There are four broad issues that the EOC believes require consideration:
- the scope of protection from discrimination in relation to public authorities;
  - inconsistencies between the Discrimination Ordinances as to which sectors prohibit discrimination;
  - RDO limitations regarding medium of instruction in the fields of education and vocational training ; and
  - expanding the fields and scope of protection from harassment.

### **A. Scope of protection in relation to public authorities**

- 4.05 All of the Discrimination Ordinances currently provide that the Ordinances bind the Government.<sup>153</sup> All of the Ordinances apart from the RDO also provide that it is unlawful for the Government to discriminate on any of the protected grounds in the performance of its functions or the exercise

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<sup>153</sup> See section 4 of the SDO; section 5 of the DDO; section 3 of the FSDO and section 3 of the RDO.

of its powers.<sup>154</sup>

- 4.06 The provisions therefore provide protection from discrimination in relation to the Government such as Government departments and other Governmental bodies (e.g. the Education Bureau and the Immigration Department), including actions taken in the performance of the Government's functions and powers (e.g. policing and detention in prisons).
- 4.07 However, it is not clear from the manner in which the current provisions are drafted whether other public authorities that are not part of the Government are within the scope of the Discrimination Ordinances in relation to the exercise of their functions. This is particularly relevant in relation to statutory bodies established by the Government but independent of it. Examples of such bodies include the EOC. All such bodies would be covered by the employment provisions in relation to any employment issues. They would also be covered by the service provisions to the extent that they are providing services to the public.
- 4.08 There may however be a gap where the exercise of such public authorities' functions and powers may not be considered a service.

**Example 30: Exercise of public authority functions and powers**

The EOC decides to discontinue a complaint of discrimination made by a woman under the Sex Discrimination Ordinance, on grounds that she is intellectually disabled. The decision to discontinue a complaint may be considered to be the exercise of function by a public authority and therefore may not be covered by the existing Discrimination Ordinances. This could mean it is difficult for the woman to pursue a complaint of disability discrimination by the EOC.

- 4.09 In other jurisdictions, it is made clear that public authorities that are not part of the Government but exercise public functions pursuant to their powers are within the scope of the discrimination legislation.
- 4.10 In the United Kingdom, the Equality Act 2010 states that the provision of a

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<sup>154</sup> See section 21 SDO; section 21 DDO; and section 28 FSDO.

service includes the provision of a service in the exercise of a public function.<sup>155</sup> In Australia, the discrimination Acts provide that acts done by or on behalf of a body or authority established for a public purpose by Federal legislation are within the scope of the discrimination laws.<sup>156</sup>

- 4.11 The EOC believes that it is important to amend the discrimination laws to make them clear that they apply across all protected characteristics not only to the Government and the exercise of its functions and powers, but also all other public authorities. The use of term “public authority” would also be consistent with the terminology under the Hong Kong Bill of Rights Ordinance which applies to the Government and all public authorities.<sup>157</sup>
- 4.12 A provision could be drafted to state that the Discrimination Ordinances (or a consolidated Discrimination Ordinance) apply to all public authorities, and it shall be unlawful for them to discriminate in the performance of their functions and exercise of their powers.

#### **Consultation Question 34**

**Do you think that there should be express provisions in the discrimination laws that it applies to all public authorities, and that it is unlawful for them to discriminate in the performance of their functions and exercise of their powers?**

#### **B. Inconsistencies concerning sectors in which discrimination is prohibited**

- 4.13 There are three areas of inconsistency under the existing Discrimination Ordinances. Firstly, as described above (see Example 2) unlike all the other Discrimination Ordinances, under the RDO there is no protection from racial discrimination in relation to the exercise of Government functions. Secondly, unlike all the other Discrimination Ordinances, there is no express protection from disability discrimination in relation to election and voting to advisory bodies. Thirdly, in relation to discrimination in sporting activity, there is only an express prohibition under the DDO and not any of

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<sup>155</sup> Section 31(3) Equality Act 2010.

<sup>156</sup> See for example section 9(7) of the Sex Discrimination Act 1984.

<sup>157</sup> Section 7(1) of the Hong Kong Bill of Rights Ordinance.

the other Discrimination Ordinances.

**(i) Protection from race discrimination in relation to Government functions**

- 4.14 Section 3 of the RDO states similarly to the other Discrimination Ordinances that it binds the Government (for example in areas of employment and the provision of services and education). However, there is no provision as in the other Discrimination Ordinances which states that it is unlawful for the Government to discriminate against persons on grounds of their race in the performance of its functions or the exercise of its powers. Such a provision would ensure that there is protection from discrimination in relation to various Government functions and powers exercised by Government departments and other public bodies such as the Immigration Department, Police and prisons.

**Example 31: Race discrimination in exercising Government functions or powers**

There currently may not be protection from racial discrimination where a Police Officer racially discriminates or racially harasses a person in carrying out their functions of the act of arresting a person, as the act of arresting someone may be a Government function or power.

- 4.15 The fact that there may be in certain circumstances a gap in protection from racial discrimination in relation to the exercise of Government functions is a fundamental flaw with the current racial discrimination legislation. This also means that there is unequal protection from discrimination in relation to the different protected characteristics. Any difference in protection in relation to Government functions in our view would need to satisfy a test of being for a legitimate aim and proportionate. We are not aware of any justifications as to why Government functions should not be within the scope of the law under the RDO.
- 4.16 This position was criticized by a number of organizations and individuals in submissions to the Legislative Council's Bills Committee on the Race Discrimination Bill.<sup>158</sup> The position has also been criticized by the United

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<sup>158</sup> See for example Hong Kong's Race Discrimination Bill A Critique and Comparison with the Sex

Nations in its most recent review of the Government's compliance with the Convention on the Elimination of Racial Discrimination. The Committee recommended that all the Government's functions and powers be covered by the RDO.<sup>159</sup>

- 4.17 The EOC therefore believes that an amendment should be made to the racial discrimination provisions, by providing that it is unlawful for the Government to discriminate in exercising Government functions and powers.

### **Consultation Question 35**

**Do you think that there should be protection from racial discrimination in the exercise of the Government's functions and powers?**

### **(ii) Protection from disability discrimination in relation to election and voting to public bodies**

- 4.18 Currently there is some express protection from discrimination in relation to determining the eligibility to stand for election, or to vote for the election of members to a public body, public authority, a statutory advisory body or a prescribed body. This prohibition extends to the protected characteristics of sex, race and family status. However, there is no express prohibition on such discrimination in relation to persons with disabilities. In practice all persons with disabilities can stand for election or vote, subject to specific exceptions.

- 4.19 Provisions under the Legislative Council Ordinance and the District Councils Ordinance disqualify from voting persons who are found under the Mental Health Ordinance to be incapable, by reason of their mental incapacity of managing and administering their property and affairs.<sup>160</sup>

- 4.20 The United Nations Human Rights Committee in its most recent 2013

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Discrimination and Disability Discrimination Ordinances, Carole Petersen, June 2007.

<sup>159</sup> Concluding Observations on China, Committee on the Elimination of Racial Discrimination, 15 September 2009, CERD/C/CHN/CO/10-13.

<sup>160</sup> Section 31(1) of the Legislative Council Ordinance and section 30 of the District Councils Ordinance.

report on the Hong Kong Government's compliance with the International Covenant on Civil and Political Rights (ICCPR) recommended:

*"(the Government) should revise its legislation to ensure that it does not discriminate against persons with mental, intellectual or psychosocial disabilities by denying them the right to vote on bases that are disproportionate or that have no reasonable and objective relation to their ability to vote."*<sup>161</sup>

- 4.21 Article 29 of the United Nations Convention on the Rights of Persons with Disabilities requires State Parties:

*"To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs..."*<sup>162</sup>

- 4.22 The EOC therefore believes that similar to the other protected characteristics, the disability discrimination legislation should be amended to expressly prohibit discrimination against persons with disabilities to stand for election and vote, including as members of public bodies. However, we also recognize that the Legislative Council Ordinance and the District Councils Ordinance may have a legitimate aim to restrict voting rights to those persons who are mentally capable.

- 4.23 We therefore believe the general prohibition on such discrimination could be subject to an exception stating such discrimination is not unlawful so long as it is for a legitimate aim and proportionate.

### Consultation Question 36

**Do you think that for reasons of consistency there should be an express prohibition on disability discrimination in relation to election and voting of members to public bodies? If so, do you think that there should be an exception permitting disability discrimination but only where it is for a legitimate aim and proportionate?**

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<sup>161</sup> Paragraph 24, Concluding Observations 107<sup>th</sup> session Third Periodic Report on Hong Kong China, CCPR/C/CHN-HKG/CO/3

<sup>162</sup> <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>



**(iii) Protection from discrimination in relation to sporting activity**

- 4.24 Currently there is only express protection from discrimination in sporting activity in relation to persons with disabilities, although in some circumstances participation in sporting activity may be covered by the prohibition on discrimination in the provision of goods, services and facilities. For example, if a person was discriminated against by being not allowed to use a sporting facility that may constitute discrimination in the provision of recreational facilities.
- 4.25 Section 35 of the DDO protects persons with disabilities from discrimination by being excluded from sporting activity, including in administrative or coaching roles. This is subject to certain exceptions, such as where a person with disabilities is not reasonably able to perform the actions required.
- 4.26 The Hong Kong provisions were based on the Australian model whereby only the Disability Discrimination Act 1992 provides an express prohibition on discrimination in participation in sporting activity. In the other discrimination Acts it can be implied that the goods, services and facilities provisions would cover participation in sport.<sup>163</sup>
- 4.27 The Draft Human Rights and Anti-Discrimination Bill 2012 in Australia proposed that participation in sporting activity be an express field in which discrimination is prohibited for all the protected characteristics, subject to various exceptions relating to competitive sporting activity and sex, gender identity, age and disability.<sup>164</sup> This is discrete and additional to the field of goods, facilities and services.
- 4.28 The EOC believes that it is preferable to have express protection from discrimination relating to participation in sporting activities (including coaching and the administration of sport) so that it is clear that discrimination in those areas is prohibited. This is because sporting activity is a key aspect of life for people to participate in. The EOC believes that this

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<sup>163</sup> For example under section 42 of the Sex Discrimination Act 1984, there is an exception relating to sex for participation in competitive sport. This indicates that sex discrimination relating to participation in sport is otherwise unlawful.

<sup>164</sup> See Clause 36 Draft Human Rights and Anti-Discrimination Bill 2012.

should also apply to all the protected characteristics, subject to exceptions for particular characteristics as may be required. For example, in relation to the protected characteristic of sex, it may be appropriate to have an exception permitting same sex only competitions.

- 4.29 The example below illustrates a situation in which such provisions would help to prevent discrimination.

**Example 32: Racial discrimination in sporting activity**

A Chinese referee to a football match racially discriminates against an Indian player by repeatedly calling him the derogatory name Ah Cha and penalizing him more than Chinese players. This would be likely to be direct racial discrimination if provisions were introduced to prohibit discrimination in sporting activity across all protected characteristics.

**Consultation Question 37**

**Do you think that the current express protection from disability discrimination in sporting activity should be extended to all the protected characteristics?**

**C. RDO limitations regarding medium of instruction in the fields of education and vocational training**

- 4.30 A particular issue that relates to the Race Discrimination Ordinance is its effect in the Educational and Vocational Training sectors.
- 4.31 Although the RDO does provide protection from racial discrimination in education and vocational training, there are express limitations on the RDO's operation in those sectors which relates to language and the medium of instruction. Section 26(2) of the RDO states that the prohibition on racial discrimination in education does not require modifying or making different arrangements in the medium of instruction for persons of any racial group. Section 20(2) provides a similar provision in relation to vocational training.

**Example 33: Exception on medium of instruction under the RDO**

The EOC received a complaint from a Nepalese plumber who wished to complete the required training course with a vocational training institution. Without completing the course the plumber would not receive the Hong Kong qualification as a plumber. The Nepalese plumber requested for the training course to be provided in English, but the institution initially refused. The exception to discrimination in vocational training regarding the medium of training meant that no claim of indirect race discrimination could be brought.

- 4.32 The issue of improving the education system for ethnic minority students in Hong Kong is one of the EOC's key current strategic work priorities. There is evidence that ethnic minorities in Hong Kong for whom Chinese is their second or third language face particular difficulties in the public education system as there is arguably insufficient support for them to learn Chinese to a proficient level. This adversely affects their ability to perform well in education and at the same level as Chinese students who speak Chinese as their first language.<sup>165</sup> The current public education system in Hong Kong has been criticized as discriminating against ethnic minorities for whom Chinese is their second language by failing to provide sufficiently targeted and adapted education to meet their special needs.<sup>166</sup> Earlier this year, the Government announced that it will be strengthening the Chinese learning support for ethnic minority students whose first language is not Chinese.<sup>167</sup>
- 4.33 The current system has also been criticized by several United Nations bodies as not fully complying with the human right to education and to be free from discrimination in the enjoyment of that right under the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of Racial Discrimination (CERD).<sup>168</sup> In relation to the CRC, the Committee on the Rights of the Child recommended that the Government urgently abolish the system of previously named "designated schools" for children of ethnic minorities and reallocate resources to promote their

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<sup>165</sup> See the study *Language Rights in education: a study of Hong Kong's linguistic minorities*, Sarah Carmichael, Centre for Comparative and Public Law, University of Hong Kong, November 2009.

<sup>166</sup> Ibid.

<sup>167</sup> Policy Address 2014, paragraphs 74-79, <http://www.policyaddress.gov.hk/2014/eng/index.html>

<sup>168</sup> Concluding Observation on China, CERD/C/CHN/CO/1—13, 15 September 2009.

access to education into mainstream schools.<sup>169</sup>

- 4.34 The express exclusions in sections 26(2) and 20(2) are also arguably not compliant with the human rights obligations regarding non-discrimination under article 22 of the Bill of Rights. This makes express reference to discrimination on grounds of language being prohibited.
- 4.35 Further, other similar jurisdictions such as the United Kingdom and Australia have no such exception relating to the medium of instruction in education or vocational training.
- 4.36 The EOC therefore believes that these limitations on the operation of the RDO in education and vocational training should be repealed. Issues about whether the provision of education or vocational training in a particular language or manner (e.g. level of language support for ethnic minorities) is discriminatory, would be determined on a case-by-case basis. This would involve normal considerations of indirect discrimination: was there a legitimate aim in teaching in a particular language and manner; and was the means used to achieve that aim proportionate.
- 4.37 We do not consider that this would affect the lawfulness of the current education system in which Chinese or English are the languages used. It is likely that teaching in Hong Kong's official languages would be considered to be for a legitimate aim and proportionate.

#### **Consultation Question 38**

**Do you think that the limitations on the operation of the RDO in the education and vocational training sectors regarding the exception on the medium of instruction should be repealed?**

#### **D. Expanding the fields and scope of protection from harassment**

- 4.38 There are a number of additional forms of harassment which we believe should or may be appropriate to prohibit under the Discrimination Ordinances. These are examined below.

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<sup>169</sup> Concluding Observations on China, CRC/C/CHN/CO/3-4, 4 October 2013.

**(i) Previous EOC Proposals**

4.39 In relation to sexual harassment, in 1999 the EOC made a number of recommendations to the Government relating to sexual harassment under the SDO:

- section 2(5)(b) be amended in the field of education to prohibit the creation of hostile environments;
- section 40(1) be amended to provide protection of providers of goods, facilities and services from sexual harassment by customers;
- introduce in section 40 protection for sexual harassment by the members of club management of members or prospective members; and
- section 40 be amended to provide protection for sexual harassment of tenants and sub-tenants by other tenants and sub-tenants.

4.40 The Government accepted these proposals relating to protecting service providers and members or prospective members of clubs and made proposals for amendment in the Discrimination Legislation (Miscellaneous Amendments) Bill 2003. However, the Bill was not enacted.

4.41 The issue of the protection from sexual harassment in education was addressed by the Government in 2008 by legislative amendments.

4.42 Most recently, the Government introduced the Sex Discrimination (Amendment) Bill 2014 on 25 June 2014 to prohibit sexual harassment by service users of service providers. The other proposals are discussed in our proposals below.

**(ii) Evidence of harassment and approaches in other jurisdictions**

4.43 The EOC has considered our own evidence of complaints of harassment outside our current jurisdiction and evidence from other studies. We have also reviewed all the Discrimination Ordinances and international best practice on additional areas in which harassment should be prohibited.

4.44 In relation to sexual harassment of women, this remains a significant

problem for women working in service industries in Hong Kong. The Association for the Advancement of Feminism (AAF) conducted a study in 2011 on the sexual harassment of women in certain service industries such as modeling, nursing, flight attendants and waitresses. Over 200 interviewees, including beer promoters, flight attendants, nurses, waitresses and saleswomen, took part in the survey, 30 per cent of whom reported being sexually harassed at work.<sup>170</sup> Most recently, in 2014 the EOC published the results of a survey of flight attendants which indicated that almost half (47%) stated that they witnessed or heard about colleagues being sexually harassed on the same flight in the last year.<sup>171</sup>

- 4.45 There are also a number of workplace situations such as shops and other service industries where individuals are in contact but do not have the same employer. This creates a gap in liability for sexual harassment.

**Example 34: Sexual harassment in a common workplace**

The EOC received a complaint of sexual harassment by a woman who worked as a promoter of electronic products. She worked on consignment in a large retail shop and alleged sexual harassment by employees of the retail shop. However, as she was an employee of the promoting company and not an employee of the retail shop, we could not take forward her complaint.

- 4.46 There are a number of different approaches to legislating in these areas in other jurisdictions. Below provisions in the United Kingdom, Australia and New Zealand are examined.
- 4.47 In the United Kingdom, what is called “third-party harassment” provisions were initially introduced in relation to sexual harassment in April 2008 under the Sex Discrimination Act 1975. The Equality Act 2010 extended this to all other protected groups (e.g. race, disability).
- 4.48 The model in the Equality Act 2010 focused on the employment situation and the obligations on employers to protect employees from the actions of customers, tenants and so on where they have notice of harassment. It

<sup>170</sup> <http://www.herfund.org.hk/html/hernews/Oct11/Oct11.html?name=>

<sup>171</sup> [http://www.eoc.org.hk/EOC/Upload/ResearchReport/SHFlightAttendants\\_e.pdf](http://www.eoc.org.hk/EOC/Upload/ResearchReport/SHFlightAttendants_e.pdf)

provided:

*“(2) The circumstances in which A is to be treated as harassing B under subsection*

*(1) include those where—*

*(a) a third party harasses B in the course of B’s employment, and*

*(b) A failed to take such steps as would have been reasonably practicable to prevent the third party from doing so.*

*(3) Subsection (2) does not apply unless A knows that B has been harassed in the course of B’s employment on at least two other occasions by a third party; and*

*it does not matter whether the third party is the same or a different person on each occasion.*

*(4) A third party is a person other than—*

*(a) A, or*

*(b) an employee of A’s.”<sup>172</sup>*

4.49 This provision applied both to sexual harassment and other forms of harassment.

4.50 The United Kingdom’s third-party harassment provisions were repealed with effect from 1 October 2013 under the Enterprise and Regulatory Reform Act 2013.<sup>173</sup> The repeal was part of the current United Kingdom Government’s policy to reduce perceived regulatory burden on employers. However it should also be noted that the repeal of this provision was strongly resisted by many stakeholders working on equality law. Of the 80 responses to the consultation, 16 (20%) agreed to the proposal for repeal and 57 (71%) opposed it.<sup>174</sup>

4.51 In Australia, there is protection from sexual harassment both at Federal as well as at State level in varying manners, but those protections do not extend to other forms of harassment (e.g. race or disability).

4.52 At Federal level, the Sex Discrimination Act 1984 was amended in 2011 to provide for protection from discrimination where the person receiving

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<sup>172</sup> Section 40(2) to (4) of the Equality Act 2010.

<sup>173</sup> Section 65 Enterprise and Regulatory Reform Act 2013.

<sup>174</sup> Executive Summary, Government Response to the consultation, October 2012.

goods or services sexually harasses the service provider:

*“(1) It is unlawful for a person to sexually harass another person in the course of providing, or offering to provide, goods, services or facilities to that other person.*

*(2) It is unlawful for a person to sexually harass another person in the course of seeking, or receiving, goods, services or facilities from that other person.”<sup>175</sup>*

- 4.53 In South Australia, in relation to employment, sexual harassment of an employee by a third party who is not a fellow employee will be unlawful:

*“If an employee reports to his or her employer specific circumstances in which the employee was subjected, in the course of his or her employment, to sexual harassment by a person other than a fellow worker, and it is reasonable in all the circumstances to expect that further sexual harassment of the employee by the same person is likely to occur, it is unlawful for the employer to fail to take reasonable steps to prevent the further sexual harassment.”<sup>176</sup>*

- 4.54 In relation to the provision of services or premises it is also unlawful for a person receiving services or housing to subject a service provider or housing provider to sexual harassment.<sup>177</sup>

- 4.55 In Victoria, the Equal Opportunity Act 2010 has a sexual harassment provision in relation to common workplaces, where persons are not employed by the same employer:

***“Harassment in common workplaces***

*(1) A person must not sexually harass another person at a place that is a workplace of both of them.*

*(2) For the purposes of this section it is irrelevant—*

- (a) whether each person is an employer, an employee or neither; and*
- (b) if they are employees, whether their employers are the same or different.*

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<sup>175</sup> Section 28G(2) Sex Discrimination Act 1984.

<sup>176</sup> Section 87(7) Equal Opportunity Act 1984 (SA), introduced in 2009.

<sup>177</sup> Section 87(6aa), Equal Opportunity Act 1984 (SA).



*(3) In this section **workplace** means any place where a person attends for the purpose of carrying out any functions in relation to his or her employment, occupation, business, trade or profession and need not be a person's principal place of business or employment"*<sup>178</sup>

4.56 There is also provision for persons receiving services not to sexually harass the service provider.<sup>179</sup>

4.57 In New South Wales, in relation to workplaces there is protection similar to Victoria where the harasser need not be an employee. It is unlawful for a workplace participant to sexually harass another workplace participant at a place that is a workplace of both those persons.<sup>180</sup> Workplace participants mean:

- (a) an employer or employee,
- (b) a commission agent or contract worker,
- (c) a partner in a partnership,
- (d) a person who is self-employed,
- (e) a volunteer or unpaid trainee.<sup>181</sup>

4.58 This goes beyond employer and employee relationships.

4.59 In addition, there is also protection from harassment where a person receiving goods and services harasses the service provider.<sup>182</sup>

4.60 In New Zealand it is relevant to note that an employer can be liable not only for sexual or racial harassment by an employee of another employee, but also where they fail to take steps to prevent such harassment by a customer or client. The employer will be liable where the employee makes a complaint to the employer and they fail to take practicable steps to prevent the behaviour.<sup>183</sup>

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<sup>178</sup> Section 94 Equal Opportunity Act 2010 (VIC).

<sup>179</sup> Section 99(2) *ibid*.

<sup>180</sup> Section 22B(6) Anti-Discrimination Act 1977 (NSW).

<sup>181</sup> Section 22B(9) *Ibid*.

<sup>182</sup> Section 22F Anti-Discrimination Act 1977.

<sup>183</sup> See sections 108, 117 and 118 of the Employment Relations Act 2000 New Zealand

**(iii) EOC options for reform**

4.61 The EOC believes that consideration should be given to prohibiting sexual harassment and other forms of harassment in further areas.

**(a) Employer Liability for employee being harassed by a third party**

4.62 The EOC firstly believes that consideration should be given to making an employer liable for harassment of an employee by customers, tenants or any other third party not in an employment relationship, where an employer is put on notice of the harassment and fails to take reasonable action to prevent the harassment.

4.63 The United Kingdom model focused liability only on an employer whether in the context of clients, customers, common workplaces, the provision of goods or services, and tenancies. This relied on the employer being notified of harassment and the employer failing to take reasonable steps to prevent it. The harassment must have occurred on at least three occasions in order to set a reasonable threshold for employer liability.

4.64 South Australian and New Zealand models has a provision relating to employer liability similar to the former United Kingdom model, but does not require that harassment must occur on at least three occasions.

4.65 The value of this model is that where employers have notice of harassment occurring and they fail to take reasonable steps to investigate or prevent the harassment occurring, they will be liable. This may be easier to enforce than provisions relating to the liability of the harasser, particularly if the identity of the harasser is not known.

4.66 Several cases from the United Kingdom illustrate how these employer liability provisions could operate in practice to protect people from sexual or other harassment.

**Example 35: Employer liability for sexual harassment of care worker by client**

The claimant who was employed as a care worker in the respondent's care home claimed that she was sexually harassed by a client at the home, and that the respondent took no action either to prevent or to minimize the harassment. The employment tribunal found that the respondent was aware of two incidents of third-party sexual harassment and took the view that the respondent should have taken steps either to prevent or to minimize the harassment. The tribunal held that the employer could have taken a number of reasonable steps to protect the employee from sexual harassment, such as having another member of staff accompany her, consulting the resident's social worker or psychiatrist for advice, altering rotas to minimize contact with the resident or transferring her to another site. The claimant was awarded £7,500 for injury to feelings.<sup>184</sup>

**Example 36: Employer liability for racial harassment of social worker by client**

The claimant, who was Iranian, was a residential social worker at a home for troubled children. One of the children's behaviour was extremely challenging, and there were a number of incidents when the claimant was on shift including mocking of his accent and saying that he should go back home. As a result, he went on sick leave and issued claims of racial harassment under the Race Relations Act 1976. The Employment Appeal Tribunal (EAT) found that a) the respondent had been on notice of the problems following a report and had not acted to put in effective measures to prevent the behaviour; and b) that the behaviour was harassment for which the respondent was liable given their inaction.<sup>185</sup>

**(b) Liability on persons in common workplaces**

4.67 The EOC believes that consideration should be given to introducing workplace liability for a person harassing another, but there is no

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<sup>184</sup> *Blake v Pashun Care Homes Ltd* [2011] EqLR 1293.

<sup>185</sup> *Sheffield City Council v Norouzi* UKEAT/0497/10/RN

employer/ employee relationship (including volunteering situations).

4.68 The Victorian and New South Wales models address the issues of common workplaces. As we indicated above, the EOC has received complaints relating to such situations which are often linked to service industries including retail shops. We have also received complaints of sexual harassment of volunteers by other volunteers where there may not be an employment relationship.

4.69 This model would have the advantage of placing liability on anyone that harasses another person in a common workplace, even where there is no common employer, or no employment relationship.

**(c) Liability for educational establishments where a student harasses another student**

4.70 Currently, there is liability when a student of an educational establishment sexually harasses another student.<sup>186</sup> Some stakeholders have suggested that the educational establishment should in some situations also be liable for that harassment.

4.71 Educational establishments should take reasonable steps to ensure that sexual harassment and other forms of harassment at the educational institution are prevented, including where students harass other students. It is arguable that similar to the above employment situations where an employer fails to prevent harassment of an employee by a third party, educational providers should also be liable where they have notice of harassment between students and fail to take reasonable steps to prevent it.

**(d) Liability on service users harassing service providers**

4.72 The EOC believes that as previously submitted, there should be liability for service users harassing service providers given we receive a number of complaints in these areas. As stated above **(see paragraph 4.42)** we are

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<sup>186</sup> Section 39(3) SDO.

pleased the Government introduced Sex Discrimination (Amendment) Bill 2014 on 25 June 2014 to the Legislative Council to provide protection from sexual harassment in such circumstances, but believe it should be expanded to all protected characteristics. All of the Australian models have provisions placing liability on a customer for sexually harassing the service provider. An advantage of this approach is that it seeks to ensure that those persons perpetrating the harassment are directly liable.

**(e) Liability of service users for harassing other service users**

4.73 Another related potential area of liability is where a service user harasses another service user. Some stakeholders working on issues of sexual harassment have called for there to be such liability. An example of such harassment may be where a resident in a care home is sexually harassed by another resident.

4.74 Similar jurisdictions of the United Kingdom and Australia do not have any liability in those situations. The EOC therefore is consulting the public on whether there is a need for such a provision.

**(f) Liability for harassment on ships and aircraft in relation to the provision of goods facilities and services**

4.75 Currently under the SDO, the DDO and RDO, the provisions regarding discrimination in the provision of goods, facilities and services apply on ships and aircraft even where they are outside the jurisdiction of Hong Kong.<sup>187</sup> This is because in law, ships and aircraft that are registered in Hong Kong are technically a part of Hong Kong territory even when they are overseas or in flight. However, those provisions do not apply to harassment by service providers of services users.

4.76 This approach is not consistent or appropriate given that it would mean, for example, that an airline that sexually discriminated against a customer on a Hong Kong registered plane during a flight would be liable, but the same airline would not be liable for sexually harassing a customer.<sup>188</sup>

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<sup>187</sup> See section 41 SDO, section 40 DDO and section 40 RDO.

<sup>188</sup> We note however the Government introduced the Sex Discrimination (Amendment) Bill 2014 on

4.77 The approach is also not consistent with that taken in the United Kingdom's Equality Act 2010 which provides that the provisions regarding discrimination, harassment and vilification in relation to the provision of goods, facilities and services all have effect in relation to United Kingdom registered ships and aircraft.<sup>189</sup> We therefore believe all the provisions regarding harassment should apply in relation to the operations of all Hong Kong registered ships and aircraft.

**(g) Harassment of tenants and sub-tenants by other tenants or sub-tenants**

4.78 The EOC has on several occasions received complaints of tenants sexually harassing other tenants. As a result and as previously submitted by the EOC, we believe that it should also be unlawful where a tenant or subtenant sexually harasses another tenant or subtenant. We also believe that this should be extended to all forms of harassment (e.g. race and disability).

**(h) Harassment of members or prospective members by members of club management**

4.79 Finally, the EOC also believes that, as previously submitted to and agreed by the Government, the current gap in protection regarding sexual harassment by members of club management of members/ prospective members should be closed by an amendment. The EOC also believes that this should be extended to other forms of harassment by members of club management of members/prospective members.

**Consultation Question 39**

**Do you think that new harassment provisions should be introduced for all the protected characteristics which provide:**

**(1) employer liability for harassment of employees by customers,**

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25 June 2014 to make amendments to the Sex Discrimination Ordinance to provide protection from sexual harassment by customers of service providers in this situation.

<sup>189</sup> See section 30(3) of the Equality Act 2010.

tenants or any other third parties not in an employment relationship where an employer is put on notice of the harassment and fails to take reasonable action;

- (2) common workplace liability on the person harassing but there is no employer/employee relationship (e.g. volunteers harassed by another volunteer);
- (3) liability on educational establishments where they are put on notice of harassment between students and fail to take reasonable action;
- (4) liability of service users for harassing the service providers;
- (5) liability of service users for harassing other service users;
- (6) liability for harassment on ships and aircraft in relation to the provision of goods, facilities and services;
- (7) liability of tenants and subtenants for harassing other tenants or subtenants; and
- (8) liability of the management of clubs for harassing members or prospective members?

# CHAPTER 5: PROMOTING AND MAINSTREAMING EQUALITY

- 5.01 International models relating to eliminating discrimination and promoting equality are increasingly focusing not just on redress for individual acts of discrimination, but on developing policies, programmes, duties and other measures to promote equality and eliminate systemic discrimination.
- 5.02 Such measures highlight that in order to better promote equality and compensate for disadvantage experienced by particular groups, proactive measures may be required which address the group rather than individual inequality or discrimination.
- 5.03 This chapter examines two methods of promoting equality and what place they should have in the reformed discrimination laws in Hong Kong. Firstly it considers the place and definition of special measures, which are lawful under all the existing Discrimination Ordinances. Secondly, based on international best practice it considers whether duties should be introduced for public authorities to eliminate discrimination and promote equality of opportunity.
- 5.04 In relation to the second issue of possible duties on public authorities, this also raises an issue of the role of the EOC in seeking to reduce systemic inequality. In international jurisdictions such as the United Kingdom which has proactive equality duties on public authorities, the Equality and Human Rights Commission monitors compliance with the duties and where necessary takes enforcement action. As a result, this issue also links to Chapter 6 and the possible reforms of the duties and powers of the EOC.

## Part I: Special Measures

- 5.05 Special measures (or positive action measures as they are also sometimes described in other international jurisdictions such as the United Kingdom and the European Union) are a crucial way in which public and private



organizations can develop and implement measures to promote the substantive equality of disadvantaged groups in society. Special measures are recognized internationally in the United Nations Human Rights Conventions as a method of promoting the full enjoyment of human rights of disadvantaged groups.<sup>190</sup> Special measures are therefore a vital measure that should be retained in reformed discrimination laws.

- 5.06 Two issues arise in relation to the special measures: the method in which they are conceptualized and positioned in the discrimination legislation; and their definition.

### **A. The conceptualization of special measures**

- 5.07 All of the existing Discrimination Ordinances contain exceptions to discrimination which permit special measures reasonably intended to:
- ensure that persons with the protected characteristics have equal opportunities with others;
  - afford persons with the protected characteristics with goods and services to meet their special needs; and
  - afford persons with protected characteristics with grants, benefits or programs to meet their special needs.
- 5.08 The special measures provisions are contained in the exceptions sections of the Ordinances, together with other exceptions described in Chapter 7. They apply to all the sectors covered by the Discrimination Ordinances including employment, education and the provision of goods and services. Although special measures are voluntary as there is no requirement for them to be used, using special measures is an important means by which to promote equality. They should also be distinguished from positive discrimination where policies or practices result in automatic preferences for particular groups in employment, education or other fields covered by discrimination laws. Positive discrimination is generally unlawful in similar common law jurisdictions such as the United Kingdom and Australia.

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<sup>190</sup> See for example the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (CERD) and the Convention on the Rights of Persons with Disabilities (CRPD).

**Example 37: Difference between special measures and unlawful discrimination**

A university reviews its enrolments in engineering courses which indicate that there is a low number of women who enroll and continue engineering studies. The university decides to offer an engineering careers seminar exclusively for women in order that they can learn more about their opportunities. This would be a lawful special measure. However, if the same university decided to introduce a quota system for its engineering course with women automatically given preference in numbers of places, this is likely to be unlawful sex discrimination.

- 5.09 The EOC believes that it would be preferable to view special measures not as exceptions to the principle of discrimination and therefore a lawful form of discrimination, but rather as proactive measures to promote substantive equality.
- 5.10 The conceptualization of special measures as a means to promote equality has been recognized in other jurisdictions. For example the positive action measures in the United Kingdom Equality Act 2010 are not included in the Parts of the Act dealing with exceptions, but rather in a separate part on the advancement of equality. Similarly, in the Australian Draft Human Rights and Anti-Discrimination Bill 2012, the special measures were stated as not being forms of discrimination.<sup>191</sup>
- 5.11 The EOC believes that the same approach should be taken in Hong Kong discrimination legislation by including special measures in a separate part on promoting equality.

**B. The definition of special measures**

- 5.12 The current definition of special measures does not make it clear what are the intentions of the provisions. There is unnecessary repetition in the scope of what constitutes special measures, and there is also lack of clarity as to their limits in terms of being lawful.
- 5.13 The current or proposed definitions of special measures in the United

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<sup>191</sup> Clause 21 Draft Human Rights and Anti-Discrimination Bill 2012.

Kingdom and Australia are clearer. For example, the United Kingdom Equality Act 2010 states that positive action measures may be used where a person reasonably believes that:

- Persons who share a protected characteristic suffer a disadvantage connected to the characteristic (e.g. lack of opportunity for persons with disabilities to enter the workforce may mean that a public authority encourages persons with disabilities to apply for positions in its advertising);
- Persons who share a protected characteristic have needs that are different from others (e.g. ethnic minority staff that have Chinese as a second language may benefit from Chinese language classes); and
- Participation in an activity by persons who share a protected characteristic is disproportionately low (e.g. a counseling service for persons suffering stress at work reviews its customers and finds that very few men use the service because of their fears of appearing weak. The counseling service decides to hold seminars for men to explain the benefits of seeking counseling).<sup>192</sup>

5.14 The positive action measures will be lawful so long as they are a proportionate means of remedying any of the above situations. It is therefore important to review any positive action measures to determine whether the disadvantage has been overcome, in which case the measures should be stopped.

**Example 38: Special measures requirement of evidence of disadvantage and proportionality**

The Government's Secondary School Places Allocation System operated in a way which meant that priority for school placement depended in part on gender. As the Government believed that girls on average performed better than boys before entry to secondary school, the Government operated a gender quota in co-educational secondary schools. This was done to ensure that a fixed ratio of boys and girls would be admitted to each school.

The Government tried to rely on the special measure exception (s. 48 of the SDO) in defence. It argued that the discriminatory elements of the system were not unlawful because they were reasonably intended to ensure that boys have equal opportunities with girls by reducing the advantage girls

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<sup>192</sup> Section 158 Equality Act 2010.

enjoyed through their better academic performance. The Court rejected this argument because first, there was no firm evidence of any developmental difference inherent in gender, and second, the discriminatory elements were disproportional to the objective of ensuring equal opportunities for the boys. The Court held that there had been direct sex discrimination against girls.<sup>193</sup>

5.15 The Australian draft Human Rights and Anti-Discrimination Bill 2012 stated that special measures may be used to achieve equality where:

- A law, policy or program is used in good faith for the sole or dominant purpose to advancing substantive equality for people;
- Those people have a protected characteristic; and
- A reasonable person would think that the law, policy or program was necessary to advance substantive equality; and special measures will cease to be lawful if substantive equality is achieved.<sup>194</sup>

5.16 This model also includes as lawful special measures to advance the equality of groups that share two or more protected characteristics in recognition of the fact that some groups experience intersectional discrimination and disadvantage (e.g. ethnic minority women).

5.17 The EOC believes that the definition of special measures should be reformed using elements from the models in the United Kingdom and Australia.

5.18 For example a possible model for the special measures provisions could read:

*“1. Nothing in this Ordinance will prevent a person taking special measures which are reasonably intended to achieve substantive equality of persons who share a protected characteristic or combination of two or more protected characteristics if:*

*(1) A person reasonably believes:*

*(a) Persons who share a protected characteristic suffer a*

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<sup>193</sup> *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690, CFI.

<sup>194</sup> Clause 21 Draft Human Rights and Anti-Discrimination Bill 2012.

- disadvantage connected to the characteristic;*
- (b) *Persons who share a protected characteristic have needs that are different from others;*
- (c) *Participation in an activity by persons who share a protected characteristic is disproportionately low;*
- (2) *A person makes, develops or adopts the law, policy or program, or engages in the conduct, in good faith for the sole or dominant purpose of advancing or achieving substantive equality for people, or a class of people, who have a particular protected characteristic or a particular combination of 2 or more protected characteristics; and*

*A reasonable person in the circumstances of the person or body would have considered that making, developing or adopting the law, policy or program, or engaging in the conduct, was necessary in order to advance or achieve substantive equality.*

2. *A law, policy or program, or conduct, ceases to be a special measure after substantive equality for the people, or class of people, has been achieved.”*

5.19 This definition would also be broad enough to incorporate training by employers or trade unions involving facilities or other services to encourage persons referred to in Chapter 7 on exceptions, and as a result that exception could be repealed (**see paragraph 7.16**).

#### **Consultation Question 40**

**Do you think that:**

- **Special measures provisions should be conceptualized and positioned within the discrimination legislation as measures to promote substantive equality rather than exceptions to non-discrimination; and**
- **The definition of special measures should be made clearer as suggested in paragraph 5.18 in terms of their purpose, circumstances in which they can be used and when they should end?**

## Part II: Duties on public authorities to promote and mainstream equality

5.20 At international level and in a number of jurisdictions around the world, in order to better promote and mainstream equality, duties are imposed on the State and public authorities to promote equality and eliminate discrimination. This is a modern approach to equality which, rather than focusing primarily on individual claims of discrimination and being reactive, requires an institutional and proactive approach. Policies and practices should be reviewed as to whether they negatively impact on groups with protected characteristics, and where necessary appropriate changes should be made.<sup>195</sup>

5.21 For example, in the context of gender equality, the concept of gender mainstreaming has been developed by the United Nations which focuses on process of States and public authorities systematically evaluating the impact that legislation, policies and programmes will have on gender equality. The United Nations defines gender mainstreaming as:

*“...the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.”<sup>196</sup>*

5.22 At the level of the European Union, the Treaty on the Function of the European Union which sets out its powers and functions also includes provisions requiring gender mainstreaming. It states that the EU “shall in all its activities aim to eliminate inequalities, and to promote equality, between men and women”.<sup>197</sup>

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<sup>195</sup> Making a difference: the promises and perils of positive duties in the equality field, Sandra Fredman, in the Anti-Discrimination Law Review, October 2008.

<sup>196</sup> United Nations ECOSOC agreed conclusions 1997/2.

<sup>197</sup> Article 8 of the Treaty on the Functioning of the European Union.

5.23 Some jurisdictions include proactive duties within their domestic discrimination legislation to promote equality and eliminate discrimination.

5.24 For example in the United Kingdom there are proactive duties on the Government and public authorities to promote equality in the jurisdictions of Britain and Northern Ireland (Public Sector Equality Duties, PSEDs).

5.25 In Britain the Equality Act 2010 requires public authorities in the exercise of its functions to have “due regard” to the need to:

*“(a) eliminate discrimination, harassment, victimization and any other conduct that is prohibited by or under this Act;*

*(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*

*(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.”<sup>198</sup>*

5.26 These duties apply to the public authorities listed in the Act and include Government departments, the National Health Service, Police and local Governments.<sup>199</sup> The duties also apply to all of the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.<sup>200</sup>

5.27 Listed public authorities are also subject to specific duties which set out in more detail what those public authorities must do to comply with the duty. There are two requirements of the specific duties:

- to publish information to show their compliance with the equality duty, at least annually; and

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<sup>198</sup> Section 149 Equality Act 2010.

<sup>199</sup> See Schedule 19 Equality Act 2010.

<sup>200</sup> Section 149(7) Equality Act. Prior to the Equality Act 2010, there were three separate public sector equality duties relating to race, sex and disability. The Equality Act expanded the scope of the duty to all protected characteristics.

- to set and publish equality objectives, at least every four years.<sup>201</sup>

5.28 The example below illustrates what may be required by the duty in practice.

**Example 39: Measures to comply with a duty to promote equality**

A university in London carries out a staff survey. The results indicate high levels of sexual harassment of staff by colleagues and by students. In order to comply with the equality duty on public authorities to eliminate discrimination, if the university failed to take steps to prevent the sexual harassment it may be liable not only for individual acts of sexual harassment, but also for a breach of the equality duty on public authorities. In those circumstances, appropriate steps to comply with the duty may for example include: revising its policy on preventing and dealing with harassment and its complaint procedures; and training all staff on the new policy and complaint procedures.

5.29 The Equality and Human Rights Commission has the statutory role to promote understanding and monitor compliance of public authorities with the duty. It publishes guidance (statutory codes of practice and non-statutory guidance) to help public bodies comply with the duty, including the steps that should be taken and practical examples of how to comply.<sup>202</sup>

5.30 Where appropriate, it can review whether public authorities are complying with their duty in relation to specific policies and practices affecting protected groups. If it believes a public authority has failed to comply with the duties, it can issue compliance notices and commence court proceedings for non-compliance.<sup>203</sup>

5.31 There have been a number of cases since the equality duties were introduced in the United Kingdom that have found a breach of the duties. This is usually in situations where there has also been a finding of direct or indirect discrimination by the relevant public authority.

<sup>201</sup> The Equality Act 2010 (Specific Duties) Regulations 2011

<http://www.legislation.gov.uk/ukxi/2011/2260/made>

<sup>202</sup> <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/>

<sup>203</sup> Section 32 Equality Act 2006.



#### **Example 40: The United Kingdom race equality duty in practice**

A school had a uniform policy which permitted pupils to wear only one pair of plain ear studs and a wrist watch. A Sikh pupil wore to school her Kara (a narrow steel bangle with great religious significance for Sikhs). A teacher asked the girl to remove it because it contravened the uniform policy. The girl's request to be exempted from the policy was refused by the school.

The Court found that the uniform policy indirectly racially discriminated against students of Sikh race and that it was not a proportionate means of achieving a legitimate aim in the circumstances.

In relation to the equality duty, the Court said it had seen no evidence that the teaching staff appreciated their obligations to fulfill the general race equality duty.<sup>204</sup> The school had breached its equality duty by failing to reconsider the uniform policy in the light of the obligations in the general equality duty. The school had also breached the duty by failing to have due regard to its aims in making decisions about the particular girl's wish to wear the Kara once the issue arose.<sup>205</sup>

5.32 In Australia, there is currently at Federal level no public duty to promote equality or eliminate discrimination in relation to any protected characteristics. However at State level, the Victorian Equality Opportunity Act 2010, includes a positive duty on public authorities and private bodies to take reasonable and proportionate measures to eliminate discrimination, harassment and victimization.<sup>206</sup> This is a proactive duty similar in some respects to the equality duty in the United Kingdom.

5.33 Although an individual cannot seek to enforce the duty in legal proceedings, the UK Equal Opportunities and Human Rights Commission can use information about compliance with the duty for the purposes of an investigation into a public or private body.

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<sup>204</sup> In this case the Race Equality Duty was set out in s.71 of the Race Relations Act 1976 (as amended) which has been superseded by the general equality duty in s.149 of the Equality Act 2010.

<sup>205</sup> *R. (Watkins-Singh) v. Governors of Aberdare Girls' High School* [2008] EWHC 1865 (Admin).

<sup>206</sup> Section 15, Equal Opportunity Act 2010, [http://www.legislation.vic.gov.au/Domino/Web\\_Notes/LDMS/PubStatbook.nsf/51dea49770555ea6ca256da4001b90cd/7CAFB78A7EE91429CA25771200123812/\\$FILE/10-016a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/51dea49770555ea6ca256da4001b90cd/7CAFB78A7EE91429CA25771200123812/$FILE/10-016a.pdf)

- 5.34 In Hong Kong, there is currently no specific duty in the Discrimination Ordinances requiring public authorities to eliminate discrimination and promote equality of opportunity equivalent to the United Kingdom or Australian legislation. The Hong Kong Government has however introduced a number of measures to promote the equality of particular groups in society which focus on ensuring that public authorities review their policies and programs for their impact on those groups.
- 5.35 For example in relation to gender equality and gender mainstreaming, the Government established the Women's Commission in 2001 to promote gender equality. In 2002 the Women's Commission published a gender mainstreaming checklist to assist Government officials to evaluate the gender impact of new and existing public policies, legislation and programs.<sup>207</sup> The checklist has been applied by a range of Government department and bureaus and the Women's Commission published in 2006 a booklet on their experiences of gender mainstreaming.<sup>208</sup>
- 5.36 In relation to race equality, during the passage of the Race Discrimination Ordinance in 2008 the Government agreed to develop Administrative Guidelines on the Promotion of Racial Equality for Government departments and other public authorities. In 2010 the Constitutional and Mainland Affairs Bureau published the Guidelines.<sup>209</sup>
- 5.37 The Guidelines provide guidance for the public authorities on how they should promote racial equality in the formulation, implementation and review of relevant policies and measures. The Guidelines are also similar in some respects to the requirements of the former public sector race equality duty in the now repealed United Kingdom Race Relations Act 1976.<sup>210</sup>
- 5.38 The Guidelines cover the public services which the Government considers are particularly relevant to meet the special needs of ethnic minorities:

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<sup>207</sup> Women's Commission, [http://www.lwb.gov.hk/Gender\\_Mainstreaming/eng/gmhke4.html](http://www.lwb.gov.hk/Gender_Mainstreaming/eng/gmhke4.html)

<sup>208</sup> [http://www.lwb.gov.hk/Gender\\_Mainstreaming/eng/gmhke1.html](http://www.lwb.gov.hk/Gender_Mainstreaming/eng/gmhke1.html)

<sup>209</sup>

[http://www.cmab.gov.hk/doc/en/documents/policy\\_responsibilities/the\\_rights\\_of\\_the\\_individuals/agpre/adm\\_guidelines.pdf](http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/agpre/adm_guidelines.pdf)

<sup>210</sup> This was the first public sector equality duty to be introduced in the United Kingdom in 2001 and has since been replaced by the public sector equality duty under the Equality Act 2010 which covers all the protected characteristics.

medical, education, vocational training, employment and major community services. Notably however they do not cover other important public functions and bodies which impact on ethnic minorities including immigration and policing.

5.39 The guidelines state that the principles governing the work of public authorities in promoting racial equality are:

- Taking steps to eliminate racial discrimination arising from all relevant policies and measures ; and
- Providing equal access to ethnic minorities for public services.

5.40 The key steps public bodies should take in formulating and reviewing policies and measures are:

- (a) identify the policies and measures that relate to key public services which are most relevant to the needs of ethnic minorities;
- (b) assess whether and to what extent these policies and measures may affect racial equality or provision of equal access to key public services, and consult relevant stakeholders as appropriate in the process;
- (c) consider whether any changes to existing or proposed policies and measures are warranted, and take measures to adopt such changes;
- (d) monitor the implementation of the changes; and
- (e) review the policies and measures concerned from time to time.

5.41 A number of organizations made submissions to the Legislative Council in relation to the draft Guidelines in 2009.<sup>211</sup> They raised similar concerns including that:

- The Guidelines were not mandatory. As a result they would be unlikely

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<sup>211</sup> Society for Community Organisation, <http://www.legco.gov.hk/yr08-09/english/panels/ca/papers/ca0707cb2-2340-1-e.pdf>, Law Society of Hong Kong  
[http://www.fjt2.net/gate/gb/www.hklawsoc.org.hk/pub\\_e/news/submissions/20090828a.pdf](http://www.fjt2.net/gate/gb/www.hklawsoc.org.hk/pub_e/news/submissions/20090828a.pdf), Hong Kong Human Rights Monitor and Hong Kong Unison Ltd,  
[http://www.unison.org.hk/DocumentDownload/R01-Position%20papers/2009/HKHM+Unison\\_submission.pdf](http://www.unison.org.hk/DocumentDownload/R01-Position%20papers/2009/HKHM+Unison_submission.pdf)

to have a significant impact on the work of public authorities in promoting racial equality;

- Only a limited number of Government departments and bureaux are covered by the Guidelines. They should apply to all public bodies including the Police, the Correctional Services Department, the Immigration Department, Legal Aid Department, Housing Authority and the Student Financial Assistance Agency.<sup>212</sup>

5.42 In relation to promoting equality of persons with disabilities and those with family status (family responsibilities), there are no equivalent guidelines or checklists to assist public authorities with promoting equality for these groups in the formulation and review of all relevant policies and programs.

5.43 The EOC believes that the current measures in Hong Kong for promoting equality in public authorities may not be sufficient in eliminating discrimination and promoting equality of opportunity. For example, in relation to persons with disabilities, Government statistics indicate that as at 31 March 2012, only 2% of current employees in the Civil Service are disabled.<sup>213</sup> This is despite the fact that the population of persons with disabilities in Hong Kong is at least between 6% and 7% of the total population.<sup>214</sup>

5.44 We therefore believe consideration should be given to introducing a public sector equality duty to promote equality and eliminate discrimination across all the protected characteristics.

#### **Consultation Question 41**

**Do you think that there should be duties on all public authorities to promote equality and eliminate discrimination in all their functions and policies, and across all protected characteristics?**

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<sup>212</sup> Submission by the Society for Community Organisation, page 1.

<sup>213</sup> Civil Service Bureau, Answer to Legislative Council Question by The Hon Emily Lau, 5 June 2013, <http://www.csb.gov.hk/english/info/2513.html>

<sup>214</sup> Special Topics Report Number 48: Persons with Disabilities and Chronic Diseases, December 2008, Census and Statistics Department.

## **CHAPTER 6: ASPECTS OF COURT PROCEEDINGS, POWERS AND CONSTITUTION OF THE EOC**

- 6.01 This chapter examines in detail two areas of the Discrimination Ordinances: certain aspects of court proceedings; and the powers and constitutional arrangements of the EOC.
- 6.02 Part I examines a number of aspects relating to court proceedings including certain roles of the EOC. Part II examines the key powers and constitutional arrangements of the EOC. In both Parts, detailed examination is given as to whether reforms are appropriate based on the EOC's experience of enforcing the discrimination laws and exercising its other functions over the last 18 years.

### **Part I: Aspects of court proceedings**

- 6.03 The process for bringing and determining discrimination claims are the same in all the Discrimination Ordinances. Proceedings must be brought in the District Court and normally within two years of the date of the act complained of, although the Court may consider claims out of time when it is just and equitable to do so.<sup>215</sup>
- 6.04 Each party normally bears their own cost of proceedings in the District Court, unless a party has acted in an inappropriate manner such as deliberately providing false information to the Court. This is intended to ensure that persons claiming discrimination have access to justice. Claimants may be disadvantaged by the possibility of having to pay court costs of a respondent, particularly since they are often likely to have more financial resources. This is similar, for example, to the system in the United Kingdom in relation to employment discrimination claims in Employment Tribunals.

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<sup>215</sup> See for example section 86(1) SDO.

## **A. Standard and burden of proof**

6.05 Discrimination claims are civil claims that must be proved by the plaintiff on the balance of probabilities. This can be contrasted with criminal claims that must be proved beyond reasonable doubt.

6.06 Discrimination claims are often difficult to prove, since there are not often acts of overt discrimination that can be directly attributed to protected characteristics. As a result, frequently it will be the respondent that has the evidence that will indicate whether or not treatment was for discriminatory reasons.

6.07 The Hong Kong approach to the standard and burden of proof has been indicated in a number of decisions. For example, in *Yeung Chung Wai v St Paul's Hospital* it was stated:

*"I am of the view that the evidential burden does not shift to the defendant employer at any stage. However, the court should approach the question of proof with common sense bearing in mind the standard of proof is on the balance of probabilities and it is sometimes not easy to have direct evidence of discrimination. Once the plaintiff establishes the relevant primary facts on the balance of probabilities, the court in drawing the appropriate inferences will have to consider and weigh the explanation (if any) given by the defendant."*<sup>216</sup>

6.08 In other words, where the claimant adduces evidence from which discrimination can be inferred, the court will then look to the defendant for evidence or explanations to indicate whether or not discrimination in fact occurred.

6.09 In many international jurisdictions, the discrimination laws regarding the burden of proof have evolved in two key ways. Firstly, given the difficulties in proving discrimination cases, the case law developed to provide that once facts have been established from which discrimination can be inferred, the court will look to the respondent to explain that there was no discrimination. Secondly, the discrimination legislation sets out the elements of the burden of proof in order that there is clarity and

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<sup>216</sup> DCEO 7/2003, paragraph 31.

consistency in how the principles are applied in court proceedings.

6.10 For example, in the United Kingdom the Equality Act 2010 provides that:

*“If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.”<sup>217</sup>*

6.11 The burden of proof principle is contained in the European Union discrimination Directives and therefore must be applied in all 27 EU Member States.<sup>218</sup> For example the Framework Directive provides:

*“Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.”<sup>219</sup>*

6.12 In Australia, the Draft Human Rights and Anti-Discrimination Bill 2012 also proposed a burden of proof provision:

*“(1) If, in proceedings against a person under section 120, the applicant:*

*(a) alleges that another person engaged, or proposed to engage, in conduct for a particular reason or purpose (the alleged reason or purpose); and*

*(b) adduces evidence from which the court could decide, in the absence of any other explanation, that the alleged reason or purpose is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct;*

*it is to be presumed in the proceedings that the alleged reason or purpose*

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<sup>217</sup> Section 136 Equality Act 2010.

<sup>218</sup> The Race Directive 2000/43/EC, the Framework Directive 2000/78/EC and the Gender Goods and Services Directive 2004/113/EC.

<sup>219</sup> Article 10(1) Framework Directive 2000/78/EC.

*is the reason or purpose (or one of the reasons or purposes) why or for which the other person engaged, or proposed to engage, in the conduct, unless the contrary is proved.”<sup>220</sup>*

- 6.13 The EOC believes that it is appropriate to set out the standard and burden of proof provisions in the discrimination laws in order that it is clear in all proceedings what is required to be proved by the respective parties. The EOC also believes that the burden of proof provisions should expressly provide for a shift in the burden of proof, once a claimant has established facts from which discrimination can be inferred. This would be important given the difficulty of proving discrimination claims.

#### **Consultation Question 42**

**Do you think there should be provisions introduced which indicate that once the claimant establishes facts from which discrimination can be inferred, the burden of proof shifts to the respondent to show there was no discrimination?**

#### **B. Damages for indirect discrimination**

- 6.14 There are a number of remedies that the District Court can award including: making a declaration that the respondent has engaged in prohibited conduct; ordering the respondent to pay damages for financial loss and/ or injury to feelings; ordering the respondent to perform any reasonable acts to redress the loss or damage suffered; and making an order declaring void in whole or in part any contract made in contravention of the Discrimination Ordinances.<sup>221</sup>
- 6.15 In relation to the damages, the EOC in its previous submissions to the Government in 2011 raised concerns about the indirect discrimination provisions.
- 6.16 Currently, damages for indirect discrimination under SDO, FSDO and RDO are restricted to situations where the respondent intended to treat the claimant unfavourably. The same restriction does not apply under the DDO.

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<sup>220</sup> Clause 124 Human Rights and Anti-Discrimination Bill 2012.

<sup>221</sup> See for example section 76(3A) of the SDO.



In the United Kingdom and Australia, similar previous restrictions on damages have been repealed and damages can be awarded irrespective of whether there was an intention to discriminate or not.

6.17 The EOC does not believe such a restriction is appropriate for several reasons. Firstly, intention to discriminate should not be a determining factor in whether or not damages are awarded, but rather whether or not discrimination in fact occurred. In proving both direct and indirect discrimination it is not necessary to prove that discrimination was intended. Therefore, intention should not be an element in deciding damages for indirect discrimination. Secondly, there is inconsistency between damages that can be awarded for indirect disability discrimination and for the other protected characteristics.

6.18 The EOC therefore reiterates its call for the Government to remove this restriction under the SDO, FSDO and RDO for awarding damages in indirect discrimination claims.

#### **Consultation Question 43**

**Do you think that, consistent with indirect disability discrimination provisions, damages should be able to be awarded for indirect sex, pregnancy, marital status, family status and race discrimination, even where there was no intention to discriminate?**

#### **C. EOC recovering its costs in legally assisted cases**

6.19 Where a complaint of discrimination has been lodged with the EOC, but there has not been a settlement of the matter, the complainant may make an application to the EOC for legal assistance in bringing any proceedings in the District Court.<sup>222</sup> The EOC may grant legal assistance where:

- The cases raises a question of principle; or
- It is unreasonable having regard to the complexity of the case or some other matter for the complainant to deal with the case unaided.

6.20 Such assistance may constitute a variety of forms including: giving advice;

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<sup>222</sup> See for example section 85(1) SDO.

arranging for representation in the proceedings and any other form of assistance the EOC thinks appropriate. In practice, the EOC uses this power in a wide range of cases: for example if the case raises issues of discrimination in a sector previously not examined; the case raises important issues of law; or as a means to discourage discrimination and raise awareness in a sector where there is evidence of continuing discrimination.

- 6.21 This power is similar to the systems operated in other jurisdictions such as New Zealand and the United Kingdom. In New Zealand, where a complaint of discrimination made to the New Zealand Human Rights Commission is not successfully conciliated, the complainant can apply to the Office for Human Rights Proceedings for legal assistance.<sup>223</sup> In the United Kingdom, the Equality and Human Rights Commission no longer has the power to conduct conciliation<sup>224</sup> but it does consider applications for and provide legal assistance in many claims of discrimination.<sup>225</sup>
- 6.22 In relation to legal assistance, the EOC believes the law should be amended to make it clear that the EOC can recover its legal costs where a claimant is awarded costs in proceedings. The same submission was made by the EOC to the Government in 1999.
- 6.23 The general rule in relation to discrimination claims is that each party will bear their own costs, unless the proceedings were brought maliciously, frivolously or there are some other special circumstances.<sup>226</sup>

However, where in the unusual event that a claimant is awarded costs and expenses, the Discrimination Ordinances provide that the EOC can recover its expenses of providing the applicant legal assistance by way of first charge on the claimant.<sup>227</sup> It cannot recover the costs of providing the legal assistance. Expenses may include aspects such as preparing an expert report, whereas legal costs would be the costs of the representing the claimant such as the time of EOC's solicitors working on a case.

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<sup>223</sup> Section 90 Human Rights Act 1993.

<sup>224</sup> For example in relation to employment discrimination claims this is now done exclusively by the Advisory Conciliation and Arbitration Service.

<sup>225</sup> Section 28 Equality Act 2006.

<sup>226</sup> Section 73B(3) District Court Ordinance.

<sup>227</sup> Section 85(4) SDO, section 81(4) DDO, section 79(4) of the RDO and section 63(4) FSDO.

- 6.24 The position in Hong Kong is not consistent with other international jurisdictions. For example under the United Kingdom Equality Act 2010, the Equality and Human Rights Commission can recover costs where it provides legal assistance to an individual and the court awards costs in favour of the claimant.<sup>228</sup> Similarly, in New Zealand where the Office of Human Rights Proceedings (part of the Human Rights Commission) provides legal assistance to an individual and they are awarded costs in proceedings, the Office can recover its costs.<sup>229</sup>
- 6.25 The EOC therefore calls on the Government to amend the legislation to ensure that the EOC can recover its legal costs in cases where an assisted claimant is awarded costs.

#### **Consultation Question 44**

**Do you think that the discrimination laws should be amended to ensure the EOC can recover its legal costs where claimants are awarded costs?**

#### **D. Proceedings that may only be brought by the EOC**

- 6.26 In relation to certain prohibited conduct it is only the EOC that can bring proceedings for alleged breaches: requesting someone to provide information; discriminatory advertisements; instructions to discriminate and pressure to discriminate. These provisions are important particularly in situations where there may not be a complainant but actions of organizations such as advertising for roles clearly demonstrate discrimination. For example, an employer may advertise in a paper that only men can apply for a position. Unless that role requires a man as a genuine occupational qualification, such an advertisement is likely to be direct sex discrimination.
- 6.27 The EOC believes that this is an important enforcement power of the EOC. However, currently this power does not apply to discriminatory

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<sup>228</sup> Section 29 Equality Act 2006.

<sup>229</sup> Section 92C(5) Human Rights Act 1993.

practices.<sup>230</sup> The EOC believes that the same principle should apply as for other similar unlawful conduct (e.g. discriminatory advertisements) such that the EOC should be able to bring proceedings. The EOC made submissions to the Government on this issue in 1999 and in 2000 the Government agreed in principle to make an amendment to that effect but to date has not done so. The EOC therefore reiterates its call for the amendment.

#### **Consultation Question 45**

**Do you think that for reasons of consistency with its other powers, the EOC should be able to initiate proceedings in its own name for discriminatory practices?**

## **Part II: Powers and Constitution of the EOC**

6.28 This part examines the existing powers and constitutional arrangements of the EOC; whether there is the need to reform these in any ways; as well as whether there is a need for a human rights commission in Hong Kong.

### **A. Powers of the EOC**

6.29 The EOC has a range of powers which it may use to fulfill its functions. It also performs a number of other roles which are not expressly set out in the Discrimination Ordinances but are exercised in furtherance of the functions. We examine both the express powers and the other roles.

6.30 The current express powers of the EOC are to issue guidance in the form of Codes of Practice, to conduct formal investigations, and in the case of the SDO to conduct research and education.

#### **(i) Codes of practice and other guidance**

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<sup>230</sup> See for example section 82 SDO. Discriminatory practices are defined as the application of a requirement or condition which results in an act of discrimination that is unlawful.

- 6.31 Under all the Discrimination Ordinances, the EOC may issue Codes of Practice containing practical guidance on eliminating discrimination and promoting equality of opportunity. The issuing of Codes is a formal process which requires them to be laid before and approved by the Legislative Council, and are therefore sometimes called statutory guidance. They also may be referred to and relied on by the Courts as evidence as to what is required to comply with the Discrimination Ordinances.
- 6.32 The Codes are a vital means by which the EOC can help organizations and individuals to understand what is required by the Discrimination Ordinances, as well as giving examples of good practice to promote equality. The EOC has issued a number of Codes to date.<sup>231</sup>
- 6.33 Given the long and formal process for approving Codes of Practice, the EOC has also issued other guidance from time to time. This may be important for example where the EOC wants to produce user friendly guidance in a brief period, or on a discrete issue under the Discrimination Ordinances such as sexual harassment in work.<sup>232</sup>
- 6.34 This is similar to the practice of other international statutory bodies such as the EHRC in the United Kingdom and the AHRC in Australia. In the United Kingdom, the Equality Act 2006 expressly sets out that the EHRC may produce both Codes of Practice and other non-statutory guidance.<sup>233</sup> In Australia, the AHRC has a general power to issue guidance relating to the prevention of discrimination.<sup>234</sup> The AHRC however has no power to produce statutory codes.
- 6.35 In Hong Kong, there are similar provisions providing powers for Statutory Bodies such as the Privacy Commissioner to produce both Codes and guidance.<sup>235</sup> The EOC believes that it would be preferable that there is

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<sup>231</sup> For example the Disability Discrimination Ordinance Code of Practice on Employment 2011; the Code of Practice on Employment under the Race Discrimination Ordinance 2009.

<sup>232</sup> See for example, Know your rights: sexual harassment, [http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=know%20your%20rights\(sex\)](http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=know%20your%20rights(sex))

<sup>233</sup> Section 13 Equality Act 2006.

<sup>234</sup> Section 11(1)(n) Australian Human Rights Commission Act 1984.

<sup>235</sup> See for example the powers of the Office of the Privacy Commissioner for Personal Data: Section 8(5) of the Personal Data (Privacy) Ordinance provides the power of the Privacy Commissioner to produce guidance and section 12 provides the power to produce Codes of Practice.

express reference to the power of the EOC to produce non-statutory guidance in the reformed discrimination laws.

#### **Consultation Question 46**

**Do you think that the discrimination laws should contain an express power that the EOC may produce non-statutory guidance?**

#### **(ii) Formal Investigations**

6.36 All of the Discrimination Ordinances provide that the EOC may conduct formal investigations into any matter which relates to its functions.<sup>236</sup> This may include general investigations into a particular sector, or investigations into named organizations. The Chief Secretary for Administration may require the EOC to conduct a formal investigation, but he or she must draw up the terms of reference for such an investigation after consulting the EOC.<sup>237</sup>

6.37 The EOC has to date conducted two formal investigations, one relating to the secondary school system for allocating places and issues of sex discrimination, and the second relating to the accessibility of public places for persons with disabilities.<sup>238</sup>

6.38 The EOC believes that the current system and provisions relating to formal investigations should be reformed in three respects: making it clearer that the EOC can conduct both general and specific investigations; harmonizing the circumstances in which enforcement notices can be issued; and introducing ability for the EOC to enter into binding undertakings with a body being investigated.

#### **(a) General and specific formal investigations**

6.39 The provisions regarding formal investigations indicate that they may either be of a general nature (where a broad issue is being examined such

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<sup>236</sup> See for example section 70 SDO.

<sup>237</sup> See for example sections 70 and 71(2).

<sup>238</sup> <http://www.eoc.org.hk/eoc/graphicsfolder/inforcenter/investigation/default.aspx>

as the accessibility of public places for persons with disabilities), or specific in examining the conduct of named individuals or organizations.<sup>239</sup> However the provisions are not very clear in indicating the difference between the two types of investigations.

- 6.40 This can be contrasted with, for example, the provisions in the United Kingdom under the Equality Act 2006 which sets out the powers of the Equality and Human Rights Commission. It separates the two different types of investigations that can be conducted: inquiries which are of a general nature and investigations which consider the conduct of named individuals where it is suspected they have committed an unlawful act (including failure to comply with the equivalent of an enforcement notice or failure to comply with binding undertakings).<sup>240</sup> Schedule 2 of the Equality Act indicates the differences between the two procedures:

*“Terms of reference*

- 2 *Before conducting an inquiry the Commission shall—*
  - (a) *publish the terms of reference of the inquiry in a manner that the Commission thinks is likely to bring the inquiry to the attention of persons whom it concerns or who are likely to be interested in it, and*
  - (b) *in particular, give notice of the terms of reference to any persons specified in them.*
- 3 *Before conducting an investigation the Commission shall—*
  - (a) *prepare terms of reference specifying the person to be investigated and the nature of the unlawful act which the Commission suspects,*
  - (b) *give the person to be investigated notice of the proposed terms of reference,*
  - (c) *give the person to be investigated an opportunity to make representations about the proposed terms of reference,*
  - (d) *consider any representations made, and*

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<sup>239</sup> See for example section 71(3) and (4) of the SDO.

<sup>240</sup> See sections 16 and 20 of the Equality Act 2006.

*(e) publish the terms of reference once settled.”<sup>241</sup>*

- 6.41 The EOC believes that it would be preferable for reasons of clarity to set out more clearly in Hong Kong’s discrimination laws the two different types of investigations (general and specific) that can be conducted.

**(b) Enforcement notices**

- 6.42 Where the EOC in the course of a formal investigation believes that a person has committed an unlawful act of discrimination, the EOC may serve an enforcement notice on them not to commit such acts. Such notices may be appealed against by the person to the District Court. But if that appeal is not successful, the enforcement notice becomes final and the EOC must maintain a register of such final enforcement notices.

- 6.43 In one respect the EOC believes the enforcement notice provisions should be amended. Under the DDO section 73 sets out the circumstances in which discrimination notices can be issued by the EOC. Unlike the SDO, FSDO and the RDO, it has omitted discriminatory practices (section 41). The EOC previously made submissions to the Government on this issue in 1999. In 2000 the Government agreed in principle to make an amendment. We are pleased the Government is proposing the described amendment to the DDO as part of the Statute Law (Miscellaneous Provisions) Bill 2014. The EOC therefore reiterates its call for the amendment to be passed as soon as possible.

**(c) Binding undertakings**

- 6.44 Currently under the Discrimination Ordinances, where formal investigations are conducted and it is identified that a public authority or private bodies may have committed acts of discrimination, there is no mechanism by which an agreement can be made to mutually agree actions and prevent future discrimination.

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<sup>241</sup> Schedule 2 Paragraph 2, Equality Act 2006.



- 6.45 This can be contrasted for example with the situation in the United Kingdom. The Equality and Human Rights Commission (EHRC) may enter into agreements where it believes having conducted an investigation, that a body has committed an unlawful act.<sup>242</sup> The agreement stipulates that:
- the body shall not commit specified unlawful acts;
  - the body take or refrain to take other specified action which may include an action plan;<sup>243</sup>
  - the EHRC undertakes not to proceed against the body for the unlawful acts.
- 6.46 In 1999, the EOC made submissions to the Government that the EOC should be able to enter into voluntary but binding undertakings or contracts in similar circumstances.
- 6.47 The EOC also believes that such agreements should be able to be enforced by the EOC in court proceedings in a similar way to discriminatory advertisements, instructions and pressure to discriminate.<sup>244</sup> This would permit the EOC to apply for an injunction to the District Court where it believes that the undertaking in an agreement is not being complied with, and it is likely that an unlawful act has occurred. Similar provisions regarding enforcement of agreements exist in the United Kingdom and could be adapted to the needs of Hong Kong.<sup>245</sup>
- 6.48 The Government agreed with the EOC's previous proposals in principle but has to date not implemented them.
- 6.49 The EOC therefore reiterates its call for the introduction of provisions on voluntary binding undertakings, and believes that the EOC should be able to enforce those undertakings when they are not complied with.

#### **Consultation Question 47**

**Do you think that the formal investigation provisions should set out more clearly the distinction between general and specific investigations?**

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<sup>242</sup> Section 23 Equality Act 2006.

<sup>243</sup> This is similar to what may be contained in an Enforcement Notice under the Discrimination Ordinances.

<sup>244</sup> See for example section 82 of the SDO.

<sup>245</sup> See section 24 of the Equality Act 2006.

#### **Consultation Question 48**

**Do you think that for reasons of consistency with the EOC's other powers, the EOC should be able to issue enforcement notices relating to discriminatory practices against persons with disabilities?**

#### **Consultation Question 49**

**Do you think that in relation to formal investigations provisions, permitting voluntary binding undertakings should be introduced and be enforceable by the EOC?**

#### **(iii) Research and Education**

6.50 The SDO provides that the EOC may undertake or assist the undertaking by other persons of any research and any educational activities which appear to the EOC necessary or expedient for the performance of its functions.<sup>246</sup>

6.51 There is no equivalent provision relating to research and education in any of the other Discrimination Ordinances, although in practice the EOC does carry out research and educational work in relation to all of them as part of its incidental powers. This can be contrasted with the Australian and United Kingdom provisions regarding the powers of the AHRC and the EHRC which provide expressly that the power to conduct research and provide education apply to all the protected characteristics.<sup>247</sup>

6.52 The EOC believes for reasons of consistency and clarity, the reformed discrimination laws should expressly provide that the EOC has the power to conduct research and education in relation to all the protected characteristics.

#### **Consultation Question 50**

**Do you think that the discrimination laws should expressly provide that the EOC has powers to conduct research and education in relation to all the protected characteristics?**

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<sup>246</sup> Section 65 SDO.

<sup>247</sup> Section 11 Australian Human Rights Commission Act 1986 and Section 13 Equality Act 2006 (UK).

**(iv) Other existing powers exercised by the EOC**

6.53 The EOC also exercises a number of other powers which are not expressly listed as powers of the EOC but are integral to furthering its functions.

**(a) Monitoring and advising on legislation or international human rights obligations**

6.54 The EOC periodically monitors and provides advice to the Government and the Legislative Council on the effect of proposed legislation or policy issues that will or may have an impact on any issue relating to equality.

6.55 For example, in May 2012 the EOC made submissions to the Legislative Council Panel on Welfare Services on Improving Barrier Free Access and Facilities for Persons with Mental Disabilities.<sup>248</sup> And in December 2011, the EOC made submissions to a Legislative Council panel on improving the education of ethnic minority children.<sup>249</sup>

6.56 In addition, the EOC regularly provides submissions to the United Nations on the Government's compliance with international human rights obligations under the key human rights conventions.<sup>250</sup> Submissions are made on issues relating to equality and discrimination in Hong Kong. Most recently it has made submissions in relation to compliance with the ICCPR, ICESCR, CRPD, and CERD, during the examinations of China.

6.57 In the United Kingdom, the Equality Act 2006 expressly provides that the EHRC has the power to monitor the law and provide advice to the Government on the effect of proposed changes in laws.<sup>251</sup> The EHRC also regularly provides submissions to the United Nations and other inter-governmental organizations on the United Kingdom Government's compliance with its international human rights obligations.

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<sup>248</sup> <http://www.eoc.org.hk/eoc/upload/2012324161038111119.pdf>

<sup>249</sup> <http://www.eoc.org.hk/eoc/upload/201222711235368136.pdf>

<sup>250</sup> The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention Against Torture (CAT), the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD).

<sup>251</sup> Section 11 Equality Act 2006.

- 6.58 In Australia, the AHRC has express powers to examine proposed and existing legislation to determine whether it complies with discrimination laws or international human rights obligations.<sup>252</sup> It also has the power to report to the Government the action that needs to be taken in order to comply with international human rights obligations.<sup>253</sup> In practice, it also regularly reports to the United Nations on the Australian Government's compliance with its international human rights obligations.
- 6.59 In Hong Kong, the Privacy Commissioner has a similar express function to examine any proposed legislation that may affect the privacy of individuals and report on those issues.<sup>254</sup>
- 6.60 The EOC believes that it would provide greater clarity to the EOC's powers if the discrimination laws expressly set out the power of the EOC to monitor and provide advice on existing or proposed legislation and policy to the Government, as well as the power to monitor and advise on the Government's compliance with international human rights obligations in relation to equality and discrimination.

#### **Consultation Question 51**

**Do you think that reformed discrimination laws should expressly provide that the EOC has powers to monitor and advise:**

- **The Government on relevant existing and proposed legislation and policy; and**
- **On the Government's compliance with international human rights obligations relating to equality and discrimination?**

#### **(b) Intervening in or appearing as amicus curiae court proceedings**

- 6.61 The EOC has applied to courts and intervened or appeared as amicus curiae (friend of the court) in a number of proceedings where it was not itself representing any of the parties, but provided independent expert advice to the courts on any issue relating to equality and discrimination.<sup>255</sup>

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<sup>252</sup> Section 11(1)(e) Australian Human Rights Commission Act 1986.

<sup>253</sup> Section 11(1)(k) Australian Human Rights Commission Act 1986.

<sup>254</sup> Section 8(1)(d) Personal Data (Privacy) Ordinance.

<sup>255</sup> An intervener is a person not a party to the action but has some interest which is directly related

For example, the EOC acted as an amicus curia in the case concerning criminal laws of buggery and their discriminatory impact on groups identified by sexual orientation.<sup>256</sup>

6.62 The practice of statutory Equality and Human Rights Institutions intervening or acting as amicus curiae in proceedings is an important means by which they can provide independent expertise and evidence on any equality or discrimination issue to courts and tribunals. It is common in a number of jurisdictions including the United Kingdom and Australia. However, a difference of the United Kingdom and Australian legislation is that they expressly provide that the EHRC and AHRC have the power to apply to intervene in or appear as amicus curiae in proceedings involving issues relating to discrimination and human rights.<sup>257</sup>

6.63 The EOC therefore believes that reformed discrimination laws should include an express power of the EOC to apply to intervene or appear as amicus curiae in relevant proceedings.

#### **Consultation Question 52**

**Do you think there should be an express power of the EOC to apply to intervene in or appear as amicus curiae in court proceedings relating to any relevant discrimination issue?**

#### **(c) Judicial review proceedings**

6.64 The EOC has the power to bring judicial review proceedings where it believes that the exercise of public power by the Government is in breach of the discrimination laws. An example of the EOC using this power is the case of *EOC v Director of Education* where it was found that the Government's policies regarding entry to secondary schools amounted to direct sex discrimination against girls.<sup>258</sup>

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to the subject matter of the proceedings. The EOC has appeared in cases as an intervener but more commonly as amicus curiae. An amicus curiae has a role to provide a court its expert views and assist it in determining the legal issues.

<sup>256</sup> *Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903, CFA.

<sup>257</sup> See section 30 of the Equality Act 2006 and section 11(1)(o) Australian Human Rights Commission Act 1986.

<sup>258</sup> [2001] 2 HKLRD 690, CFI.

- 6.65 This power is referred to in the SDO in Part IX Miscellaneous provisions, but only in the context of stating that other provisions are without prejudice to the power of the EOC to bring judicial review proceedings.<sup>259</sup>
- 6.66 This can be contrasted with, for example, the position in the United Kingdom where the Equality Act 2006 expressly provides that the EHRC has the power to institute judicial review proceedings.<sup>260</sup> The EOC believes that it would be preferable that the power of the EOC to institute judicial review proceedings is more clearly set out as a separate power in the part of the legislation dealing with EOC powers rather than miscellaneous provisions.

### **Consultation Question 53**

**Do you think that the EOC's power to institute judicial review proceedings should be more clearly set out as a separate power of the EOC?**

## **B. Constitutional matters**

- 6.67 The Sex Discrimination Ordinance sets out provisions on the constitutional aspects of the EOC including the appointment of the Chairperson, members, and staff; the functioning of Committees; the financial aspects of the EOC including accounting; and annual reports. These provisions are mostly contained in the Schedules to the SDO.<sup>261</sup>
- 6.68 The EOC believes that there are several areas where the constitutional provisions could be improved based on international or Hong Kong practices.

### **(i) Strategic Plans**

- 6.69 Although the EOC is required to produce annual reports on its activities

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<sup>259</sup> Section 89(3) SDO.

<sup>260</sup> Section 30 Equality Act 2006.

<sup>261</sup> Schedule 6 of the SDO.

each year, there is no requirement to produce written strategic or corporate plans which set out in detail its planned strategic areas of work over an extended period, as well as how performance in those areas will be measured. In practice it is to be noted that in 2013, for the first time the EOC has produced a three-year Work Plan.

6.70 In other international jurisdictions with similar organizations such as the EHRC in the United Kingdom and the AHRC in Australia, the requirements to produce Strategic or Corporate Plans are set out in legislation. For example, the EHRC is required to prepare after consultation with the public a Strategic Plan for its main areas of work every five years. The Strategic Plan must also be published and sent to the Government who lays it before parliament.<sup>262</sup>

6.71 In Australia, the AHRC is required to prepare a Corporate Plan every three years which sets out the objectives and the strategies and policies to be followed in order to achieve the objectives. The Corporate Plan must also be published by the AHRC.<sup>263</sup>

6.72 The EOC believes that the development of a Strategic or Corporate Plan for the EOC would be important to:

- Engage with the public and all key stakeholders in order to and before it decides its priority areas of work;
- Ensure that the EOC has a clear focus on how it should prioritize and allocate its resources, as well as provide indicators in order to measure performance;
- help to produce institutional and systemic changes across society on particular equality issues by focusing on macro areas of concern.

#### **Consultation Question 54**

**Do you think that the EOC should be required to produce a Strategic Plan in consultation with the public that sets out its strategic priority areas of work over several years?**

#### **(ii) Ensuring the independence of the EOC from Government**

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<sup>262</sup> Sections 4 and 5 of the Equality Act 2006.

<sup>263</sup> Sections 46AA and 46AB Australian Human Rights Commission Act 1986.

6.73 There are a number of issues relating to independence of the EOC from Government. These include issues of legal and operational independence, the manner in which the Chair and Board members are appointed, and their experience. All these issues are examined below.

**(a) Legal and Operational independence**

6.74 The importance of independence from Governments of human rights institutions is emphasized by the United Nations Paris Principles which set out the key elements for their effective functioning.<sup>264</sup> Although the EOC is not a United Nations accredited human rights institution, many elements of its work require independence and are similar to the functioning of human rights institutions.

6.75 Independence is important for practical reasons. The Discrimination Ordinances apply to the Government and public authorities in relation to key sectors including employment, the provision of goods and services, education, and Government functions.<sup>265</sup>

6.76 As the EOC has a role in enforcing compliance with the Discrimination Ordinances by using its various powers, it is therefore vital that the EOC remains independent of Government in principle and in practice. There are situations where, for example, the EOC conducts a formal investigation into the actions of a Government department, or provides legal assistance to an individual who is claiming that a Government department discriminated against or harassed them.

6.77 There are a number of means by which legal and operational independence can be achieved. One means is having specific provisions in the legislation concerning the maintenance of independence of an Equality Body.

6.78 Some of the constitutional provisions in international jurisdictions contain specific provisions relating to guaranteeing independence. For example in

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<sup>264</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

<sup>265</sup> Subject to the RDO not applying to Government functions.



relation to the EHRC, in the United Kingdom the Equality Act 2006 provides:

*“...The Secretary of State shall have regard to the desirability of ensuring that the Commission is under as few constraints as reasonably possible in determining—*

*(a) its activities,*

*(b) its timetables, and*

*(c) its priorities.”<sup>266</sup>*

6.79 There is to some extent recognition of the independent status of the EOC:

*“The Commission shall not be regarded as a servant or agent of the Government or as enjoying any status, immunity or privilege of the Government”<sup>267</sup>*

6.80 The EOC believes that it may be helpful to include further provisions similar to the independence provision in the United Kingdom discrimination laws.

**(b) Independence and experience of the Chair and Board members**

6.81 The Chief Executive of HKSAR appoints the Chairperson and the members of the EOC.<sup>268</sup>

6.82 In relation to the appointment of the Chairperson, there is a process of advertising the position. An independent panel is appointed by the Government to interview applicants and make a recommendation. In relation to the positions of Board members, there is no process of open application or an independent panel to interview and appoint them.

6.83 A further issue is ensuring that the composition of Board members has suitable experience and is representative of the groups in society the EOC works to protect from discrimination.

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<sup>266</sup> Schedule 1 Paragraph 42 of the Equality Act 2006.

<sup>267</sup> Section 63(7) of the SDO.

<sup>268</sup> Section 63(3) SDO.

- 6.84 In other international jurisdictions there are express provisions concerning the experience and representativeness of Board members. For example in the United Kingdom, the Board members of the Equality and Human Rights Commission are required to have experience in areas of discrimination or other human rights.<sup>269</sup> There is also a requirement to have at least one person with disabilities as a Board member.<sup>270</sup>

**Consultation Question 55**

**Do you think that a provision should be included in reformed discrimination laws providing for the maintenance of the independence of the EOC from the Government?**

**Consultation Question 56**

**Do you think that in relation to Board members, applications should be openly invited and an independent panel established to interview and make recommendations for appointments?**

**Consultation Question 57**

**Do you think that there should be a provision in the legislation requiring Board members to have suitable experience in any relevant area of discrimination or promoting equality?**

**(iii) Protection of EOC members and staff from personal liability**

- 6.85 Under the SDO and RDO the constitutional provisions include a provision protecting EOC members and staff from personal liability in damages for acts done in good faith and in performance of their duties and powers.<sup>271</sup> This provision is important to ensure that the EOC can carry out its work without concerns of personal liability. A similar provision is contained for example in the Australian Human Rights Commission Act 1986.<sup>272</sup>

- 6.86 The EOC believes that this provision should be harmonized to apply to the DDO and FSDO, not just in relation to the SDO and RDO. The EOC made

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<sup>269</sup> Schedule 1 Paragraph 2, Equality Act 2006.

<sup>270</sup> Schedule 1 Paragraph 3(a), Equality Act 2006.

<sup>271</sup> Section 68 SDO and section 62 RDO.

<sup>272</sup> Section 48 Australian Human Rights Commission Act 1986.

submissions on this issue in 1999 and in 2000. We are pleased that the Government has tabled an amendment on this issue as part of the Statute Law (Miscellaneous Provisions) Bill 2014, and we therefore reiterate our call for this amendment to be passed as soon as possible.

#### **Consultation Question 58**

**Do you think that there should be a provision protecting EOC members and staff from personal liability where they act in good faith in relation to the DDO and FSDO, as is the case for the SDO and RDO?**

#### **(iv) Disclosure of information arising from complaint handling**

6.87 The EOC has a statutory process for handling discrimination complaints (see SDO s.84; DDO s.80; FSDO s.62; and RDO s.79). It is the EOC's practice to observe the principles of confidentiality in relation to information obtained in the process of handling complaints.

6.88 However, there are no express general provisions restricting disclosure of information arising from complaint handling. This is in contrast to legislation relating to the complaint handling functions of other statutory bodies such as the Ombudsman and the Privacy Commissioner.<sup>273</sup>

6.89 The EOC believes that there should be clear express provision restricting disclosure of information arising from complaint handling in accordance with the principles of confidentiality.

#### **Consultation Question 59**

**Do you think that there should be express provision restricting disclosure of information arising from complaint handling in accordance with the principles of confidentiality?**

### **C. Establishment of a Hong Kong Human Rights Commission**

6.90 A related issue to possible reforms of the duties and powers of the EOC, is whether a Human Rights Commission should be established in Hong Kong.

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<sup>273</sup> Section 15 of the Ombudsman Ordinance and section 46 of the Personal Data (Privacy) Ordinance.

- 6.91 Currently there is no single body in Hong Kong that has responsibility for promoting and monitoring wider human rights. The EOC's mandate is restricted to promoting equality and eliminating discrimination. There are some other bodies that perform specific functions connected to particular human rights. For example, the Office of the Privacy Commissioner for Personal Data has responsibility for dealing with issues relating to the right to privacy of personal data, but its jurisdiction is limited and it does not have a wider human rights mandate.
- 6.92 There has been regular discussion in Hong Kong society on the need for the establishment of a Human Rights Commission.<sup>274</sup>
- 6.93 The United Nations has repeatedly expressed its concern that there is no Human Rights Commission in Hong Kong and recommended that one be established in compliance with the Paris Principles<sup>275</sup> for National Human Rights Institutions.<sup>276</sup>
- 6.94 The EOC has on several occasions in the past expressed its support for the consultation on, and the establishment of a Human Rights Commission.<sup>277</sup>
- 6.95 Internationally there has been a positive trend over the last 20 years with increasing numbers of States or jurisdictions establishing national human rights institutions (NHRIs).<sup>278</sup> As at August 2011 the United Nations stated that there were 70 "A" status NHRIs, meaning that they are fully compliant with the Paris Principles.<sup>279</sup> A number of NHRIs have also developed mandates that include monitoring compliance with both discrimination

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<sup>274</sup> See for example Proposal for the Establishment of the Human Rights Commission in Hong Kong, Human Rights Monitor, November 2006.

<sup>275</sup> The Paris Principles are the set of minimum requirements regarding mandates and institutional structures of National Human Rights Institutions:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

<sup>276</sup> Concluding Observations Human Rights Committee, 15 November 1999 CCPR/C/79/Add.117 paragraph 9 and 21 April 2006, CCPR/C/HKG/CO/2, paragraph 8; Concluding Observations of the Committee on Economic Social and Cultural Rights, E/C.12/1/Add.107, paragraph 78(b), 13 May 2005; Concluding Observations on China, CRC/C/CHN/CO/3-4, 4 October 2013, paragraph 19.

<sup>277</sup> For example, EOC's submission to the Meeting of Legislative Council Panel on Home Affairs held on 21 June 2005, following the Concluding Observations of the ICESCR Committee, 34<sup>th</sup> session 2005, <http://www.eoc.org.hk/eoc/TextFolder/inforcenter/papers/cedawcontent.aspx?itemid=9796>

<sup>278</sup> <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx>

<sup>279</sup> The Paris Principles were developed by the United Nations and set out the key requirements for effective NHRIs, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

and human rights law. The Equality and Human Rights Commission in the United Kingdom and the Australian Human Rights Commission in Australia monitor and enforce both the domestic discrimination legislation and compliance with domestic and international human rights obligations.

- 6.96 In light of international practice, there are several options that could be considered for Hong Kong. One option would be to establish a separate Human Rights Commission with jurisdiction over promoting and protecting the human rights under the Bill of Rights and international human rights obligations. Another option could be that the mandate of the EOC is amended to monitor and promote compliance with the Hong Kong Bill of Rights Ordinance and international human rights obligations. The EOC already fulfils that role to some extent, for example in reporting to the United Nations on the human rights treaties in so far as they raise issues of equality and discrimination against different groups in society. This may also have the advantage of having one organization with a mandate to consider all issues relating to human rights, including the interaction between the right to equality and other human rights such as to be free from inhumane and degrading treatment, the rights to privacy, family life and freedom of religion.

#### **Consultation Question 60**

**Do you think that Hong Kong should establish a Human Rights Commission fully compliant with the Paris Principles?**

**If so what structure and mandate should the Human Rights Commission have?**

# CHAPTER 7: EXCEPTIONS

## Part I: Overview

- 7.01 The general principle is that discrimination and other prohibited conduct is unlawful in the relevant fields of discrimination laws. However, in some circumstances it may be justifiable to discriminate against protected groups. Such exceptions arise in a wide range of situations such as where having or not having a protected characteristic is a genuine occupational qualification; the need to protect people for health and safety reasons in the context of pregnant women; differences in insurance premiums for persons with certain disabilities based on appropriate information; and need for countries to effectively maintain their immigration policies which may, for example, discriminate against people of different nationalities.
- 7.02 The key elements for exceptions to be lawful are that they pursue a legitimate aim and are proportionate in the means by which they achieve that aim. This principle is essential both to discrimination laws, and the discrimination provisions in the Hong Kong Bill of Rights Ordinance. It means that exceptions should be construed narrowly as they go against the general principle of non-discrimination.
- 7.03 The EOC has examined the existing exceptions in the Discrimination Ordinances and has a number of concerns with them:
- **Dispersal:** the exceptions are often located in several different parts of the Ordinances (the main body and the Schedules) which makes them very difficult to navigate;
  - **Repetition:** some of the exceptions are unnecessarily repeated (for example the exceptions relating to reproductive technology and adoption in relation to sex are contained in both the main body of the SDO and the Schedules);
  - **Inconsistency:** for example, the exception relating to national security applies to the protected characteristic of sex but not to any of the other characteristics;
  - **Unjustified:** we believe that a number of exceptions are not justified

and should be repealed;

- **Proportionality:** in some cases we believe that the exceptions require amendment to ensure that they are proportionate.

7.04 In order to make the discrimination legislation easier to navigate, we believe it would therefore be better that all the exceptions are set out in one section of the law.

#### **Consultation Question 61**

**Do you think that all the exceptions should be contained in one section (Schedules) of the discrimination laws in order that the law is clearer?**

## **Part II: Concerns with the current exceptions under the Discrimination Ordinances**

7.05 The exceptions are considered either by their category (e.g. genuine occupational qualifications) where they apply to more than one protected characteristic, or by protected characteristic such as sex or race where they only apply to one protected characteristic.

### **A. Genuine Occupational Qualifications**

7.06 An exception contained in all the Discrimination Ordinances apart from the Family Status Discrimination Ordinance is Genuine Occupational Qualifications (GOQs). This exception is common across a number of other international jurisdictions such as the United Kingdom, Australia and the European Union. It concerns employment situations where differences in treatment on grounds of a protected characteristic (e.g. sex, race) are justifiable because the nature of the role requires that the person has particular attributes. This may involve situations where having the protected characteristic (e.g. being of one sex) is essential, or where not having it (e.g. not having a specific disability) is essential.

**Example 41: Genuine occupational requirement to be a woman**

A counseling service for female victims of domestic violence and rape may decide that in order to cope with the sensitivities of the role of counseling such women, they will only employ female counselors.

**Example 42: Genuine occupational requirement relating to race**

In the context of theatrical and film performances, a film production company producing a film concerning the experience of a black person may decide that it will only employ black people to perform in certain roles for reasons of authenticity.

- 7.07      These exceptions should be narrowly construed as they only apply in very limited circumstances.

**Concerns generally with sex, race and disability GOQs**

- 7.08      The current GOQs are based on the former models for GOQs in the United Kingdom and Australia that listed the express situations in which GOQs applied. There are several problems with this model. Firstly, the absence of a general definition for GOQs does not allow for other possible situations in which GOQs can apply. Secondly, some of the current GOQs exceptions are outdated and no longer appear to be for a legitimate aim and proportionate.<sup>280</sup>

**Concerns with the disability GOQ and unjustifiable hardship**

- 7.09      In relation to disability, the EOC has a particular concern with the formulation of the exception under section 12 of the DDO. The exception for GOQs is framed as the absence of a disability being a genuine occupation qualification. There are two elements of the exception:

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<sup>280</sup> For example under section 12(2)(i) of the SDO an exception is permitted to choosing persons for positions where the job is one of two to be held by a married couple.



- A person with disabilities would be unable to carry out the inherent requirements of the particular employment; or
- In order to carry out the requirements of the job, facilities or services would be required which would impose unjustifiable hardship on the employer.

7.10 As discussed in Chapter 2, we believe that there should be a duty on employers to make reasonable accommodation. As a result we believe that the exception as it relates to persons with disabilities should make it clear that it does not apply where reasonable accommodation can be made.

7.11 The EOC believes that the Genuine Occupational Qualification should be simplified and harmonized as has been done in the United Kingdom under the Equality Act 2010<sup>281</sup> and in the Draft Human Rights and Anti-Discrimination Bill in Australia. The exception would apply to all protected characteristics and provide that differences of treatment are not unlawful where:

- there is an occupational requirement which relates to a protected characteristic;
- the application of the requirement is a proportionate means of achieving a legitimate aim;
- the applicant or worker does not meet the requirement; or
- the employer has reasonable grounds for not being satisfied that the applicant or worker meets the requirement.<sup>282</sup>

7.12 The broad exception could mean it is no longer necessary to retain the specific list of situations in which the GOQ applies, although it would also be possible to list some of the situations in which it would apply.

7.13 The exception could also expressly provide that it does not apply where reasonable accommodation could be made for person with disabilities to perform the occupational requirements.<sup>283</sup>

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<sup>281</sup> Schedule 9, paragraph 1 Equality Act 2010.

<sup>282</sup> This formulation is based on the United Kingdom model.

<sup>283</sup> Based on Clause 24(4) of the Draft Human Rights and Anti-Discrimination Bill 2012.

## Consultation Question 62

Do you think that the definition of genuine occupational qualifications (GOQs) should be reformed and made consistent across all the protected characteristics by defining them as:

- “- There is an occupational requirement which relates to a protected characteristic;
- the application of the requirement is a proportionate means of achieving a legitimate aim;
- the applicant or worker does not meet the requirement; or, the employer has reasonable grounds for not being satisfied that the applicant or worker meets the requirement.

In relation to the protected characteristic of disability, the exception does not apply where a reasonable accommodation can be made to perform the occupational requirement.”?

## B. Discriminatory training

7.14 In all the Discrimination Ordinances there are currently exceptions relating to discriminatory training by employers or trade union organizations. The exceptions state that providing training, facilities and other services to encourage persons with a protected characteristic to take up work or positions in trade unions will not be unlawful where there is evidence of under representation of those groups in the positions.<sup>284</sup>

7.15 These provisions are similar to what is permitted by the special measures exceptions in all the Discrimination Ordinances and discussed in Chapter 5.

7.16 In other jurisdictions such as the United Kingdom and Australia, there is no specific exception relating to discriminatory training as they would fall within the exceptions for positive action or special measures respectively. As a result, the EOC believes it is not necessary to have the specific exceptions relating to discriminatory training. The suggested amendment to the special measures provisions as discussed in Chapter 5 would be wide enough to include training (see paragraph 5.12 to 5.19).

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<sup>284</sup> See sections 53 and 54 SDO; section 39 FSDO; sections 53 and 54 DDO; and sections 51 and 52 RDO.

### Consultation Question 63

**Do you think that the discriminatory training exceptions are unnecessary and should be repealed and incorporated within the scope of the definition of special measures?**

### C. Exceptions relating to charities

7.17 All the Discrimination Ordinances contain exceptions permitting discrimination by charities that provide benefits only to persons with the protected characteristics of sex, family status, disability or race.<sup>285</sup> This applies to the fields of employment, education and the provision of goods, facilities and services.

7.18 There is however no requirement that the provision of such benefits is for a legitimate aim and proportionate. This can be contrasted with a similar exception under the United Kingdom Equality Act 2010 which does require the benefits to be “a proportionate means of achieving a legitimate aim”.<sup>286</sup> This is important in order to prevent charities using the exception for inappropriate purposes.

#### **Example 43: Charitable purpose which may not be proportionate**

A Chinese charity is established to provide foster care and adoption services of Chinese children and babies. They decide to only offer their services to Chinese people as they do not believe that people of other races would be culturally appropriate to look after such children. In this context, the restriction of the service to only Chinese persons may not be a proportionate means of achieving a legitimate aim.

7.19 The EOC therefore believes that all the exceptions relating to charities should be amended to require that the benefits are for a legitimate aim and proportionate.

### Consultation Question 64

**Do you think that the charities exceptions should be amended to require**

<sup>285</sup> Section 49 SDO, Section 37 FSDO, Section 50 DDO and Section 50 RDO.

<sup>286</sup> Section 193 Equality Act 2010.

**a legitimate aim and proportionality in order to be lawful?**

**D. Exceptions relating to New Territories Ordinances and small house policy**

7.20 The SDO<sup>287</sup>, FSDO<sup>288</sup> and the RDO<sup>289</sup> all contain exceptions relating to the New Territories small house policy.<sup>290</sup> The policy is that an indigenous male villager who is over 18 years and is descended through the male line from a resident in 1898 of a recognised village is entitled to apply for a grant to build a small house.

7.21 The policy also links to the obligation to protect the customs and rights of indigenous villagers of the New Territories, which are protected under the Basic Law.<sup>291</sup>

7.22 Given that the policy does create discrimination against women, the EOC believes that the Government should conduct a comprehensive review of the policy. This would then enable the Government to also review the continuing need for the exceptions in the Discrimination Ordinances.

**Consultation Question 65**

**Do you think that the Government should conduct a review of its New Territories small house policy?**

**E. Exceptions relating to sex**

**(i) Exceptions the Government previously agreed to repeal**

7.23 As described previously, in 1999 the EOC made submissions to the Government on its proposals to reform the Sex Discrimination Ordinance and the Disability Discrimination Ordinance.

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<sup>287</sup> Section 61 SDO and Schedule 5 Part 2 Paragraph 2.

<sup>288</sup> Section 42 FSDO.

<sup>289</sup> Section 57 RDO.

<sup>290</sup> See New Territories Ordinance (Cap 97); and the New Territories Leases (Extension) Ordinance (Cap 150)

<sup>291</sup> Article 40 Basic Law.

7.24 In October 2000, the Government responded to the EOC's proposals and indicated that it had no objection in principle to implementing some of the proposals, including repealing a number of the exceptions between men and women in Schedule 5 of the SDO. The Government indicated that the exceptions had either been incorporated in the main body of the SDO or had become obsolete because of a change in Government policy or repeal of other laws.

7.25 The Government agreed to repeal the exceptions relating to:

- (a) requirements relating to height, uniform weight or equipment in relevant positions;<sup>292</sup>
- (b) discrimination in the reservation of positions for men in the police Tactical Unit;<sup>293</sup>
- (c) discrimination in weapon training;<sup>294</sup>
- (d) discrimination between persons of different marital status in the provision of reproductive technology procedure as section 56B of the SDO has incorporated this exception;<sup>295</sup>
- (e) discrimination between persons of different marital status arising from the provision of any services relating to the adoption of children as section 56C of the SDO has incorporated this exception;<sup>296</sup>
- (f) sex discrimination relating to granting of pension benefits to surviving spouses and children of deceased public officers;<sup>297</sup> and
- (g) marital status discrimination relating to granting of gratuities to unmarried widows of police officers who die or receive injuries.<sup>298</sup>

7.26 In 2011, the EOC reiterated its request that the Government implement its previous commitment to repeal the above provisions. In 2014 the Government introduced the Statute Law (Miscellaneous Provisions) Bill to make most of the above amendments.<sup>299</sup> We urge the Government to

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<sup>292</sup> Item 1(a) of Part 2 of Schedule 5 SDO.

<sup>293</sup> Item 1(c) of Part 2 of Schedule 5 SDO.

<sup>294</sup> Item 1(d) of Part 2 of Schedule 5 SDO.

<sup>295</sup> Item 4 of Part 2 of Schedule 5 SDO.

<sup>296</sup> Item 5 of Part 2 of Schedule 5 SDO.

<sup>297</sup> Item 7 of Part 2 of Schedule 5 SDO.

<sup>298</sup> Item 8 of Part 2 of Schedule 5 SDO.

<sup>299</sup> The Government is making an amendment to Item 1(a) of Part 2 of Schedule 5 SDO by removing the references to requirements for uniform or equipment but it is retaining the requirements relating to height and weight. The Government has also indicated it will not remove the exception (Item 7 of

make amendments as soon as possible to repeal the below exceptions relating to:

- requirements for height or weight; and
- granting pension benefits to surviving spouses and children of deceased public officers.

#### **Consultation Question 66**

**Do you think that the Government should as soon as possible repeal the exceptions in the SDO relating to sex and:**

- requirements for height or weight;
- granting pension benefits to surviving spouses and children of deceased public officers?

#### **(ii) Numbers of men and women in Correctional Services Department positions: (Item 1(b) of Part 2 Schedule 5 SDO)**

7.27 The exception relates to the number of men and women employed in the Correctional Services Department. The EOC is not aware of there being sufficient evidence as to why this exception is necessary. In our view, where for operational reasons it may be appropriate to maintain a different ratio of staff determined by gender (for example for security reasons), the Correctional Services Department could rely on the existing exceptions in the SDO of genuine occupational qualifications. As a result, the EOC believes that there is insufficient evidence that the exception is necessary.

#### **Consultation Question 67**

**Do you think that the exception for numbers of men and women employed in the Correctional Services Department is unnecessary and should be repealed?**

#### **(iii) National security**

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Part 2 of Schedule 5 SDO) regarding sex discrimination in the granting of pensions to surviving spouses and children of deceased public officers as there are still children of officers appointed before March 1993 receiving pensions.

7.28 Under section 59 of the SDO there is an exception for acts done for the purpose of safeguarding national security. This is the only one of the Discrimination Ordinances that contains such an exception. The EOC believes that the Government should provide evidence as to why an exception relating to sex is necessary. In any event, we are concerned that the exception does not require the acts to be proportionate. This can be contrasted, for example, with a similar exception relating to national security under the United Kingdom Equality Act 2010 requiring proportionality for the exception to be lawful.<sup>300</sup> The EOC therefore believes the exception should be amended to include a proportionality requirement.

#### **Consultation Question 68**

**Do you think that the national security exception relating to sex is necessary, and if so do you agree that it should be amended to require proportionality?**

#### **(iv) Employment and qualifying bodies relating to an organized religion**

7.29 Currently under section 22 of the SDO there are exceptions relating to sex discrimination where it relates to either employment or a qualification for an organized religion. The exception applies where the discrimination is necessary to comply with the doctrines of the religion, or to avoid offending the religious susceptibilities common to its followers.

7.30 The EOC has received representations that the exception should also apply to the characteristic of marital status given that for some religious employment positions (for example priests), the candidate cannot be divorced.

7.31 Such an approach would be consistent with the scope of a similar exception relating to organized religions under the Australian Sex Discrimination Act 1984, which permits both sex and marital status discrimination in employment.<sup>301</sup>

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<sup>300</sup> Section 192 Equality Act 2010.

<sup>301</sup> See section 38 Sex Discrimination Act 1984.

### **Consultation Question 69**

**Do you think that the exception permitting sex discrimination in employment and qualification bodies for religious purposes should be extended to permit marital status discrimination?**

## **F. Exceptions relating to marital status**

### **(v) Entitlement to benefits dependent on marital status (Item 3 of Part 2 Schedule 5 SDO)**

7.32 The exception relates to employers providing different rates of allowances or benefits to employees based on their marital status. It permits discrimination on the ground of marital status where a person is single. This usually applies to situations where employers agree to provide benefits relating to housing, medical insurance or other benefits to the spouses of their employees.

7.33 The Government's previous position was that the exception was necessary and that the removal of the exception would have financial implications for employers as the rates of allowances would have to be aligned irrespective of the recipients' marital status.

7.34 The exception has a discriminatory effect on those persons that are in de facto relationships but are not married. The partners of employees will not be entitled to the same benefits unless they get married. As we indicated previously in Chapter 2, we believe that the protection from discrimination based on marital status should be broadened to "relationship status" to also protect people in de facto relationships from discrimination.

### **Consultation Question 70**

**Do you think that the exception relating to providing benefits differentially based on marital status should be amended to provide equality between persons who are married and persons in a de facto relationship?**



**(vi) Provision of reproductive technology services dependent on marital status (section 56B SDO)**

- 7.35 Although the Government agreed to repeal Item 4 of Part 2 Schedule 5 regarding discrimination on grounds of marital status in relation to reproductive technology, this was because it had enacted an exception in the body of the SDO (section 56B) so the exception in Schedule 5 was no longer necessary.
- 7.36 The Human Reproductive Technology Ordinance (HRTO) states that reproductive technology services are only available to married persons.<sup>302</sup> Concerns with the discriminatory nature of the HRTO have been raised.<sup>303</sup>
- 7.37 The EOC does not believe that discrimination in the provision of reproductive technology services on the basis of marital status serves a legitimate aim or is proportionate. In particular, we do not believe that the restriction of in vitro fertilization (IVF) treatment only to married couples reflects the evolving nature of Hong Kong society, for example that many unmarried couples would like to have children, or that single people not in a relationship at the time of seeking IVF may also want children.
- 7.38 The discrimination based on marital status may also be in breach of article 22 of the Bill of Rights which prohibits discrimination on grounds including “other status” which would include marital status.
- 7.39 Further, the HRTO is not consistent with the Adoption Ordinance which does not require a person to be married in order to apply for and adopt a child.
- 7.40 The EOC therefore believes that the HRTO should be amended to remove the discriminatory aspects requiring marriage for the IVF treatment, which could then mean the exception in the SDO can be repealed.

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<sup>302</sup> Section 15(5) Human Reproductive Technology Ordinance.

<sup>303</sup> See for example

<http://www.scmp.com/lifestyle/family-education/article/1283278/internal-contradiction>; and comments by Winnie Chow, a partner at the law firm Hampton, Winter and Glynn, <http://www.hwg-law.com/articles/hong-kong-government-should-review-conservative-and-discriminatory-parent-and-child-ordinance>

### **Consultation Question 71**

**Do you think that:**

- **the Human Reproductive Technology Ordinance should be amended to remove a requirement that a person is married to be provided with IVF treatment; and**
- **the exception in the SDO relating to reproductive technology should then be repealed?**

#### **(vii) Adoption dependent on marital status**

7.41 Although the Government agreed to repeal Item 5 of Part 2 Schedule 5 regarding the exception for discrimination on grounds of marital status in relation to adoption, this was because it had enacted an exception in the body of the SDO (section 56C) so the exception was no longer necessary.

7.42 The Adoption Ordinance no longer requires an applicant to be married.<sup>304</sup> A report in 1998 indicated that each year several adoption orders were made in favour of sole applicants.<sup>305</sup> As a result, we consider that the exception under section 56C is no longer necessary and should be repealed.

### **Consultation Question 72**

**Do you think that the exception relating to adoption and marital status is no longer necessary because of amendments to the Adoption Ordinance and should be repealed?**

#### **(viii) Home Ownership or Private Sector Participation Schemes dependent on marital status (Item 6 of Part 2 Schedule 5 SDO)**

7.43 Discrimination is permitted in relation to marital status whereby in order to qualify for the Home Ownership or Private Sector Participation schemes applicants with families rather than single persons are given

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<sup>304</sup> See section 4 of the Adoption Ordinance which permits applications of adoption either by a “sole applicant” or two applicants who are spouses. Sole applicants could include persons who are single and not in a relationship or persons who are in a de facto relationship.

<sup>305</sup> For example between April 1997 and March 1998, 9 single applicants and 254 married couples were granted adoption orders: Report on the Review of the Adoption Ordinance, Working Group in the Review of the Adoption Ordinance November 1998.

preferences.<sup>306</sup> We believe that the policy of giving preference to public housing for families is a legitimate aim, but that does not mean an exception for marital status is necessary. For example unmarried couples can have a family, and single parents may have a family. As a result we believe the exception should be repealed

### **Consultation Question 73**

**Do you think that the exception to discrimination relating to the provision of public housing permitting discrimination on grounds of marital status should be repealed?**

## **G. Exceptions relating to family status**

### **(i) Insurance (section 38 FSDO)**

7.44 There is an exception relating to insurance premiums which permits discrimination in relation to a person's family status of having the responsibility to care for an immediate family member. This is similar to equivalent exceptions relating to difference in insurance premiums on grounds of sex or disability.

7.45 There may be legitimate reasons for the insurance exception in relation to sex (e.g. if there are differences in insurance premiums for health insurance where there is evidence that men are more likely to suffer from certain diseases) or disability (certain disabilities may mean a person is more at risk of death or sickness; therefore their insurance premiums may be higher than for persons without those disabilities).

7.46 However, in relation to family status the EOC does not see what justification there could be in having a different level of insurance premiums for persons having to care for immediate family. Where the immediate family members are, for example sick, persons with disabilities or elderly that may affect the immediate family members insurance premiums. Nevertheless, we do not think that should affect the insurance premiums for the carer. As a result, the EOC believes that this

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<sup>306</sup> See position paper of the Government October 2000, <http://www.legco.gov.hk/yr06-07/english/bc/bc52/papers/bc52cb2-658-2-e.pdf>

exception should be repealed.

**Consultation Question 74**

**Do you think that the exception relating to family status which permits difference in insurance premiums based on family status should be repealed?**

**H. Exceptions relating to disability**

**(i) Minimum wage for persons with disabilities (Items 1 to 3 of Schedule 5 DDO)**

7.47 The DDO contains exceptions relating to provisions under the Minimum Wage Ordinance (MWO) which permit persons with disabilities to be paid less than the minimum wage where they have been assessed as having less than full productivity. The Government explained the reasons for the exception in its report to the United Nations on its compliance with the Convention on the Rights of Persons with Disabilities:

*“On the treatment of persons with disabilities under the SMW [Statutory Minimum Wage] regime, LD [Labour Department] has conducted consultation sessions with more than 50 rehabilitation organisations and over 30 employers with ample experience in employing workers with disabilities, and with the participation of EOC. The majority view gauged is that while SMW should be applicable to employees with disabilities like their able-bodied counterparts, a special arrangement should also be put in place for those with impaired productivity so as to minimise any possible adverse impact of SMW on their job opportunities. Under the MWO, employees with disabilities enjoy the same entitlement to SMW as able-bodied workers. The Ordinance also provides a special arrangement so that employees with disabilities may choose to have their productivity assessed in the authentic workplace. The assessment serves to determine the extent, if any, that the disabilities affect the degree of productivity of the employees in performing their work so as to determine whether they should be remunerated at no less than the SMW level or at a rate commensurate with their productivity. To forestall abuse, the right to invoke the assessment is vested in the employees with disabilities rather*

*than the employers.*<sup>307</sup>

- 7.48 The EOC would like to hear from rehabilitation organizations, employers, and persons with disabilities as to how the procedure relating to minimum wage has operated in practice, and therefore whether the exception in the DDO should be retained.

#### **Consultation Question 75**

**Do you think that the system under the Minimum Wage Ordinance by which persons with disabilities can assess their productivity has worked effectively? Do you think that the exceptions under Items 1 to 3 of Schedule 5 of the DDO should therefore be retained and/or reformed in any way or repealed?**

#### **I. Exceptions relating to race**

##### **(i) Recruitment of employees from overseas with special skills, knowledge or experience (section 13 RDO)**

- 7.49 Section 13 of the RDO is an exception relating to the terms and conditions by which overseas staff are employed at an establishment in Hong Kong. It applies to acts done where a person is employed from overseas and the position requires special skills, knowledge or experience not readily available in Hong Kong. For example, a person recruited from overseas could be employed on better terms and conditions than a person from Hong Kong because those terms and conditions were the same as what they would be offered in a similar position overseas.

- 7.50 The exception is intended to ensure that employers in Hong Kong can secure the services of appropriate staff where the particular skills or experience required of the role mean a person from overseas is more suitable. This situation does not however involve differences in treatment based on the race of the overseas person.<sup>308</sup>

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<sup>307</sup> Report of the HKSAR Government on the United Nations Convention on the Rights of Persons with Disabilities, [http://www.lwb.gov.hk/UNCRPD/Publications/HKSAR's%20UNCRPD%20report\\_Eng%20\(version%20for%20publication\).pdf](http://www.lwb.gov.hk/UNCRPD/Publications/HKSAR's%20UNCRPD%20report_Eng%20(version%20for%20publication).pdf)

<sup>308</sup> Section 13(1)(c)(ii) RDO.

7.51 In relation to direct racial discrimination, where a person from overseas is chosen by criteria of their skills and experience, that would not constitute racial discrimination. In relation to indirect racial discrimination, employing persons from overseas on better terms and conditions could sometimes constitute indirect racial discrimination. The question would then be whether the differences in terms and conditions were a proportionate means of achieving a legitimate aim. The aim of acquiring staff with particular skills is likely to be a legitimate aim. Differences in conditions are also likely to be proportionate if persons in Hong Kong do not have the same type or level of skills.

7.52 The EOC believes that this exception should be repealed and that issues relating to differences in the employment terms and conditions of overseas recruits compared to other persons should be dealt with on a case-by-case basis. It is likely that difference in treatment in terms and conditions of employment where the person has special skills and experience is likely to be justifiable.

**Example 44: Employment of persons from overseas may not be racial discrimination**

A private school decides to employ an English teacher. The role requires a native English speaker. The appointee asks and the school agrees to pay the appointee on more favourable terms and conditions than their other English teacher who is Chinese from Hong Kong and not a native English speaker. The appointee asks for the terms and conditions based on what she was paid in England. It would not constitute direct race discrimination as the appointee was not treated more favourably than the local teacher based on her race but the level of her language skills. The local teacher may have been subjected to indirect race discrimination, but it is likely such discrimination was justifiable given the role required a native English speaker and better terms and conditions may be reasonable for such a hire.

7.53 Other international jurisdictions such as the United Kingdom and Australia do not have such an exception in their discrimination legislation. Instead, such issues would be dealt with on a case-by-case basis under the direct and indirect race discrimination provisions. As a result, the EOC believes

this exception should be repealed.

**Consultation Question 76**

**Do you think that the exception permitting discrimination in employment conditions for persons from overseas with special skills, knowledge or experience should be repealed?**

**(ii) Employing staff on local and overseas terms of employment (section 14 and Schedule 2 RDO)**

7.54 This exception permits employers for specified public positions to have different terms of employment, whereby some employees are employed on local terms of employment and others are employed on overseas terms of employment. It relates in particular to the employment of judicial officers, Independent Commission Against Corruption officers, other public officers and specified English teachers.<sup>309</sup>

7.55 The exception is in place as for the above posts prior to January 1999 (or in the case of judicial officers November 1997) there were differences in terms of employment based on whether the person was from overseas or not. The EOC believes that the Government should review what steps can be taken to eliminate any differences in such terms of employment in order that the inequality in treatment can be ended and the exception repealed.

**Consultation Question 77**

**Do you think that the exception which permits differences in terms of employment for overseas and local staff for specified posts should be reviewed by the Government?**

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<sup>309</sup> Schedule 2 RDO.

# **APPENDIX: LIST OF CONSULTATION QUESTIONS**

## **CHAPTER 1: RATIONALE AND PRINCIPLES OF THE REVIEW**

**Consultation Question 1 ..... P.26**  
**Do you think that, in reforming the current discrimination laws, the Government should consolidate all the existing Discrimination Ordinances into a single modernized Discrimination Ordinance?**

## **CHAPTER 2: GOALS OF THE LEGISLATION AND PROTECTED CHARACTERISTICS**

**Consultation Question 2 ..... P.29**  
**Do you think that a clause at the commencement of the discrimination legislation should be incorporated to set out its purpose or goals?**

**Consultation Question 3 ..... P.30**  
**Do you think that in relation to the protected characteristic of sex, neutral language of “a person” should be used?**

**Consultation Question 4 ..... P.32**  
**Do you think there should be express reference to protection from discrimination during maternity leave?**

**Consultation Question 5 ..... P.32**  
**Do you think there should be protection from discrimination on grounds of potential pregnancy?**

**Consultation Question 6 ..... P.37**  
**Do you think that the protected characteristic of marital status should be amended to apply to “relationship status” and expressly protect persons in de facto relationships? If so, how should de facto relationships be defined? Should it be defined to include protection for both heterosexual relationships and same-sex relationships? Should this also be extended to protection from discrimination relating to former de facto relationships?**

**Consultation Question 7 ..... P.40**



Do you think that the current definition and scope of what constitutes a disability is appropriate and proportionate? Or should it be amended in any way, for example by qualifying that the physical or mental impairment must be substantial and/ or likely to last a certain period?

**Consultation Question 8 ..... P.43**

Do you think that the protected characteristic of family status should be redefined as “family responsibilities” in order to clarify that it relates to persons who have responsibility for the care of immediate family members?

**Consultation Question 9 ..... P.44**

Do you think that the scope of family status discrimination should be expanded to include protection where persons in de facto relationships care for immediate family members? If so, how should de facto relationships be defined? Further, do you think the protection should be extended to situations where a person cares for an immediate family member from a former marriage or de facto relationship?

**Consultation Question 10 ..... P.44**

Do you think that there should be express reference in the definition of family status to include breastfeeding women?

**Consultation Question 11 ..... P.50**

In relation to the protected characteristic of race, do you think that any or all of the characteristics of nationality, citizenship, residency or related status should be added as protected characteristics?

**Consultation Question 12 ..... P.50**

In relation to residency status or related status, if you think there should be protection, how should it be defined?

**Consultation Question 13 ..... P.51**

Do you think that the exception to race discrimination on the grounds of permanent residency and right of abode in Hong Kong under section 8(3)(b)(i) and (ii) should be repealed?

**Consultation Question 14 ..... P.51**

Do you think that the exception to race discrimination on the grounds of length of residence in Hong Kong under section 8(3)(c) should be repealed?

**Consultation Question 15 ..... P.51**

**Do you think that the exception to race discrimination on the grounds of nationality, citizenship or resident status of a person in another country under section 8(3)(d) should be repealed?**

**Consultation Question 16 ..... P.51**

**Do you think that consideration should be given to an exception to discrimination on grounds of residency status, but only where the relevant requirement is for a legitimate aim and is proportionate?**

### **CHAPTER 3: FORMS OF PROHIBITED CONDUCT**

**Consultation Question 17 ..... P.57**

**Do you think that the definition of direct discrimination should be amended to:**

- include any less favourable treatment on grounds of a protected characteristic; and
- made clear that for direct disability discrimination a comparison can be made with persons without that particular disability (including persons with a different disability)?

**Consultation Question 18 ..... P.59**

**Do you think that there should be a different test for direct pregnancy discrimination which states:**

**“on the ground of her pregnancy, sickness or other characteristic that appertains generally to women who are pregnant or potentially pregnant a person treats her unfavourably”?**

**Consultation Question 19 ..... P.59**

**How to protect pregnant staff from dismissal after maternity leave on the pretext that the temporary replacement performed better?**

**Consultation Question 20 ..... P.62**

**Do you think that the definition of indirect discrimination should be amended to:**

- refer to a “provision, requirement or practice”; and
- set out the meaning of “justifiable” as where a provision, requirement or practice “serves a legitimate objective and bears a rational and proportionate connection to the objective”?

**Consultation Question 21 ..... P.66**

**Do you think that there is a need for introducing specific equal pay for equal value provisions?**

**Consultation Question 22 ..... P.67**

**Do you think that discrimination due to being accompanied by assistance animal should be added as a category of disability discrimination?**

**Consultation Question 23 ..... P.70**

**Do you think that a new category of discrimination arising from disability should be introduced?**

**Consultation Question 24 ..... P.73**

**Do you think that new distinct duty to make reasonable accommodation for persons with disabilities should be introduced in the discrimination legislation and that it should be based on the United Kingdom model?**

**Consultation Question 25 ..... P.76**

**Do you think that harassment should be prohibited in relation to the protected characteristics of sex, pregnancy, family status and marital status?**

**Consultation Question 26 ..... P.78**

**Do you think that the definition for harassment for all protected characteristics should be “A person (A) harasses another (B) if—**

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and**
- (b) the conduct has the purpose or effect of—**
  - (i) violating B’s dignity, or**
  - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”?**

**Consultation Question 27 ..... P.79**

**Do you think there should be protection from harassment for all protected characteristics?**

**Consultation Question 28 ..... P.79**

**In relation to sexual harassment, do you think that the definition should be the**

same as other forms of harassment, other than stating in addition that it is unwanted conduct of a sexual nature?

**Consultation Question 29 ..... P.81**

**Do you think that there should be provisions on intersectional direct and indirect discrimination, as well as harassment? If so, do you think that there should be protection from intersectional discrimination on the basis of two or more protected characteristics?**

**Consultation Question 30 ..... P.84**

**Do you think that:**

- **there should be protection from direct and indirect discrimination, and harassment by association across all the protected characteristics;**
- **and if so, do you think “association” should be broadly defined to include association by immediate family, other relatives, caring responsibilities, friendships or working relationships?**

**Consultation Question 31 ..... P.85**

**Do you think that there should be express protection from direct and indirect discrimination, and harassment by perception and imputation across all the existing protected characteristics?**

**Consultation Question 32 ..... P.87**

**Do you think that there should be a defence for principals to liability from unlawful conduct of agents, where the principal took reasonably practicable steps to prevent the unlawful conduct?**

**Consultation Question 33 ..... P.88**

**Do you think that the prohibition on requesting information for a discriminatory purpose relating to disability discrimination should be extended to all existing protected characteristics?**

## **CHAPTER 4: FIELDS OF PROHIBITED CONDUCT**

**Consultation Question 34 ..... P.91**

**Do you think that there should be express provisions in the discrimination laws that it applies to all public authorities, and that it is unlawful for them to**

**discriminate in the performance of their functions and exercise of their powers?**

**Consultation Question 35 ..... P.93**

**Do you think that there should be protection from racial discrimination in the exercise of the Government's functions and powers?**

**Consultation Question 36 ..... P.94**

**Do you think that for reasons of consistency there should be an express prohibition on disability discrimination in relation to election and voting of members to public bodies? If so, do you think that there should be an exception permitting disability discrimination but only where it is for a legitimate aim and proportionate?**

**Consultation Question 37 ..... P.96**

**Do you think that the current express protection from disability discrimination in sporting activity should be extended to all the protected characteristics?**

**Consultation Question 38 ..... P.98**

**Do you think that the limitations on the operation of the RDO in the education and vocational training sectors regarding the exception on the medium of instruction should be repealed?**

**Consultation Question 39 ..... P.108**

**Do you think that new harassment provisions should be introduced for all the protected characteristics which provide:**

- (1) employer liability for harassment of employees by customers, tenants or any other third parties not in an employment relationship where an employer is put on notice of the harassment and fails to take reasonable action;**
- (2) common workplace liability on the person harassing but there is no employer/employee relationship (e.g. volunteers harassed by another volunteer);**
- (3) liability on educational establishments where they are put on notice of harassment between students and fail to take reasonable action;**
- (4) liability of service users for harassing the service providers;**
- (5) liability of service users for harassing other service users;**
- (6) liability for harassment on ships and aircraft in relation to the provision of goods, facilities and services;**
- (7) liability of tenants and subtenants for harassing other tenants or subtenants;**

and

- (8) liability of the management of clubs for harassing members or prospective members?

## **CHAPTER 5: PROMOTING AND MAINSTREAMING EQUALITY**

**Consultation Question 40 ..... P.115**

**Do you think that:**

- Special measures provisions should be conceptualized and positioned within the discrimination legislation as measures to promote substantive equality rather than exceptions to non-discrimination; and
- The definition of special measures should be made clearer as suggested in paragraph 5.18 in terms of their purpose, circumstances in which they can be used and when they should end?

**Consultation Question 41 ..... P.122**

**Do you think that there should be duties on all public authorities to promote equality and eliminate discrimination in all their functions and policies, and across all protected characteristics?**

## **CHAPTER 6: ASPECTS OF COURT PROCEEDINGS, POWERS AND CONSTITUTION OF THE EOC**

**Consultation Question 42 ..... P.126**

**Do you think there should be provisions introduced which indicate that once the claimant establishes facts from which discrimination can be inferred, the burden of proof shifts to the respondent to show there was no discrimination?**

**Consultation Question 43 ..... P.127**

**Do you think that, consistent with indirect disability discrimination provisions, damages should be able to be awarded for indirect sex, pregnancy, marital status, family status and race discrimination, even where there was no intention to discriminate?**

**Consultation Question 44 ..... P.129**

**Do you think that the discrimination laws should be amended to ensure the EOC**

can recover its legal costs where claimants are awarded costs?

**Consultation Question 45 ..... P.130**

**Do you think that for reasons of consistency with its other powers, the EOC should be able to initiate proceedings in its own name for discriminatory practices?**

**Consultation Question 46 ..... P.132**

**Do you think that the discrimination laws should contain an express power that the EOC may produce non-statutory guidance?**

**Consultation Question 47 ..... P.135**

**Do you think that the formal investigation provisions should set out more clearly the distinction between general and specific investigations?**

**Consultation Question 48 ..... P.136**

**Do you think that for reasons of consistency with the EOC's other powers, the EOC should be able to issue enforcement notices relating to discriminatory practices against persons with disabilities?**

**Consultation Question 49 ..... P.136**

**Do you think that in relation to formal investigations provisions, permitting voluntary binding undertakings should be introduced and be enforceable by the EOC?**

**Consultation Question 50 ..... P.136**

**Do you think that the discrimination laws should expressly provide that the EOC has powers to conduct research and education in relation to all the protected characteristics?**

**Consultation Question 51 ..... P.138**

**Do you think that reformed discrimination laws should expressly provide that the EOC has powers to monitor and advise:**

- **The Government on relevant existing and proposed legislation and policy; and**
- **On the Government's compliance with international human rights obligations relating to equality and discrimination?**

**Consultation Question 52 ..... P.139**

**Do you think there should be an express power of the EOC to apply to intervene in or appear as amicus curiae in court proceedings relating to any relevant discrimination issue?**

**Consultation Question 53 ..... P.140**

**Do you think that the EOC's power to institute judicial review proceedings should be more clearly set out as a separate power of the EOC?**

**Consultation Question 54 ..... P.141**

**Do you think that the EOC should be required to produce a Strategic Plan in consultation with the public that sets out its strategic priority areas of work over several years?**

**Consultation Question 55 ..... P.144**

**Do you think that a provision should be included in reformed discrimination laws providing for the maintenance of the independence of the EOC from the Government?**

**Consultation Question 56 ..... P.144**

**Do you think that in relation to Board members, applications should be openly invited and an independent panel established to interview and make recommendations for appointments?**

**Consultation Question 57 ..... P.144**

**Do you think that there should be a provision in the legislation requiring Board members to have suitable experience in any relevant area of discrimination or promoting equality?**

**Consultation Question 58 ..... P.145**

**Do you think that there should be a provision protecting EOC members and staff from personal liability where they act in good faith in relation to the DDO and FSDO, as is the case for the SDO and RDO?**

**Consultation Question 59 ..... P.145**

**Do you think that there should be express provision restricting disclosure of information arising from complaint handling in accordance with the principles of confidentiality?**



**Consultation Question 60 ..... P.147**

**Do you think that Hong Kong should establish a Human Rights Commission fully compliant with the Paris Principles? If so what structure and mandate should the Human Rights Commission have?**

## **CHAPTER 7: EXCEPTIONS**

**Consultation Question 61 ..... P.149**

**Do you think that all the exceptions should be contained in one section (Schedules) of the discrimination laws in order that the law is clearer?**

**Consultation Question 62 ..... P.152**

**Do you think that the definition of genuine occupational qualifications (GOQs) should be reformed and made consistent across all the protected characteristics by defining them as:**

- “- There is an occupational requirement which relates to a protected characteristic;**
- the application of the requirement is a proportionate means of achieving a legitimate aim;**
- the applicant or worker does not meet the requirement; or, the employer has reasonable grounds for not being satisfied that the applicant or worker meets the requirement.**

**In relation to the protected characteristic of disability, the exception does not apply where a reasonable accommodation can be made to perform the occupational requirement.”?**

**Consultation Question 63 ..... P.153**

**Do you think that the discriminatory training exceptions are unnecessary and should be repealed and incorporated within the scope of the definition of special measures?**

**Consultation Question 64 ..... P.153**

**Do you think that the charities exceptions should be amended to require a legitimate aim and proportionality in order to be lawful?**

**Consultation Question 65 ..... P.154**

**Do you think that the Government should conduct a review of its New Territories**

**small house policy?**

**Consultation Question 66 ..... P.156**

**Do you think that the Government should as soon as possible repeal the exceptions in the SDO relating to sex and:**

- requirements for height or weight;
- granting pension benefits to surviving spouses and children of deceased public officers?

**Consultation Question 67 ..... P.156**

**Do you think that the exception for numbers of men and women employed in the Correctional Services Department is unnecessary and should be repealed?**

**Consultation Question 68 ..... P.157**

**Do you think that the national security exception relating to sex is necessary, and if so do you agree that it should be amended to require proportionality?**

**Consultation Question 69 ..... P.158**

**Do you think that the exception permitting sex discrimination in employment and qualification bodies for religious purposes should be extended to permit marital status discrimination?**

**Consultation Question 70 ..... P.158**

**Do you think that the exception relating to providing benefits differentially based on marital status should be amended to provide equality between persons who are married and persons in a de facto relationship?**

**Consultation Question 71 ..... P.160**

**Do you think that:**

- the Human Reproductive Technology Ordinance should be amended to remove a requirement that a person is married to be provided with IVF treatment; and
- the exception in the SDO relating to reproductive technology should then be repealed?

**Consultation Question 72..... P.160**

**Do you think that the exception relating to adoption and marital status is no longer necessary because of amendments to the Adoption Ordinance and should be**

repealed?

**Consultation Question 73 ..... P.161**

**Do you think that the exception to discrimination relating to the provision of public housing permitting discrimination on grounds of marital status should be repealed?**

**Consultation Question 74..... P.162**

**Do you think that the exception relating to family status which permits difference in insurance premiums based on family status should be repealed?**

**Consultation Question 75 ..... P.163**

**Do you think that the system under the Minimum Wage Ordinance by which persons with disabilities can assess their productivity has worked effectively? Do you think that the exceptions under Items 1 to 3 of Schedule 5 of the DDO should therefore be retained and/or reformed in any way or repealed?**

**Consultation Question 76 ..... P.165**

**Do you think that the exception permitting discrimination in employment conditions for persons from overseas with special skills, knowledge or experience should be repealed?**

**Consultation Question 77..... P.165**

**Do you think that the exception which permits differences in terms of employment for overseas and local staff for specified posts should be reviewed by the Government?**

**THE END**



平 等 機 會 委 員 會  
EQUAL OPPORTUNITIES COMMISSION

地址 Address : 香港太古城太古灣道 14 號 太古城中心三座19樓  
19/F, Cityplaza Three, 14 Taikoo Wan Road  
Taikoo Shing, Hong Kong

電話 Tel : 2511 8211

傳真 Fax : 2511 8142

網址 Website : <http://www.eoc.org.hk>

電郵 Email : [eoc@eoc.org.hk](mailto:eoc@eoc.org.hk)

電話短訊查詢服務 SMS Enquiry Service : 6972566616538

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