

**Paper for the Subcommittee to Study the Transport Needs and Provision of
Concessionary Public Transport Fares for Persons with Disabilities**

**Whether non-provision of concessionary public
transport fares to persons with disabilities who need to be accompanied
by a carer to use public transport facilities constitutes discrimination under the
Disability Discrimination Ordinance (Cap. 487)**

Purpose

At the meeting of the Subcommittee to Study the Transport Needs and Provision of Concessionary Public Transport Fares for Persons with Disabilities (“PwDs”) on 9 January 2006, some members expressed concern that non-provision of concessionary public transport fares for those PwDs who need to be accompanied by a carer in using public transport services (“the relevant PwDs”) and/or for their carers might constitute a contravention of the Disability Discrimination Ordinance (Cap. 487) (“DDO”). Members asked the legal adviser to the Subcommittee to provide legal advice on this issue.

Meaning of “discrimination” under DDO

2. The Disability Discrimination Ordinance renders unlawful discrimination against persons on the ground of their disability in respect of their employment, accommodation, education, access to partnerships, membership of trade unions and clubs, access to premises, educational establishments, sporting activities and the provision of goods, services and facilities and makes provision against harassment and vilification of persons with a disability.

3. Since the question being considered by the Subcommittee relates to the provision of transport facilities, the relevant provisions that should be taken into consideration are sections 6 and 26 of DDO. Extracts of the said sections are attached in the Annex for members’ reference.

Whether non-provision of concessionary public transport fares to the relevant PwDs constitutes discrimination under section 6(a) of DDO

4. The type of discrimination referred to in section 6(a) of DDO is generally known as direct discrimination. Under DDO, direct discrimination can only be established if the complainant was treated less favourably than a person without a disability was or would have been treated. Less favourable treatment can take various forms including words, acts and failures to provide opportunities.¹ The less favourable treatment must be on the ground of the complainant's disability if it is to amount to disability discrimination. The test to identify direct discrimination is generally referred to as the "but for" test.² This test has recently been applied by the District Court in *Siu Kai Yuen v Maria College*³ in considering whether there is discrimination under section 6(a) of DDO. The application of the "but for" test would mean that there is discrimination if the relevant PwDs would have received the same treatment as persons without a disability but for their disability.

5. In applying the "but for" test, it is necessary to carry out a comparison of the cases of persons with or without a disability. Section 8 of DDO requires that in comparing one case with another, the relevant circumstances in the one case should be the same, or not materially different, in the other. The case under consideration is one where a PwD is required to be accompanied by a carer in order that he or she can use public transport facilities ("the relevant PwD"). In such a case, using public transport would mean paying the fare of both the PwD and that of the carer. To decide whether there is discrimination under section 6(a) of DDO, it is necessary to find a suitable comparator and compare how the operator would have treated such a comparator. While it is the claimant who generally chooses the comparator, the correctness of that choice is a matter of law for the court to decide.⁴ The comparator should mirror the characteristics of the claimant relevant to the benefit or benefit sought, except for the personal characteristics related to the enumerated or analogous ground raised as the basis of discrimination.⁵

6. Based on decided cases on disability discrimination in Hong Kong and other jurisdictions which have comparable anti-disability discrimination legislation, it is likely that the suitable comparator in the present case is a person without the relevant PwD's disability but who needs to be accompanied by a carer (other than a

¹ *Halsbury Laws of England*, Fourth Edition Reissue, para. 311.

² *Purvis obo Hoggan v New South Wales (Department of Education)* [2001] EOC, 93-117; *Purvis v New South Wales (Department of Education and Training)* (2003) 202 ALR 133.

³ [2005] 2 HKC, 115.

⁴ *Hodge v Canada (Minister of Human Resources Development)* [2004] 3 S.C.R.357, Supreme Court of Canada

⁵ *Auton (Guardian ad litem of) et al v British Columbia (Attorney General)* [2004] 3 S.C.R. 657, Supreme Court of Canada

child or an elderly person of 65 years old or above who are currently eligible for concessionary fares).⁶ Assuming this choice of comparator is correct, the next question is whether the public transport operators would have treated the comparator in a way different from the relevant PwD. Given that the able-bodied person and his companion/carer are required to pay fares without concessions in the same way as a PwD and his carer, a person without a disability would have been treated in the same way as the relevant PwD as far as the charging of fare is concerned. On this basis, it would seem that non-provision of concessionary public transport fares to the relevant PwDs would not amount to discrimination under section 6(a) of DDO.

Whether non-provision of concessionary public transport fares to the relevant PwDs constitutes discrimination under section 6(b) of DDO

7. The type of discrimination referred to in section 6(b) of DDO is commonly known as “indirect discrimination”. Indirect discrimination occurs if a person applies a condition or requirement equally to all people, which has a discriminatory effect on a PwD and a PwD is subjected to a detriment because he cannot comply with it.

The need for a requirement or condition

8. To determine whether there is discrimination under section 6(b) of DDO where public transport operators do not provide concessionary fares to the relevant PwDs, it is necessary to decide whether there is a requirement or condition applied to the relevant PwDs. In Australia which has anti-disability discrimination legislation similar to that of Hong Kong, it has been held that the expression “requirement or condition” used in the relevant legislation should be construed broadly to include any form of qualification or pre-requisite, although the actual requirement or condition need to be formulated with precision.⁷ In the context of provision of goods and services, the phrase “requirement or condition” has been construed to mean something over and above that which is necessarily inherent in the goods or services provided.⁸ Moreover, section 6(b) of DDO requires that the requirement or condition applies or would apply equally to a person without a disability.

⁶ In *Ma Bik Yung v Ko Chuen* [2000] 1 HKLRD 514, the Court of Appeal approved the trial judge’s finding that the suitable comparator in the case where the complainant was a paraplegic and needed to use a wheelchair was an able-bodied person who had a heavy item of luggage. In *Purvis v New South Wales (Department of Education Training)* (2003) 202 ALR 133 where the High Court of Australia considered whether the expulsion of a student because of his violent behaviour which was caused by his disability amounted to direct discrimination, it was held by a majority of 3 to 2 that the appropriate comparator should be pupils without the relevant disability but who also engaged in violent behaviour.

⁷ *Catholic Education Office v Clarke* [2004] FCAFC 197, Federal Court of Australia; *Hinchliffe v University of Sydney* [2004] FMCA 85, Federal Magistrates Court of Australia.

⁸ *Waters & Others v Public Transport Corporation*, 103 A.L.R.513, High Court of Australia.

9. Applying the above principles to the present case, it seems open to the courts to find that the relevant requirement or condition applied to the relevant PwD is that he or she travels on public transport without any concessionary fares. This requirement or condition also applies to a general class of persons including those without the PwD's disability.

Whether there is discrimination under section 6(b) of DDO

10. To determine whether there has been discrimination on the part of the public transport operators under section 6(b) of DDO, apart from finding that a requirement or condition is applied both to the relevant PwD and to any other person without the relevant PwD's disability, the courts need to be satisfied that the following three conditions are satisfied -

- (a) the individual claiming discrimination has to show that the requirement or condition is such that the proportion of persons with the disability in question who can comply with it is considerably smaller than the proportion of persons without the disability who can comply with it;
- (b) the public transport operators cannot show it is justifiable to apply that requirement or condition to a user of public transport irrespective of the disability or the absence of the disability; and
- (c) the application of that requirement or condition is detrimental to the PwD in that he cannot comply with it.

11. From the way section 6(b) of DDO is drafted, it can be said that the law does not require that a public transport operator must give allowance to a user's disability under all circumstances. If despite his disability, the relevant user can comply with the requirement or condition, or a proportion of persons with a disability who can comply with the requirement or condition is not considerably smaller than the proportion of persons without a disability who can comply with it, then the application of the requirement or condition is not discrimination under section 6(b) of DDO.

12. In determining whether the three conditions set out above are satisfied, the following matters may be relevant:

- (a) In deciding whether or not the relevant PwDs can comply with the

requirement or condition to travel without concessionary fares, it is possible for the courts to come to the view that this matter has more to do with the means of the PwDs rather than their disability. If this is the case, it appears that no issue of disability discrimination is involved.

- (b) To determine whether the proportion of person with a disability who can comply with the requirement or condition is considerably smaller than the proportion of persons without a disability who can comply with it, it is necessary to identify an “appropriate base group” with which the individual claiming discrimination is compared, and to decide whether a substantial proportion of those individuals in the base group are able to comply with the relevant requirement or condition.⁹ In the present case, it would appear that the appropriate base group with which to compare a PwD who needs to be accompanied by a carer because of his or her disability would be those people without the PwD’s disability. As the number of PwDs falling into such a category is not available, it would not be possible to conduct the comparison required under section 6(b) of DDO at this stage in order to ascertain whether there is indirect discrimination.
- (c) In the event that the above two conditions are satisfied, it would then be for the public transport operator to show that the requirement or condition is justified irrespective of the user’s disability or lack of it. As no guidance is given in DDO as to the criteria to be applied in determining whether a requirement or condition is justified, it may be useful to refer to judicial decisions on the subject. In *Waters and Others v Public Transport Corporation*¹⁰, the High Court of Australia, in interpreting the Equal Opportunity Act 1984 of Victoria, which contains provisions similar to the provisions in DDO, held by a majority that whether a requirement or condition is reasonable for the purposes of the Act is to be determined by reference not only to the circumstances of the complainants but to all the circumstances of the case, including the financial and economic considerations of the Corporation. If this principle is applied to the present case, it would be necessary to consider the economic and financial justifications of the public transport operators in determining whether the requirement or condition for the relevant PwDs to travel on public transport without concessionary fares is reasonable.

⁹ *Australian Iron & Steel Pty Ltd. v Banovic* (1989) 89 ALR 1.

¹⁰ 103 ALR 513.

Whether there is discrimination under section 26(1) of DDO

13. As the issue under consideration does not relate to the refusal of the public transport operators to provide transport services to the relevant PwDs, no question of discrimination under section 26(1)(a) should arise. There is also no suggestion that the operators discriminate against the relevant PwDs in the manner in which they provide the PwDs with public transport services within the terms of section 26(1)(c). The question remains is whether the operators discriminate against the relevant PwDs in the terms or conditions on which the operators provide transport services to them under section 26(1)(b) of DDO.

14. Although the reference to “requirement or condition” in section 6(b) and the reference to “terms or conditions” in 26(1)(b) of DDO may be regarded as referring to the same or similar subject matter, the courts have held that the expressions are not necessarily identical.¹¹ In the light of *Catholic Education Office v Clarke*¹² which was decided by the Federal Court of Australia, section 26(1)(b) of DDO could be read in conjunction with section 6(b) in that the former is concerned with the actual terms and conditions on which a public transport operator is prepared to offer its services to the relevant PwDs while section 6(b) states the test for determining whether the operator has discriminated against the relevant PwDs by requiring them to comply with a requirement or condition that satisfies the three criteria specified in section 6(b)(i), (ii) and (iii).

15. In the present case, there is no suggestion that public transport operators are prepared to provide their services to the relevant PwDs on special terms and conditions as far as the charging of fare is concerned. On this basis, it could be said that the term or condition under section 26(1)(b) is no different from the requirement or condition under section 6(b) of DDO, namely, travelling on public transport by paying the fare of the relevant PwD and his carer without fare concessions. When section 26(1)(b) is read in conjunction with section 6(b) of DDO, it would be necessary to determine whether the term or condition on which the public transport operator is providing the service to the relevant PwD satisfies the criteria specified in section 6(b)(i), (ii) and (iii) in order to decide whether discrimination under section 26(1)(b) is established. This would require consideration of the matters set out in paragraph 12(a), (b) and (c) above.

¹¹ *Catholic Education Office v Clarke* [2004] FCAFC 197, Federal Court of Australia.

¹² [2004] FCAFC 197.

Conclusion

16. Based on the above analysis, it would appear unlikely that non-provision of concessionary public transport fares by public transport operators would constitute direct discrimination under section 6(a) of DDO given that both the relevant PwDs and persons without a disability are treated in the same manner, namely, travelling on public transport without any concessionary fares.

17. To determine whether there is a case of discrimination under section 6(b) and/or section 26(1)(b) of DDO, it would be necessary to obtain further information such as statistics on the number of PwDs who can travel on public transport only with the assistance of a carer, and the economic and financial considerations or justifications of the public transport operators. However, it should be noted that even if such information is available and it can be established that the relevant PwD cannot comply with the requirement or condition to travel without concessionary fares, it remains to be seen as to whether the courts are prepared to accept that the failure to comply with the relevant requirement or condition is due to his disability instead of other reasons such as financial difficulties. If it is the latter, it seems that the issue involved is more likely to be one of social welfare rather than disability discrimination.

Encl.

Legal Service Division
Legislative Council Secretariat
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Chapter: 487	Title:	DISABILITY DISCRIMINATION ORDINANCE	Gazette Number:
Section: 6	Heading:	Discrimination against persons with disability, etc.	Version Date: 30/06/1997

PART II

DISCRIMINATION TO WHICH ORDINANCE APPLIES

A person discriminates against another person in any circumstances relevant for the purposes of any provision of this Ordinance if-

- (a) on the ground of that other person's disability he treats him less favourably than he treats or would treat a person without a disability;
- (b) he applies to that other person a requirement or condition which he applies or would apply equally to a person without a disability but-
 - (i) which is such that the proportion of persons with a disability who can comply with it is considerably smaller than the proportion of persons without a disability who can comply with it;
 - (ii) which he cannot show to be justifiable irrespective of the disability or absence of the disability of the person to whom it is applied; and
 - (iii) which is to that person's detriment because he cannot comply with it; or
- (c) on the ground of the disability of an associate of that other person he treats him less favourably than he treats or would treat a person without such a disability.

(Enacted 1995)

Chapter:	487	Title:	DISABILITY DISCRIMINATION ORDINANCE	Gazette Number:
Section:	26	Heading:	Goods, services and facilities	Version Date: 30/06/1997

(1) Subject to subsection (2), it is unlawful for a person who, whether for payment or not, provides goods, services or facilities, to discriminate against another person with a disability-

- (a) by refusing to provide that other person with those goods, services or facilities;
- (b) in the terms or conditions on which the first-mentioned person provides that other person with those goods, services or facilities; or
- (c) in the manner in which the first-mentioned person provides that other person with those goods, services or facilities.

(2) Subsection (1) shall not apply to a person who discriminates against another person with a disability if-

- (a) the provision of the goods, services or facilities would impose unjustifiable hardship on the person who would have to provide those goods, services or facilities; and
- (b) in the case of the facilities described in paragraphs (c), (d), (e) or (f) of section 27 (or facilities of a like nature to the facilities so described) and to the extent that those facilities are physical in nature, those facilities are so designed or constructed as to be inaccessible to a person with a disability.

(Enacted 1995)