

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

**Submission by the Equal Opportunities Commission for the
Subcommittee Meeting on 4 April 2006**

Previous discussion

1. The EOC's paper (LC Paper No. CB(1)645/05-06(02)), submitted for the Subcommittee's meeting on 9 January 2006 made it clear that the Equal Opportunities Commission (EOC) welcomes the effort to help Persons with Disabilities (PwDs) who are in need by providing them with public transport concessionary fares.
2. Whilst supporting the general proposition of providing concessionary fares to deserving PwDs, the EOC's mandate is to ensure that:-
 - (a) individual PwDs who have the same or similar need are treated equally;
 - (b) if individual PwDs who have the same or similar need are not treated equally, there are demonstrably good reasons for the different treatment.
3. If a scheme provides concession to individual PwDs who need it, then equally, other individual PwDs who can also demonstrate the same or similar need for concession should be provided concession, unless there are good valid reasons to explain why, as between equally deserving individual PwDs, some are provided concession and others are not. The EOC is concerned with whether there may be deserving PwDs who are left out of the scheme.
4. The EOC will have no reservation about a scheme if there is assurance that it will cover all deserving PwDs, and no deserving PwDs are left out. But this begs the question of who are deserving PwDs, and by what criteria are they to be assessed.
5. If eligibility is based on clear identification and assessment of the need for concessionary fares, without distinction based on types of disability; and, if PwDs not falling within selected types of disabilities may still apply subject to proper assessment on a case by case basis, then there will be assurance that no

deserving PwDs are left out. But there is no such assurance at present.

6. During the discussion in the Subcommittee meeting on 16 February 2006, points of law were raised on the issue of comparator and on the special measure defence under the Disability Discrimination Ordinance (DDO) (s.50). It was also suggested that new legislative provisions be introduced to put it beyond doubt that selective provision of concessionary fares to PwDs would not constitute a contravention of DDO. This present paper will outline the EOC's comments on these issues.

Comparator

7. The EOC considers that the comparator in a case of direct discrimination may properly be a person with a different disability as the claimant, as opposed to a person without any disability at all, as long as both the comparator and the claimant are in the same or materially similar relevant circumstances.
8. This is supported by the judgment in a disability discrimination case decided in the District Court (*Aquino Valdez v So Mei Ngor* DCEO 3/2004, paragraph 9 of the judgment). It stated that the comparator should be a "*real person or a notional person without a disability or the same disability*", thereby indicating that comparison may be made between persons with different disabilities. Opinion from counsel experienced in discrimination law obtained by EOC also confirms this view of the law.

New Zealand Total Mobility Scheme

9. The New Zealand Human Rights Commission's comments on the New Zealand Total Mobility ("TM") Scheme provide insights into the discussion.
10. In essence, the Total Mobility Scheme is a scheme whereby subsidized taxi services are provided for eligible PwDs. Eligible PwDs are individually assessed. They have to show that, because of their disability, they are unable to proceed to the nearest bus stop/train station; board, ride securely and alight; and proceed from the destination stop to the trip end without assistance. Eligibility criteria are not based on types of disability, but on functional capacity of PwDs, which can be applied across different types of disability.

11. The New Zealand Human Rights Act 1993 outlaws disability discrimination. The definition of disability (set out in the Annex to this present paper) is similar to the DDO in that it is also a comprehensive definition. The definition of what constitutes discrimination (also set out in the Annex to this present paper) is materially similar to the DDO. The New Zealand Human Rights Commission, in its Inquiry into Accessible Public Land Transport, lasting for two and a half years, examined the Total Mobility Scheme and made the following comments in a report in September 2005:-

The definition of disability in the Human Rights Act is comprehensive, covering physical and sensory disabilities, people with experience of mental illness, people with anxiety disorders and people with intellectual disability. Submissions to the Inquiry suggest that some people with experience of mental illness and some people with intellectual disability are missing out on the benefits of the TM scheme in some areas. Not adopting the definition of disability in the Human Rights Act means this practice could continue. Adopting the definition will make it explicit who is eligible for the scheme. Failure to incorporate the definition could result in some disabled people being excluded from the scheme. Such exclusion could constitute unlawful discrimination.

12. The above passage is consistent with the EOC's view that the exclusion of certain types of disability from a scheme may be unlawful discrimination. When eligibility is only based on types of disability, there is a risk of such exclusion.
13. The TM scheme has an important feature: it clearly identifies the target difficulties in respect of which the scheme seeks to assist PwDs, without distinction based on types of disability. It does so by stating that it is available to people who, because of their disability, are unable to "*proceed to the nearest bus stop/train station; board, ride securely and alight; and proceed from the destination stop to the trip end without assistance*". By identifying the target difficulties, the focus is on functional capacity assessment, and any distinction based on types of disabilities is avoided. After the conclusion of a New Zealand government review also in 2005, there was a recommendation to reformulate the description of the target difficulties, but the recommended criteria remain based on functional capacity without distinction on types of disability.

14. In contrast, the present effort to formulate a concessionary fare scheme does not make clear what are the target difficulties it seeks to address, and eligibility criteria are based on types of disability.
15. As it is unclear what are the target difficulties, the risk of a successful claim of discrimination by an excluded PwD cannot be dismissed because it cannot be ruled out that this excluded PwD also faces the same difficulties as the selected PwDs and is equally deserving of concessionary fares. If the target difficulties are clearly identified, PwDs who are affected by them can then be legitimately separated for different treatment from those who are not affected. This is why the EOC emphasized the importance of identifying the target difficulties in LC Paper No. CB(1)645/05-06(02).

Special measures defence (DDO s.50)

16. It is clear from the EOC's comments, contained in Annex A of the Administration's paper submitted for the Subcommittee's meeting on 16 February 2006 (LC Paper No. CB(1)869/05-06(01)), on the many proposed schemes described in that paper, that the EOC takes the view that reliance may be placed on the special measures defence under the DDO (s.50) to legitimize selective treatment among equally deserving PwDs. But as this defence is a restriction on the operation of the DDO, according to general principles, a heavy burden has to be discharged in order to rely on it.
17. If a scheme benefits only selected types of PwDs, and exclude other equally deserving PwDs, it may be possible to rely on the special measures defence by showing that, as a group, each type of the selected PwDs are affected by the target difficulties more seriously than other PwDs who have different types of disabilities, and that it is therefore reasonable to accord priority to the selected types among other equally deserving individual PwDs.
18. The EOC is not suggesting that the special measures defence may not be relied on as a basis for a selective concessionary fares scheme. The EOC's view is that, in order to rely on the special measures defence and to maximize the chances of success, it will be desirable to clearly identify the target difficulties, and to show how different types of PwDs are affected by them, and to determine priority accordingly. The EOC's concerns with the present proposals are that

there is no clear identification of the target difficulties, no assurance that the selected types of PwDs are the only deserving PwDs (or that other equally deserving PwDs have not been left out); or if there are excluded PwDs who are equally deserving, there is no convincing explanation of why they have been left out, other than perhaps that there have been no serious efforts to find out about them or to consider their situation before any scheme is drawn up.

19. In short, there should a closely reasoned, factually comprehensive and demonstrably evidenced basis for reliance on the special measure defence. This is consistent with the following statements contained in Standard Rules on the Equalization of Opportunities for Persons with Disabilities adopted by the United Nations General Assembly on 20 December 1993:

“The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation” (paragraph 25 of Introduction)

“all action in the field of disability presupposes adequate knowledge and experience of the conditions and special needs of person with disabilities”
(Preamble)

20. In the event of a claim by an excluded but equally deserving PwD, it would be advisable to show that target difficulties are properly identified and priority of selection is based on comprehensive knowledge of the conditions and needs of the many different persons with different disabilities. This would be the proper approach to adopt in considering the proposal (discussed at the Subcommittee meeting on 16 February 2006) to offer concessionary fares to recipients of Disability Allowance and Comprehensive Social Security Assistance with 100% loss of earning capacity, and any other disability groups who may be added to the list of beneficiaries at a later date.

Introducing legislation

21. Under the provisions for special measures defence, the DDO in its present state already provides legitimacy for a selective scheme, as long as there is a closely reasoned, factually comprehensive and demonstrably evidenced basis for the

selection.

22. But if it is considered that a closely reasoned, factually comprehensive and demonstrably evidenced basis for selection is administratively or for other reasons undesirable, then one solution to the problem may be the introduction of new legislative provisions to provide for a selective scheme based on types of disability, that is, in effect, a legislative decision that the selected types of PwDs are the “designated” beneficiaries of the concessionary scheme in preference to other PwDs.
23. In the United Kingdom, for instance, there are specific provisions in the Transport Act 2000 which require a minimum of 50% discount be provided to PwDs. An outline of the features of these provisions will be found below.
24. In introducing new provisions to provide legitimacy for a selective concessionary fares scheme, care should be taken that the impact on the generality of equality principles as implemented by the DDO is minimized. New provisions should not amend fundamental concepts and definitions contained in the DDO, but should be confined to a narrow scope sufficient to cover the scheme. These concepts and definitions embody important principles concerning the fundamental right of equal treatment. Any changes to them may undermine this fundamental human right and may lead to unexpected undesirable repercussions.
25. There are different ways in which narrow specific provisions may be introduced. Firstly, they may be introduced under legislation separate from the DDO, like the relevant provisions already mentioned in the United Kingdom in the Transport Act 2000 which is a separate Act from the Disability Discrimination Act 1995. Secondly, new provisions may be inserted into the DDO, in the form of additional specific exceptions in the DDO.
26. Addition of specific exceptions in the DDO may be done by amending Schedule 5 of the DDO. This schedule at present has no content but can be used to contain exceptions for specified discrimination from specified provisions of the DDO (s.60). Amendment of Schedule 5 can be done by the Chief Executive in Council by notice in the Gazette subject to the approval of the Legislative Council (s.87).
27. If it is decided to amend Schedule 5, a scheme will need to be finalized and

drawn up so that Schedule 5 may then refer to it.

28. The DDO implements fundamental principles of the human right of equal treatment. Any additional exception in the DDO inevitably reduces the scope and effectiveness of these fundamental principles. Given that a properly formulated scheme for concessionary fares is already permissible under the present DDO, as long as the scheme does not leave out any deserving PwDs (or if it does, it does so only on a proper solid basis), the Subcommittee may wish to balance the need for a further exception against its implication on the fundamental principles enshrined in the existing legislation.
29. Subject to the above comments, the introduction of new and separate legislation is an available option which has the benefit of avoiding possible challenges against the use of an exception to justify a proposed concessionary scheme. It may be that through the legislative process the intention of Administration would become clearer and the views of the community known.

UK Transport Act 2000

30. Under the relevant provisions of the United Kingdom Transport Act 2000, “disabled people” are entitled to a statutory travel concession permit to be issued by local authorities. The holder of the permit is entitled to be provided with half price travel concession by transport operators. A “disabled person” means a person who:-
 - (a) is blind or partially sighted
 - (b) is profoundly or severely deaf
 - (c) is without speech
 - (d) has a disability, or has suffered an injury, which has a substantial and long-term adverse effect on his ability to walk
 - (e) does not have arms or has long-term loss of the use of both arms
 - (f) has a learning disability, that is, a state of arrested or incomplete development of mind which includes significant impairment of

intelligence and social functioning, or

- (g) would, if he applied for the grant of a licence to drive a motor vehicle under Part III of the Road Traffic Act 1988, have his application refused pursuant to section 92 of that Act (physical fitness) otherwise than on the ground of persistent misuse of drugs or alcohol
31. Local Authorities have to assess applicants to determine if they are “disabled person” for the purpose of issuing the travel concession permit. Guidance has been issued to local authorities which they must have regard in determining whether applicants are entitled to the permit. It is to be noted that the above categories are not entirely based on types of disability, but also focus on functional capacity, like (d) (ability to walk) and (g) (ability to drive safely), which may be open to different types of disabilities.
32. Since the provision of travel concession is based on separate primary legislative provisions, any issue of compliance with the Disability Discrimination Act 1995 is avoided.
33. The Subcommittee may also take note that, while current provisions in the Transport Act 2000 require a discount to be given, old provisions only provided local authorities with an option to provide discount. The old provisions were introduced as a legislative response to the case of *Prescott v Birmingham Corporation* ([1954] 3 WLR 600, Ch.D.; [1954] 3 WLR 990, C.A.).
34. In this case, a local government implemented a concessionary fares scheme whereby certain classes of old people were provided free travel on transport services operated by the local government of Birmingham. The number of old people covered by the scheme was 40,000. This scheme was *ultra vires* because the judge held that the local government had:-

“no general inherent power to offer free seats in their vehicles or other benefits in money or money’s worth to particular individuals or to particular classes of individuals, and to discriminate between the citizens of Birmingham on the large scale and to the wide extent which they do in the present case. Where is the process of discrimination and favouritism to stop? Let me suppose that the council of the corporation were honestly of the opinion that the success of a particular political party at the polls was

essential to the public welfare. Would they be entitled to confer pecuniary benefits on the supporters of that party? Plainly not; but where is the difference in principle between that and the proposals of the present scheme? For myself, I cannot see it. Of course, there is no element of venality or corruption here, but only, if I am right, an excess of misplaced philanthropic zeal." ([1954] 3 WLR 600, 605 Ch.D)

35. This judgment was later upheld by the Court of Appeal. The Court of Appeal made the following judicial statements:-

"[the local government] are not, in our view, entitled to use their discriminatory power as proprietors of the transport undertaking in order to confer out of rates a special benefit on some particular class of inhabitants whom they, as the local authority for the town or district in question, may think deserving of such assistance." ([1954] 3 WLR 990, 1002 C.A.)

"The practice of allowing free travel to blind and disabled persons may, or may not, be strictly justifiable, but may perhaps be classed as a minor act of elementary charity to which no reasonable ratepayer would be likely to object." ([1954] 3 WLR 990, 1003 C.A.)

36. Even though there was no equality provision or legislation involved in the case, the courts still rejected philanthropy as sufficient justification for discrimination, and the Court of Appeal clearly had doubts about whether providing concession to disabled people could be justified. This highlights the importance of having vigorous and objective eligibility criteria and assessment, by clearly identifying target difficulties and properly explaining any differential treatment between equally deserving individuals. This case also shows that legitimacy for a selective scheme, which cannot withstand vigorous scrutiny, can only be provided by legislation, with legislators being accountable for the selection.

Annex

Human Rights Act 1993 – selected sections

21. *Prohibited grounds of discrimination—*

(1) For the purposes of this Act, the prohibited grounds of discrimination are—

...

- (h) Disability, which means—
 - (i) Physical disability or impairment:
 - (ii) Physical illness:
 - (iii) Psychiatric illness:
 - (iv) Intellectual or psychological disability or impairment:
 - (v) Any other loss or abnormality of psychological, physiological, or anatomical structure or function:
 - (vi) Reliance on a guide dog, wheelchair, or other remedial means:
 - (vii) The presence in the body of organisms capable of causing illness:

42. *Access by the public to places, vehicles, and facilities—*

(1) It shall be unlawful for any person—

- (a) To refuse to allow any other person access to or use of any place or vehicle which members of the public are entitled or allowed to enter or use; or
- (b) To refuse any other person the use of any facilities in that place or vehicle which are available to members of the public; or
- (c) To require any other person to leave or cease to use that place or vehicle or those facilities,—

by reason of any of the prohibited grounds of discrimination.

(2) In this section the term “vehicle” includes a vessel, an aircraft, or a hovercraft.

43. *Exceptions in relation to access by the public to places, vehicles, and facilities—*

(1) Section 42 of this Act shall not prevent the maintenance of separate facilities for each sex on the ground of public decency or public safety.

(2) Nothing in section 42 of this Act requires any person to provide for any person, by reason of the disability of that person, special services or special facilities to enable any such person to gain access to or use any place or vehicle when it

would not be reasonable to require the provision of such special services or facilities.

- (3) Nothing in subsection (2) limits section 118 of the Building Act 2004.
- (4) Subject to subsection (5) of this section, nothing in section 42 of this Act shall apply where the disability of a person is such that there would be a risk of harm to that person or to others, including the risk of infecting others with an illness, if that person were to have access to or use of any place or vehicle and it is not reasonable to take that risk.
- (5) Subsection (4) of this section shall not apply if the person in charge of the place, vehicle, or facility could, without unreasonable disruption, take reasonable measures to reduce the risk to a normal level.

Discrimination in provision of goods and services

44. *Provision of goods and services—*

- (1) It shall be unlawful for any person who supplies goods, facilities, or services to the public or to any section of the public—
 - (a) To refuse or fail on demand to provide any other person with those goods, facilities, or services; or
 - (b) To treat any other person less favourably in connection with the provision of those goods, facilities, or services than would otherwise be the case,—by reason of any of the prohibited grounds of discrimination.

...

52. *Exception in relation to disability—*

It shall not be a breach of section 44 of this Act for a person who supplies facilities or services—

- (a) To refuse to provide those facilities or services to any person if—
 - (i) That person's disability requires those facilities or services to be provided in a special manner; and
 - (ii) The person who supplies the facilities or services cannot reasonably be expected to provide them in that special manner;or
- (b) To provide those facilities or services to any person on terms that are more onerous than those on which they are made available to other persons, if—
 - (i) That person's disability requires those facilities or services to be

provided in a special manner; and

- (ii) The person who supplies the facilities or services cannot reasonably be expected to provide them without requiring more onerous terms.

65. *Indirect discrimination—*

Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part of this Act has the effect of treating a person or group of persons differently on one of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part of this Act other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.