

**EOC'S RESPONSE TO ADMINISTRATION'S RESPONSE TO
EOC'S PROPOSALS FOR AMENDMENT OF
SEX DISCRIMINATION ORDINANCE AND
DISABILITY DISCRIMINATION ORDINANCE**

INTRODUCTION

At the end of 1997 the Equal Opportunities Commission (EOC) commenced a review of the provisions of the Sex Discrimination Ordinance, Cap. 480 (SDO) and the Disability Discrimination Ordinance, Cap. 487 (DDO), based on its operational experience.

2. The review was completed in February 1999 and, pursuant to section 64(1)(e) of the SDO and section 62(1)(e) of the DDO, the EOC's proposals for legislative amendment were submitted to the Chief Executive for his consideration. A copy of the EOC's proposal is attached as *Annex A*.

3. The EOC's recommendations aim to:-

- (i) simplify and clarify some provisions; and
- (ii) overcome operational difficulties encountered in others.

4. On 10 November 2000 the EOC received the Administration's views and comments on the EOC's proposals.

PROPOSALS AGREED TO IN PRINCIPLE

5. The Administration has agreed in principle to a number of the proposals of the EOC. A summary of the proposals agreed to in principle is attached as *Annex B*.

6. The EOC is desirous that such proposals for amendment which are agreed to in principle should be implemented as soon as possible.

7. Explanatory comments in respect of each proposal of the EOC are already set out in Annex A. To assist Panel Members in their discussions and deliberations, the EOC makes the following observations.

(a) Extend the scope of protection against sexual harassment in the SDO by implementing the four proposals as recommended at pages 3 and 4 of Annex A.

8. The extension of section 2(5)(b) of the SDO to the field of education would help to prevent a sexually hostile learning environment from developing in educational establishments. At present, section 2(5)(b) applies only to the field of employment, and only sexual hostile work environment is prohibited under the law.

9. The amendment of section 40(1) of the SDO to protect providers of goods, services and facilities against sexual harassment by customers will afford protection against individual acts committed by customers.

10. The amendment of section 40 of the SDO to protect members / prospective members of a club against sexual harassment by members of a committee of management of that club will ensure that sexual harassment will be prohibited in the field of clubs. At present, sexual harassment is not prohibited. It is only discrimination that is prohibited.

11. The amendment of section 40 of the SDO to protect tenants and sub-tenants from sexual harassment by other tenants and sub-tenants will ensure fuller protection in this field, which is presently only limited to landlords and tenants.

(b) Repeal Item 1 in Schedule 5 of the SDO, as recommended at pages 5 to 7 of Annex A, insofar as Item 1 relates to uniform / equipment requirements and training in the use of weapons in the disciplinary forces; positions reserved for men in the Police Tactical Unit; and gender quotas (except in the Correctional Services Department).

12. The repeal of Item 1 in Schedule 5, to the extent agreed to by the Administration, will ensure that exceptions in the legislation are kept to a minimum. In the course of its review, the EOC found that only the Police Force and Auxiliary Police Force applied different treatment to men and women in respect of training in and use of equipment, and that there were

some minor differences in uniforms worn by men and women in some of the other services. Removing these exceptions will remove these unnecessary differences.

13. As regards positions reserved for men in the Police Tactical Unit, in the course of its review the EOC found that there were no offices reserved for men. Accordingly, this exception is completely unnecessary and should be repealed immediately.

14. The EOC also found during the course of its review that there were differences in the total number of men and women recruited to, or seeking to hold office in, the disciplinary services. As gender quotas are contrary to gender equality, the EOC takes the view that the exception in Item 1 should be removed as soon as possible.

15. The Administration has agreed to the removal of gender quotas in all the disciplinary services, except the Correctional Services Department. The reservation in respect of the Correctional Services Department is dealt with more fully at paragraph 44(ii) below.

(c) Repeal Items 4, 5, 7 and 8 in Schedule 5 of the SDO, as recommended at pages 7 to 10 of Annex A.

16. The exception in Item 4 in Schedule 5 (which relates to marital status discrimination in the provision of reproductive technology procedure) has become redundant, as it has been incorporated into the substantive provisions of the SDO (section 56B).

17. The exception in Item 5 in Schedule 5 (which relates to marital status discrimination in the provision of adoption services or facilities) has also become redundant, as it too has been incorporated into the substantive provisions of the SDO (section 56C).

18. The exception in Item 7 in Schedule 5 relates to discrimination between male and female children in respect of pensions granted to surviving spouses and / or children of deceased public officers and the like. As this exception had been introduced for a limited purpose, it should be removed as soon as possible.

19. The exception in Item 8 in Schedule 5 results in preferential treatment being given to widows of officers who remain “unmarried and of good character”. This exception is completely unnecessary and should be removed immediately.

(d) Introduce Voluntary and Binding Undertakings into the SDO and the DDO, as recommended at page 14 of Annex A.

20. These types of undertakings will assist the EOC to accept an undertaking or agreement from an individual who, or a company / association which, has been identified in some way as possibly committing an unlawful act under the anti-discrimination legislation, without needing to go through a formal process (formal investigation or litigation).

21. It is envisaged that such an undertaking or agreement would be entered into on a voluntary basis, in writing, be legally binding on a party and requiring such things as may be required in an enforcement notice. Such undertaking or agreement should be treated as if it were an enforcement notice, and the EOC would maintain a register of such binding undertakings (as it is required to do for enforcement notices issued pursuant to formal investigations).

22. Although the proposal by the EOC relates only to amendment of the SDO and the DDO, the EOC urges Panel Members to consider similar amendment of the Family Status Discrimination Ordinance, Cap. 527 (FSDO). Although the FSDO was not included in the legislative review exercise (due to insufficient operational experience at the time), a similar amendment to the FSDO would enable the EOC to resolve matters where more than one ordinance was involved (for example, where the undertaking is related to unlawful acts under the SDO and the FSDO).

(e) Amend section 85(4) of the SDO and section 81(4) of the DDO to enable EOC to recover legal costs for acting as solicitor / counsel in providing legal assistance, as recommended at pages 15 and 16 of Annex A.

23. The EOC is not separately funded to give legal assistance in cases. It uses its own funds to provide legal assistance where “it thinks it fit to do so”

as provided by the legislation, and adopts a strategic approach to litigation by granting assistance in cases where important principles are involved or which will have wide impact.

24. Although section 85(4) of the SDO and section 81(4) of the DDO deal with recovery of “expenses” by the EOC upon completion of any civil proceedings, the EOC is at present unable to recover “costs”. Costs include fees and remuneration such as the type charged by solicitors for professional services. This is because the lawyers employed by the EOC provide their services on behalf of the EOC, and the EOC is a corporate body and not a person entitled to practise law under any ordinance in Hong Kong. Immediate amendment of these provisions will enable the EOC to recover its costs, in circumstances where an award for costs is made, and help fund further cases.

25. Although not part of the EOC’s proposals in the legislative review, the EOC urges Panel Members to give their support to the equivalent amendment in the FSDO.

(f) Amend section 76(1) of the SDO and section 72(1) of the DDO to make it clear that claims may be made against persons who are vicariously liable for acts of sexual harassment, disability harassment and vilification, as recommended at pages 17 and 18 of Annex A.

26. Employers and principals are clearly liable for acts of sexual harassment committed by their employees and agents, pursuant to sections 46 and 47 of the SDO. Similarly, employers and principals are clearly liable for acts of harassment and vilification committed by their employees and agents, pursuant to sections 48 and 49 of the DDO. Those who knowingly aid such acts are also vicariously liable.

27. Accordingly, the amendment of section 76(1) of the SDO and section 72(1) of the DDO as proposed will make it clear that such vicarious liability exists and ensure that there is no confusion.

(g) Declaratory and Injunctive Relief for Discriminatory Acts, Policies and Practices.

28. Existing provisions in the SDO and the DDO provide that the only way to deal with discriminatory practices is by way of formal investigation by the EOC. Complainants cannot lodge complaints pursuant to the EOC's complaint handling mechanism, nor can they institute civil proceedings. Complainants can only lodge complaints, and bring civil action, when discriminatory practices result in an individual act of discrimination which is unlawful under the legislation. Thus, where the EOC becomes aware of a discriminatory practice, but there is no potential individual claim on which to fund a legal action, the EOC cannot take civil action. Its only option is to conduct a formal investigation.

29. Furthermore, even in respect of discriminatory acts, the EOC cannot take legal action unless there is an individual claimant and a respondent. This poses difficulties in situations where the EOC may want to seek a declaration that a particular act is unlawful, or where the EOC may want to obtain an injunction to prevent an unlawful act from being committed or continuing.

30. The EOC's proposal will enable the EOC to take action for declaratory relief where no complainant and / or respondent is available, and for injunctory relief where no complainant is available. Such remedies will only be sought by the EOC in cases of public interest, and it is not intended that these powers be used for obtaining relief for individuals.

(h) Amend the Headings of sections 7 and 8 in the SDO to more accurately describe their contents, as recommended at page 20 of Annex A.

31. The comments at Annex A are self explanatory.

(i) Amend the expressions and characters in the Chinese text of the SDO, as recommended at pages 20 and 21 of Annex A, to provide for greater clarity.

32. The comments at Annex A are self explanatory.

(j) Amend the expressions of “associate” in section 2 of the DDO to extend it to a person under the care of a person, and make any other consequential amendments, as recommended at page 13 of Annex A.

33. Because of the way in which the definition of “associate” is drafted, discrimination against a person on the ground of the disability of his / her carer is prohibited, but discrimination against a carer on the ground of disability of the person under his / her care is not. As the latter is more common than the former, prompt amendment of this provision will ensure that there is protection in both situations.

(k) Amend section 73(1) of the DDO to include reference to section 41 of the DDO, as recommended at pages 14 and 15 of Annex A.

34. Prompt amendment of this provision will simply cure an oversight in the legislation.

(l) Include in the DDO protection for members, employees and conciliators of the EOC equivalent to that found in section 68 of the SDO, as recommended at pages 16 and 17 of Annex A.

35. This proposal seeks to ensure that members, employees and conciliators of the EOC have the same protection as they do under the SDO when executing their duties under other pieces of anti-discrimination legislation.

36. Although the proposal relates only to the DDO, the EOC would urge Panel Members to support an equivalent amendment to the FSDO to ensure full protection against liability for EOC members, employees, and the like.

(m) Amend the expressions and characters in the Chinese text of the DDO, as recommended at pages 22 to 23 of Annex A.

37. The comments at Annex A are self explanatory.

PROPOSALS CONSIDERED NOT NECESSARY

38. The Administration has stated in its views that certain proposals by the EOC are considered not necessary for the purposes stated in the EOC's Report, namely –

- (i) to make it clear that section 14 of the SDO and the DDO has extra-territorial effect and protects against unlawful acts committed outside Hong Kong;
- (ii) to amend section 76(3A) of the SDO and section 72(4) of the DDO to make it clear that the District Court may make one or more of the orders set out in the list of statutory remedies;
- (iii) to introduce specific protection for people with a disability in the field of eligibility to vote for and to be elected or appointed to advisory bodies; and
- (iv) to amend section 64 of the DDO to refer to section 67 of the DDO.

39. The EOC agrees with the Administration that section 14 already has extra-territorial application, but takes the view that clarification of this in the actual provision can only assist in its interpretation. Nevertheless, the EOC will follow the advice of the Labour Advisory Board and step up its publicity efforts to inform the public of the extra-territorial effects of section 14.

40. The EOC also agrees with the Administration that section 76(3A) of the SDO and section 72(4) of the DDO does not prevent the District Court from granting more than one remedy. For this reason, the EOC cannot see why the legislation should not be amended to make this more clear.

41. The EOC takes the view that, if Panel Members agree, these two proposals may be easily included in the list of proposals agreed to in principle by the Administration and implemented promptly.

42. Regarding specific protection for persons with a disability in the field

of eligibility to vote for and to be elected or appointed, the EOC considers that the amendment could be made to the DDO, subject to any other provisions which may be relevant (for example, mental incapacitation under the Mental Health Ordinance).

43. The EOC suggests that this proposal be put to one side for further discussion with the Administration at a later stage.

44. The EOC agrees with the Administration that section 64 of the DDO does not need amendment, as it has already been rectified by the Law Reform (Miscellaneous Provisions & Minor Amendments) Ordinance 1997.

PROPOSALS IN RESPECT OF WHICH THERE ARE RESERVATIONS

45. The Administration has indicated that it has reservations in respect of repealing some of the items in Schedule 5 of the SDO, as recommended by the EOC.

46. The EOC takes the view that these reservations should not hold up the implementation of other proposals agreed to in principle by the Administration. Rather, the proposals in respect of which the Administration has reservations may be put to one side temporarily and may be more fully explored between the EOC and the Administration with further discussion at a later time.

47. Nevertheless, the EOC makes the following observations for Panel Members' information:-

- (i) the Police Force maintains that height and weight requirements should be retained to meet their "unique operational needs". Given that there should be a more holistic approach to assessing physical fitness, and that men and women should be assessed on their ability to perform the inherent requirements of a job, it is unclear what is meant by the "unique operational needs of the Hong Kong Police Force"; and

- (ii) exceptions in anti-discrimination legislation should be kept to a minimum. The exception of genuine occupational qualification in section 12(2)(e) of the SDO makes it possible for the Correctional Services Department to discriminate against women by employing a higher ratio of men than women to cater for the prison populations. The exception in section 38(2)(b) of the SDO also makes it possible for the Correctional Services Department to discriminate against women in order to comply with existing statutory provisions, such as the Prison Rules. Given that there are already these two exceptions, the EOC takes the view that the exception in Item 1 relating to gender quotas is unnecessary and should not be retained for administrative convenience.

48. The Administration has also indicated that it has reservations in respect of the EOC's proposals to:-

- (i) amend the definition of section 6(a) of the DDO to the effect that the comparison of treatment is made between a person with a disability and a person without "the" or "that" disability; and
- (ii) repeal section 60 and Schedule 5 of the DDO and amend sections 63 and 87(2) of the DDO to remove any references to Schedule 5.

49. There should be no concern that amendment of the definition of section 6(a) of the DDO may render unlawful the implementation of some worthwhile affirmative programmes for persons with a particular disability. Apart from the exception found in section 51 of the DDO, section 50 of the DDO deals with special measures. Any affirmative programme such as the "Self Help Integrated Placement Service" run by the Labour Department for the ex-mentally ill falls within the scope of the "special measures" exception and would not be rendered unlawful were the definition of section 6(a) to be amended.

50. Instead, if the definition in section 6(a) is not amended, it could lead to the ludicrous situation of having to compare a person with one type of

disability against a person with no disability at all.

51. The EOC therefore urges Panel Members to support this proposed amendment and its early implementation.

52. Insofar as Schedule 5 of the DDO is concerned, the EOC refers Panel Members to the comments in Annex A and the fact that Schedule 5 has been blank since the enactment of the DDO.

PROPOSAL IN RESPECT OF EXTENSION OF DEFINITION IN SECTION 14

53. In respect of the EOC's proposal to extend the definition of "an establishment in Hong Kong" in section 14 of the SDO and the DDO, to protect Hong Kong residents working wholly or mainly outside Hong Kong for businesses and / or companies registered in Hong Kong, the Administration has sought further elaboration from the EOC on the scope and application of the proposed amendment.

54. The EOC takes the view that this proposal should also be kept to one side for further discussion and more detailed elaboration with the Administration at a later stage.

CONCLUSION

55. The EOC seeks the support and the approval of Panel Members to implement as soon as possible those proposals agreed to in principle by the Administration.

56. The EOC also asks that those proposals in respect of which the Administration has reservations, requires further information, or does not consider necessary, should be treated separately from those agreed to in principle and left for further discussion between the Administration and the EOC.

Equal Opportunities Commission

February 2001

**EQUAL OPPORTUNITIES LEGISLATIVE REVIEW
PROPOSALS FOR AMENDMENT OF THE SDO AND DDO**

INTRODUCTION

The Equal Opportunities Commission (“EOC”) is a statutory body established under the Sex Discrimination Ordinance, Cap. 480 (“SDO”). Under the SDO, it is charged with the duty to work towards the elimination of discrimination on the grounds of sex, pregnancy and marital status, to promote equality of opportunity between men and women generally and to work towards the elimination of sexual harassment. Under the Disability Discrimination Ordinance, Cap. 487 (“DDO”), the EOC is charged with the duty to work towards the elimination of discrimination on the ground of disability, to promote equality of opportunity between persons with and without a disability and to work towards the elimination of disability harassment and vilification.

Pursuant to both the SDO and the DDO, the EOC is also charged with the duty to keep under review the working of each Ordinance and to advise the Government accordingly.

These proposals for amendment of the SDO and the DDO are the culmination of a legislative review undertaken by the EOC following twelve months of operational experience. The recommendations comprise proposals for amendment which would clarify and simplify existing provisions, as well as proposals for amendments aimed at rectifying what have found to be defects in the legislation. Underpinning the review exercise is the recognition by the EOC that the legislation in question has not yet been tested in the courts and that any reformulation of equal opportunities laws would benefit from a timely review at a later stage.

This legislative review has been limited to the SDO and the DDO, which were enacted on 14 July 1995 and 3 August 1995 respectively. The non-employment related provisions of these two Ordinances became operational on 20 September 1996 and the employment related provisions came into operation on 20 December 1996. A third

Ordinance, the Family Status Discrimination Ordinance, Cap. 527 (“FSDO”) was passed on 24 June 1997. It did not come into operation until 21 November 1997. It was not included in this review.

1. Extra Territorial Application of Law

Section 14 of both the SDO and the DDO defines the meaning of “an establishment in Hong Kong”. This term governs the scope of the jurisdiction in the field of employment of both Ordinances, as all employment is to be regarded as being at an establishment in Hong Kong unless the employee does his or her work wholly or mainly outside Hong Kong.

The definition suggests that the legislation protects not only against unlawful acts committed against employees in Hong Kong, but also against unlawful acts committed against employees outside Hong Kong as long as such employees work wholly or mainly in Hong Kong. Such construction of section 14 is in keeping with the position in overseas jurisdictions such as Britain and Australia.

● *The EOC proposes that the Government should amend section 14 of the SDO and section 14 of the DDO to make it clear that these sections have extra-territorial effect and protect against unlawful acts committed outside Hong Kong.*

2. Employment Wholly or Mainly Outside Hong Kong

The EOC is of the view that there should also be legal protection against discrimination of employees who work wholly or mainly outside Hong Kong, where both the employee and the employer have a connection with Hong Kong.

● *The EOC proposes that the Government should extend the definition of “an establishment in Hong Kong” in section 14 of the SDO and section 14 of the DDO to protect Hong Kong residents working wholly or mainly outside Hong Kong for businesses and / or companies registered in Hong Kong.*

3. Sexual Harassment

(a) Education Field

The definition of sexual harassment in section 2(5) of the SDO contains two limbs: the first limb is found in section 2(5)(a) and refers to unwelcome conduct or behaviour by one person against another and the second limb is found in section 2(5)(b) and refers to hostile environment harassment. Although the first limb of the definition applies to all fields covered by the SDO, pursuant to section 2(6) of the SDO the second limb of sexual harassment applies only to the field of employment.

The EOC believes that section 2(5)(b) of the SDO should also apply to the field of education. Educational establishments are responsible for the psychological well-being of their students and for the prevention of the creation of a sexually hostile or intimidating learning environment in like manner as employers are responsible for the psychological well-being of their employees and the prevention of the creation of a sexually hostile or intimidating work environment.

● ***The EOC proposes that the Government should amend section 2(6) of the SDO so that section 2(5)(b) applies to the field of education.***

(b) Provision of Goods, Services and Facilities

Section 40 of the SDO deals with sexual harassment in relation to all fields other than employment and education. Operational experience has shown that there are gaps in the protection afforded by this section in respect of the provision of goods, services and facilities, in respect of clubs, and in respect of some tenancy relationships.

Whilst there is protection for a victim of sexual harassment by a provider of goods, services and facilities, section 40 of the SDO does not provide protection for the victim who may be providing such goods, services and facilities. This leaves persons employed in the service industry, in particular, vulnerable.

● *The EOC proposes that the Government should amend section 40(1) of the SDO to ensure that persons providing goods, services or facilities to another person are not sexually harassed by that other person in the course of offering to provide, or providing, the goods, services or facilities.*

(c) Clubs

The SDO makes it unlawful for members of a committee of management of a club to discriminate against members or prospective members of that club. There is no provision in section 40 of the SDO making sexual harassment in such situation unlawful.

● *The EOC proposes that the Government should amend section 40 of the SDO so that it protects members or prospective members of a club against sexual harassment by members of a committee of management of that club.*

(d) Tenancy

Sections 40(2), 40(3) and 40(4) of the SDO provide some limited protection against sexual harassment in tenancy relationships but there is no provision in section 40 of the SDO which makes unlawful sexual harassment by:

- ✧ a tenant against another tenant or sub-tenant occupying the same premises;
- ✧ a sub-tenant against another sub-tenant occupying the same premises.

The EOC considers that the SDO should provide protection against sexual harassment in such cases.

● *The EOC proposes that the Government should amend section 40 of the SDO so that it protects tenants and sub-tenants from sexual harassment by other tenants and sub-tenants occupying the*

same premises.

4. Schedule 5 to the SDO

Exceptions are contrary to the principle of equal opportunities and defeat the spirit of anti-discrimination legislation. To prevent exceptions from undermining the effectiveness of anti-discrimination legislation, exceptions should be kept to a minimum. The EOC takes the view that, where necessary exceptions do exist, they should form part of the substantive provisions of the legislation and should not be contained in a schedule of exceptions.

Schedule 5 to the SDO contains eight items set out in Part 2 which, although discriminatory in nature and effect, are exempted from the operation of the SDO and are deemed not to be unlawful by virtue of section 62 of the SDO.

All eight items arise out of government policies, practices and regulations. Each one affects the rights of individuals in their relationship with the Government; Item 3 also relates to private sector employment. The eight items set out in Part 2 of Schedule 5 to the SDO are as follows:

Item 1 - this item exempts discrimination between men and women from the operation of Parts III, IV and V of the SDO, where such discrimination arises in the context of men and women holding, or seeking to hold, office in the disciplinary services and relates to -

(i) height, uniform, weight or equipment requirements;

The EOC has found that there is a minimum height and weight requirement for men and women for recruitment to the disciplinary services; the Police Force and Auxiliary Police Force apply different treatment to men and women in respect of equipment carried; and there is a difference in uniforms worn by men and women in some of the services, which

discriminates against women.

- (ii) gender recruitment quotas;

The EOC has found that there is a difference in the total number of men and women recruited to, or seeking to hold office in, the disciplinary services.

- (iii) the reservation of positions within the Police Tactical Unit for men;

The EOC has found that, at the time of the review, there were in fact no offices falling within the Police Tactical Unit that were reserved for men.

and / or

- (iv) difference in training in the use of weapons between men and women.

The EOC has found that there is a difference in training in the use of weapons between men and women in the Police Force and the Auxiliary Police Force, which discriminates against women and men.

The EOC takes the view that there should be no height and weight requirements imposed for either women or men. Rather, the inherent requirements of the job in question should be carefully set out and consistent selection criteria developed to recruit to the disciplinary services persons able to meet these specific requirements. A more wholistic approach to physical fitness should ensure that individuals are assessed according to their capabilities to carry out the duties of the job.

Accordingly, the EOC considers that a satisfactory method of assessment should be devised, with consistent selection criteria applied to both sexes alike, that will not (either directly or indirectly) discriminate against women.

The EOC also believes that equal treatment for women and men must be mainstreamed into every aspect of life and that equality of opportunity should extend to women in the disciplinary services. This cannot be achieved if discriminatory practices are allowed to continue. Not only

are fewer women recruited to such services, fewer women are promoted.

Simply removing the discriminatory elements of the disciplinary services' recruitment policies, training policies and dress codes is not enough to eliminate sex discrimination. Effective monitoring is required of specific recruitment and promotion exercises to detect where the problem - if any - lies. Gender distribution in the disciplinary services should be properly assessed, reasons should be identified and examined, and steps should be taken to rectify the inequality.

The EOC considers that the disciplinary services should be required to monitor gender distribution in recruitment and promotion exercises to ensure that there is no discrimination.

Item 2 - this item exempts from the operation of Part IV of the SDO any discrimination between men and women arising from the Government's 'small house' policy, pursuant to which benefits relating to land in the New Territories are granted to male indigenous villagers.

This policy was introduced to improve the housing situation which existed in the New Territories more than 20 years ago. It does not reflect the developments and changes in the law regarding women owning properties in the New Territories, nor does it reflect changes in the economic make-up of the indigenous villagers.

The Government has advised that a committee was set up to review the 'small house' policy. The review of the policy was commenced in September 1997 and was expected to have been completed at the end of 1998.

The EOC is of the view that the findings of that committee should be made public and that the Government resolve the discriminatory aspects of the 'small house' policy as soon as possible.

Item 3 - this item exempts discrimination on the ground of marital status from the operation of Parts III, IV and V of the SDO arising from the provision of benefits or allowances by employers in relation to housing,

education, air-conditioning, passage and baggage.

The EOC has found that this exception was introduced to deal with the payment of double benefits to married persons. The introduction of section 56A to the SDO by the Sex and Disability Discrimination (Miscellaneous Provisions) Ordinance 1997 now makes it clear that it is not unlawful to deny double benefits to married persons.

In the circumstances, the EOC considers it unnecessary to retain this exception in Item 3.

Item 4 - this item exempts discrimination on the ground of marital status arising from the provision of any reproductive technology procedure.

With the introduction of Section 56B to the SDO by the Sex and Disability Discrimination (Miscellaneous Provisions) Ordinance 1997, this exception has been incorporated into the substantive provisions of the SDO.

In the circumstances, the EOC is of the view that it is unnecessary to retain this exception in Item 4.

Item 5 - This item exempts from the provisions of Parts III, IV and V of the SDO discrimination on the basis of marital status arising out of the provision of adoption services or facilities relating to adoption. Discrimination on the ground of sex remains unlawful.

The Social Welfare Department has conducted a review of the Adoption Ordinance, which regulates adoption in Hong Kong. The Social Welfare Department has advised that it has recommended amendment of the provisions in the Adoption Ordinance to remove any references to gender and marital status, on the basis that it is the interests of the child that should be of paramount consideration in each case.

In view of this, and in view of the introduction of section 56C to the SDO by the Sex and Disability Discrimination (Miscellaneous Provisions) Ordinance 1997, which has incorporated the exception in Item 5 into the substantive provisions of the SDO, the EOC is of the view that it is

unnecessary to retain this exception in Item 5.

Item 6 - This item exempts from the provisions of Part IV and V of the SDO discrimination on the basis of marital status arising from the public housing scheme known as the Home Ownership Scheme or the Private Sector Participation Scheme.

Discrimination on the ground of marital status arises from the fact that, in order to qualify as an applicant under the public housing scheme, an applicant must have a family. Where the familial relationship is that of husband and wife, such relationship is given priority over other familial relationships and other marital statuses.

The EOC believes that detailed consideration should be given to this exception to determine whether it is a necessary one or whether, in fact, there exists an alternative method of assessment of applicants which is not discriminatory and does not offend against the principle of equal opportunities.

Item 7 - This item exempts from the provisions of Parts III, IV and V of the SDO discrimination on the ground of sex arising from certain legislative provisions involving the granting of pensions to surviving spouses and / or children of deceased public officers, public service officers and individual officers. The legislative provisions contain terms that discriminate between male and female children.

The Civil Service Bureau has advised that this exception was included to ensure that the rights of the children of officers appointed before 5 March 1993 was preserved.

The EOC believes that there should be no preferential treatment given to either male or female children in such circumstances and that consideration should be given to finding a method of phasing out this type of discrimination whilst preserving the rights of the children of those officers appointed prior to 5 March 1993.

Item 8 - This item exempts from the operation of Parts III, IV and V of the SDO discrimination on the ground of

marital status which arises from a proviso to the regulations governing the circumstances in which gratuities may be granted to dependants of officers who die or receive injuries.

The proviso mentioned results in preferential treatment being given to widows who remain “unmarried and of good character” when compared to widows who remarry.

The EOC is of the view that this type of discrimination is based on outmoded attitudes relating to women, which perpetuates stereotypical images and unfair treatment.

- *The EOC proposes that the Government should repeal section 62 of the SDO and Schedule 5 to the SDO and amend sections 66 and 90(1) of the SDO to remove any references to Schedule 5.*

5. Schedule 5 to the DDO

Schedule 5 to the DDO is meant to provide, by virtue of section 60 of the DDO, a blanket exemption for discriminatory acts identified in the schedule. Since its inception, however, Schedule 5 to the DDO has remained empty.

In view of the fact that exceptions are contrary to the principle of equal opportunities and should be kept to a minimum, and only when necessary, the EOC considers it unnecessary to retain a schedule of exceptions which is blank.

- *The EOC proposes that the Government should repeal section 60 of the DDO and Schedule 5 to the DDO and amend sections 63 and 87(2) of the DDO to remove any references to Schedule 5.*

6. Eligibility to Vote for and to be Elected or Appointed to Advisory Bodies under the DDO

The SDO provides protection against discrimination on the ground of sex, marital status or pregnancy in -

- ✧ determining the eligibility of a person to stand for election or to be selected;
- ✧ the terms and conditions on which a person is considered eligible to stand for election or to be selected;
- ✧ determining the eligibility of a person to vote in elections of members of a relevant body or the holder of a position, or to take part in the selection of the holder of such position;
- ✧ the terms and conditions upon which a person is considered eligible to vote in elections of members or the holder of a position, or to take part in the selection of the holder of such position; and
- ✧ considering whether a person should be appointed to a position, approved as a member of a body or recognised as holding a position.

Relevant bodies for the purposes of section 35 of the SDO are public bodies, public authorities, statutory advisory bodies and bodies prescribed by the SDO.

There is no equivalent protection under the DDO against discrimination on the ground of disability in this field. Under the existing provisions of the DDO, a person who is discriminated against on the ground of disability in any of the five situations outlined above has no recourse to the DDO. This is contrary to the principle of equal opportunities for all.

● ***The EOC proposes that the Government should amend the DDO by introducing specific protection for persons with a disability in the field of eligibility to vote for and to be elected or appointed to advisory bodies.***

7. Definition of Direct Disability Discrimination

Section 6(a) of the DDO defines the meaning of direct discrimination under the DDO. Under the existing definition, in order to prove direct discrimination on the ground of disability, a complainant must show that :

- ✧ the treatment is on the ground of disability;
- ✧ the treatment is less favourable; and
- ✧ the comparison of treatment is between the person with the disability and a person without a disability.

If taken literally, the comparison of treatment must be between the person with the disability and a person without any disability. This is because of the use of the indefinite article “a” in the expression “person without a disability” in section 6(a) of the DDO. This could lead to confusion.

The EOC takes the view that it could not have been the intention behind the legislation to compare a person with one type of disability and a person without any disability in order to find discrimination. The definition of ‘disability’ is itself so wide, it would be extremely difficult to find a comparator without any disability at all.

Equivalent legislation in overseas jurisdictions such as Australia makes it clear that the comparison of treatment should be made between the complainant and a comparator without ‘the’ disability of the complainant.

● ***The EOC proposes that the Government should amend the definition of direct discrimination in section 6(a) of the DDO to make it clear that the comparison of treatment is made between the person with a disability and a person without ‘the’ or ‘that’ disability.***

8. Disability Discrimination against Associates

Section 6(c) of the DDO makes it unlawful to discriminate against an associate of a person with a disability. The word ‘associate’ is defined in section 2 of the DDO in the following terms :

“ ‘associate’, in relation to a person, includes -

- (a) a spouse of the person;
- (b) another person who is living with the person on a genuine domestic basis;
- (c) a relative of the person;
- (d) a carer of the person; and
- (e) another person who is in a business, sporting or recreational relationship with the person.”

Paragraphs (a), (b), (c) and (e) of the definition of ‘associate’ have been drafted in terms which suggest reciprocal relationships. Because of the way paragraph (d) has been drafted, this reciprocity does not apply to the situation of carers.

This leads to difficulties under section 6(c) of the DDO, which provides that a person discriminates against another person for the purposes of the DDO if there is less favourable treatment on the ground of the disability of an associate of that other person. It is rare that a person with a disability would be discriminated against on the ground of the disability of his or her carer. It is more likely that a carer would be discriminated against on the ground of the disability of the person under his or her care.

The EOC is of the view that the legislation should provide protection in both situations.

- ***The EOC proposes that the Government should amend the definition of ‘associate’ in section 2 of the DDO to extend it to a person under the care of a person, and make any other consequential amendments which may be necessary.***

9. **Binding Undertakings**

The EOC's enforcement powers under the SDO and the DDO are essentially restricted to the handling of complaints under its power to investigate and conciliate, the institution of legal proceedings under various heads of power, and the conduct of formal investigations (including the issue of enforcement notices.)

The existing regime does not recognise that the EOC may find it useful to accept an undertaking or agreement from an individual who, or an organisation which, has been identified in some way as possibly committing an unlawful act, without needing to go through a formal process. Such an undertaking or agreement would be entered into on a voluntary basis and would provide an attractive option for the parties involved.

The EOC is of the view that a voluntary undertaking or agreement would be desirable if it were formally recognised by the legislation and could be enforced in on the same manner as enforcement notices.

- ***The EOC proposes that the Government introduce voluntary and binding undertakings, which are legally enforceable, into the SDO and the DDO.***

10. **Enforcement Notices for Discriminatory Practices under the DDO**

Under the SDO and the DDO, discriminatory practices may only be dealt with by way of formal investigation.

Pursuant to section 77(1) of the SDO, enforcement notices may be served on persons by the EOC where, in the course of a formal investigation, the EOC becomes satisfied that the person is committing or has committed, among other things, a contravention of section 42 of the SDO. Section

42 of the SDO deals with discriminatory practices.

Section 41 of the DDO deals with discriminatory practices under the DDO, and makes specific reference to proceedings under section 73. Unlike section 77(1) of the SDO, however, section 73(1) of the DDO fails to mention that enforcement notices may be issued for discriminatory practices under the DDO. The EOC is of the view that this was an oversight in the legislation.

● *The EOC proposes that the Government should amend section 73(1) of the DDO to include reference to section 41 of the DDO.*

11. Costs and Expenses of Litigation

The EOC has a discretion under the SDO and the DDO to grant assistance upon application for assistance to institute civil proceedings by persons who have been unable to achieve a settlement of their dispute for whatever reason. The assistance which the EOC may give in each case ranges from the giving of legal advice by its own lawyers to the briefing of private counsel to represent a complainant in the civil proceedings.

Sections 85(4) of the SDO and 81(4) of the DDO deal with the recovery of expenses by the EOC upon completion of any civil proceedings. Both sections provide that any expenses incurred by the EOC in providing assistance relating to civil proceedings constitute a first charge for the benefit of the EOC on any costs or expenses payable to the EOC's client. Whilst it is clear that the EOC may recover its expenses, it is unclear whether the EOC can recover its costs.

Pursuant to section 73B(3) of the District Court Ordinance, parties to proceedings under the SDO or the DDO would ordinarily pay their own costs unless the court found that the proceedings were brought maliciously or frivolously, or there existed special circumstances warranting an award of costs.

In the event that an order for costs were made in favour of the EOC's client, it is not clear whether the EOC could recover the costs for legal work done by its own lawyers. The EOC considers that it is desirable that it be able to recover its costs in the same manner as solicitors' firms and the Legal Aid Department.

- *The EOC proposes that the Government should amend section 85(4) of the DDO and section 81(4) of the DDO to enable the EOC to recover costs as well as expenses.*

12. Delegation of Powers under the DDO

Section 64 of the DDO states that the EOC shall not, under section 69 of the SDO, delegate certain functions and powers. The reference to section 69 of the SDO is incorrect. The correct delegation section under the SDO is section 67.

- *The EOC proposes that the Government should amend section 64 of the DDO to refer to section 67 of the SDO.*

13. Protection Against Liability of EOC

Section 68 of the SDO affords some protection to members of the EOC and its committees, employees of the EOC, and conciliators, from personal liability for acts and / or defaults made in performance or purported performance of any function or exercise of power conferred on the EOC by the SDO, as long as such members, employees or conciliators have acted in good faith.

There is no equivalent provision for acts or defaults made in performance of any function or exercise of power imposed or conferred by the DDO or the FSDO. Although the legislative review is restricted to the SDO and the DDO, the EOC considers it desirable that members, employees and conciliators be protected from liability when exercising their functions and powers under all three pieces of legislation.

- *The EOC proposes that the Government should amend the DDO and the FSDO to include protection for members, employees and conciliators of the EOC equivalent to that found in section 68 of the SDO.*

14. Jurisdiction of District Court for Vicarious Liability and Aiding under SDO

Section 76(1) of the SDO sets out the circumstances in which claims may be made the subject of civil proceedings in the District Court. Although reference is made in section 76(1)(b) to claims where persons may be vicariously liable for acts of discrimination, there is no reference in section 76(1) of the SDO to claims where persons may be vicariously liable for acts of sexual harassment.

Clearly claimants are, and should be, able to bring civil proceedings for sexual harassment against respondents who are liable under section 46 or section 47 of the SDO.

For the sake of completeness, and to avoid any confusion, the EOC considers it desirable that this should be spelt out in the legislation.

- *The EOC proposes that the Government should amend section 76(1) of the SDO, by including a new section 76(1)(d) along the following lines:*

“(d) is by virtue of section 46 or 47 to be treated as having committed such an act of sexual harassment against the claimant.”

15. Jurisdiction of District Court for Vicarious Liability and Aiding under DDO

Section 72(1) of the DDO sets out the circumstances in which claims may be made the subject of civil proceedings in the District Court. Although reference is made in section 72(1)(d) to claims where persons may be vicariously liable for acts of discrimination, there is no reference in section 72(1) of the DDO to claims where persons may be vicariously

liable for acts of harassment or vilification.

Clearly claimants are, and should be, able to bring civil proceedings in respect of harassment and vilification of persons with a disability against respondents who are liable under section 48 or section 49 of the DDO.

For the sake of completeness, and to avoid any confusion, the EOC considers it desirable that this should be spelt out in the legislation.

● *The EOC proposes that the Government should amend section 72(1) of the DDO, by re-numbering the existing paragraphs and introducing two new paragraphs along the following lines:*

- “(a) has committed an act of discrimination against a claimant which is unlawful by virtue of Part III or IV;*
- (b) is by virtue of section 48 or 49 to be treated as having committed such an act of discrimination against the claimant;*
- (c) has committed an act of harassment against the claimant which is unlawful by virtue of Part III or IV;*
- (d) is by virtue of section 48 or 49 to be treated as having committed an act of harassment against the claimant;*
- (e) has committed an act which is unlawful by virtue of section 46; or*
- (f) is by virtue of section 48 or 49 to be treated as having committed an act which is unlawful by virtue of section 46.”*

16. Availability of Specified Statutory Remedies

Section 76(3A) of the SDO and section 72(4) of the DDO are the provisions that deal with the statutory remedies that may be ordered by the District Court in civil proceedings under each Ordinance.

The various remedies that the District Court may order are linked by the disjunctive “or”, suggesting that only one remedy may be ordered at any

time. The EOC takes the view that, since both section 76(3A) of the SDO and section 72(4) of the DDO are without prejudice to the Court's power to make orders which it considers just and appropriate in the circumstances, the Court has power to award more than one of the remedies set out in the legislation at any time.

For the avoidance of doubt or argument to the contrary, the EOC considers it desirable that to have this spelt out more clearly in the legislation.

- *The EOC proposes that the Government should amend section 76(3A) of the SDO and section 72(4) of the DDO to make it clear that the District Court may make any one or more of the orders set out in the list of statutory remedies.*

17. Civil Proceedings for Discriminatory Practices

Both the SDO and the DDO contain provisions relating to discriminatory practices. These are sections 42 and 41 respectively. Contravention of such provisions may be dealt with only by the EOC, and only by way of formal investigation. Complainants cannot lodge complaints for the purpose of investigation and conciliation by the EOC in respect of discriminatory practices, nor may they institute civil proceedings in respect of same. They may only lodge complaints, and may bring civil action, against respondents whose discriminatory practices lead to an individual act of discrimination which is unlawful under the legislation.

In cases where a complainant could bring a civil action, but chooses not to, the EOC may rely on the Sex Discrimination (Proceedings by Equal Opportunities Commission) Regulation and the Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation to bring proceedings in its own name. Such proceedings would be restricted to the specific act of discrimination alleged by the aggrieved person.

Where the EOC becomes aware of a discriminatory practice, but there is no potential individual claim on which to found a legal action, the EOC is unable to deal with the discriminatory practice other than by way of formal investigation.

The EOC is of the view that it should be able to bring civil proceedings in the District Court for declaratory relief against respondents with discriminatory practices, without the need to base such proceedings on individual claims and without conducting a formal investigation.

- ***The EOC proposes that the Government should amend the SDO and the DDO to enable the EOC to bring civil proceedings against respondents believed to have discriminatory practices.***

18. Headings in the SDO

The EOC has considered the various headings in the legislation and has found that there are two which are misleading. Although they have no binding effect and may only be referred to for guidance in construction, it is an opportune time to amend them.

Section 7 of the SDO refers to “Discrimination against married, etc. persons in employment field”. This is incorrect, as the section refers to marital status discrimination in all fields.

Section 8 of the SDO refers to “Discrimination against pregnant women in employment field”. This is incorrect. The section refers to pregnancy discrimination in all fields.

- ***The EOC proposes that the Government should amend the headings of sections 7 and 8 of the SDO to more accurately reflect the content of the relevant provisions.***

19. Chinese Text of the SDO

The EOC is of the view that certain expressions and characters in the Chinese text of the SDO should be amended to provide for clarity and better meaning.

- ***The EOC proposes that the Government should amend the Chinese text of the SDO as follows:-***

- A. *in paragraph (b) under Section 2 defining “會社” (club) by repealing “處所” and substituting “會址”.*
- B. *in paragraph (a) under Section 2 defining “僱用” (employment) by repealing “服務” and substituting “僱傭”.*
- C. *in paragraph (b) under Section 2 defining “僱用” (employment) by adding “由個人” before “親自”.*
- D. *in Section 11(4) by repealing all words after “外” and substituting “就 1997 年 10 月 15 日前與女性的死亡或退休有關的規定,如在該日期及之後繼續適用於該女性, 則第(1)(b)及(2)款不適用於該些規定.”*
- E. *in Section 11(5), by repealing*
- (i) *“就” and substituting “與” wherever it appears;*
and
 - (ii) *“而作的付款” and substituting “有關的規定” wherever it appears.*
- F. *in Section 15(4) by repealing all words after “外” and substituting “就 1997 年 10 月 15 日前與女性的死亡或退休有關的規定,如在該日期及之後繼續適用於該女性, 則第(1)(b)及(d)款不適用於該些規定.”*
- G. *in Section 15(5), by repealing*
- (i) *“就” and substituting “與” wherever it appears;*
and
 - (ii) *“而作的付款” and substituting “有關的規定” wherever it appears.*
- H. *By repealing Section 16(4) and substituting “(4) 就 1997 年 10 月 15 日前與成員死亡或退休有關的規定,如在該日期及之後繼續適用於該成員,則在有關範圍內,本條不適用於該些規定.”*

- I. *in Section 19(4)(a), by repealing “該行” and substituting “該職業介紹所”.*
- J. *in Section 19(4)(b), by repealing “該行” and substituting “該職業介紹所”.*

20. Chinese Text of the DDO

The EOC is of the view that certain expressions and characters in the Chinese text of the DDO should be amended to provide for clarity and better meaning.

● *The EOC proposes that the Government should amend the Chinese text of the DDO as follows:-*

- A. *in the preamble, by adding*
 - (i) *“或他的有聯繫人士” after “任何人”;*
 - (ii) *“或他的有聯繫人士” before “的騷擾”;*
 - (iii) *“至包括基於任何人或他的聯繫人士的殘疾而作出的歧視” before “及相關”.*
- B. *in paragraph (e) under Section 2 defining “殘疾” (disability), by adding “外觀” before “毀損”.*
- C. *in paragraph (b) under Section 2 defining “會社” (club), by repealing “該其處所” and substituting “其會址”.*
- D. *in paragraph (b) under Section 2 defining “僱用” (employment), by repealing “進行任何工作或勞動合約” and substituting “執行任何工作或付出勞動力的合約”.*
- E. *in Section 4(a), by repealing “作出的處所提供” and substituting “提供遷就”.*
- F. *in Section 19(5)(a), by repealing “該行” and substituting “該職業介紹所”.*

- G. in Section 19(5)(b), by repealing “該行” and substituting “該職業介紹所”.**
- H. in Section 20(4)(c)(ii) by repealing all “僱主” and substituting “主事人”.**
- I. In Section 12(5)(a) by repealing “已承諾” and substituting “承諾”**
- J. In Section 37(2) by repealing “教職員” and substituting “職員”.**

**SUMMARY OF PROPOSALS AGREED TO IN PRINCIPLE BY
ADMINISTRATION**

The Administration has agreed in principle to:

1. Extend the scope of protection against sexual harassment in the SDO by implementing the four proposals as recommended at pages 3 and 4 of Annex A-
 - (i) amend section 2(6) of the SDO so that section 2(5)(b) extends “sexually hostile environment” harassment to the field of education;
 - (ii) amend section 40 of the SDO to protect providers of goods, services and facilities against sexual harassment by customers;
 - (iii) amend section 40 of the SDO to protect members / prospective members of a club against sexual harassment by members of a committee of management of that club; and
 - (iv) amend section 40 of the SDO to protect tenants and sub-tenants from sexual harassment by other tenants and sub-tenants.
2. Repeal Item 1 in Schedule 5 of the SDO, as recommended at pages 5 to 7 of Annex A, insofar as Item 1 relates to uniform / equipment requirements and training in the use of weapons in the disciplinary forces; positions reserved for men in the Police Tactical Unit; and gender quotas (except in respect of the Correctional Services Department).
3. Repeal Items 4, 5, 7 and 8 in Schedule 5 of the SDO, as recommended at pages 7 to 10 of Annex A.
4. Introduce voluntary and binding undertakings into the SDO and the DDO, as recommended at page 14 of Annex A.
5. Amend section 85(4) of the SDO and section 81(4) of the DDO to enable EOC to recover legal costs for acting as solicitor / counsel in

Annex B

providing legal assistance, as recommended at pages 15 and 16 of Annex A.

6. Amend section 76(1) of the SDO and section 72(1) of the DDO to make it clear that claims may be made against persons who are vicariously liable for acts of sexual harassment, disability harassment and disability vilification as recommended at pages 17 and 18 of Annex A.
7. Enable the EOC to seek declaratory and injunctive relief in the District Court under the SDO and the DDO in respect of discriminatory acts, policies and practices, as recommended at page 19 of Annex A.
8. Amend the headings of sections 7 and 8 in the SDO to more accurately describe their contents, as recommended at page 20 of Annex A.
9. Amend the expressions and characters in the Chinese text of the SDO, as recommended at pages 20 and 21 of Annex A, to provide for greater clarity.
10. Amend the definition of “associate” in section 2 of the DDO to extend it to a person under the care of a person, and make any other necessary consequential amendments, as recommended at page 13 of Annex A.
11. Amend section 73(1) of the DDO to include reference to section 41 of the DDO, as recommended at pages 14 and 15 of Annex A.
12. Include in the DDO protection for members, employees and conciliators of the EOC equivalent to that found in section 68 of the SDO, as recommended at pages 16 and 17 of Annex A.
13. Amend the expressions and characters in the Chinese text of the DDO, as recommended at pages 20 to 23 of Annex A.