

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

Submission by Equal Opportunities Commission for

Meeting on 12 April 2007

1. This Paper serves as the report in response to the following Motion passed by the Subcommittee in its meeting on 27 February 2007:-

“本會促請平等機會委員會跟進研究有關政府部門及所有交通營辦商沒有落實為殘疾人士提供交通票價優惠的政策、措施和辦法的情況，研究進行相關的調查，並向本會提交跟進的報告。”

(Translation)

“This Subcommittee urges the Equal Opportunities Commission to follow up and study the failure on the part of the relevant government departments and various public transport operators to implement the policies, measures and means regarding the provision of concessionary fares for persons with disabilities, and to consider conducting investigations in this respect and to submit a follow-up report to this Subcommittee.”

Brief background

2. The above Motion has the following background:-
 - (a) For some time, there have been calls for public transport operators to offer fare

concession to people with disabilities.

- (b) The Administration has responded to these calls by inviting and encouraging operators to consider offering concessionary fares to people with disabilities.
- (c) In doing so, the Administration recognized that, in view of the wide definition of disability under the Disability Discrimination Ordinance, Cap.487, there is a risk of litigation by people with disabilities who are not eligible for concessionary fares if the entitlement criteria and the related assessment mechanism are not carefully formulated.
- (d) The ideal way to minimize risk of litigation is, first, to clearly specify the purpose and objective of offering concessionary fares; and, second, to formulate eligibility criteria and assessment mechanism in accordance with the specified purpose and objective.
- (e) From the discussion so far in this Subcommittee, it seems clear that the purpose and objective of offering concessionary fares is twofold: first, to lessen their financial burden; and second, to integrate people with disabilities into society¹. It follows that the ideal way is to formulate eligibility criteria and assessment mechanism in terms of financial means and the level of social integration, applicable to all people with disabilities, regardless of the type of their disabilities.
- (f) However, a suitable formulation of eligibility criteria and assessment mechanism in terms of financial means and the level of social integration, applicable to all people with disabilities, regardless of the type of their disabilities, did not emerge from the discussion in this Subcommittee. This Subcommittee then turned to the option of amending the Disability Discrimination Ordinance to expressly secure the legal basis of concessionary fares, so as to eliminate litigation risk.
- (g) The amendment discussed is to provide an exemption in Schedule 5 of the Disability

¹ See LegCo letter dated 5 March 2007 to EOC, p.2.

Discrimination Ordinance for public transport operators to offer concessionary fares to recipients of Disability Allowance and Comprehensive Social Security Allowance with 100% loss of earning capacity.

- (h) It is important to note that this amendment does not impose on operators a legal obligation to offer concessionary fares to people with disabilities. The amendment will only have the effect of making sure that the operators would not be in breach of the Disability Discrimination Ordinance, if they choose to offer concessionary fares to people with disabilities; but they would not have to do so if they choose not to.
- (i) The stance of the operators emerging from the discussion seems to be that litigation risk is not the fundamental reason why they have not offered concessionary fares to people with disabilities. The fundamental reason seems to be that they operate on commercial principles and, as a matter of general principles, they do not see that it is their responsibility to offer concessionary fares to people with disabilities. Apart from general principles, many of the operators also stated that it is not commercially viable for them to do so.
- (j) The Administration's policy on this matter is to encourage the operators to offer concessionary fares to people with disabilities and to secure a legal basis for them to do so if they so choose; but the policy is not to compel them to do so.

3. It was against this background that the above Motion was passed. Having examined the responsibility of the Administration and the operators with regard to concessionary fares for people with disabilities, and having considered the basis of an investigation to establish legal liability, the Equal Opportunities Commission makes the following report.

Different aspects of responsibility

4. There are in fact different aspects to the issue of responsibility in the present context. The Administration has a general accountability and responsibility to the public to formulate and implement appropriate policies, including transport policy and policy for social integration

of people with disabilities and for relieving their financial burden. For the operators, there is a responsibility on them as corporate citizens to contribute to the society. These different aspects of responsibility will be dealt with below.

5. But it is useful to first deal with the aspect of legal responsibility and the issue of whether it is unlawful discrimination under the Disability Discrimination Ordinance for the Administration or the operators not to provide concessionary fares to people with disabilities, to relieve their financial burden and promote their social integration.

Legal obligation

6. Under the Disability Discrimination Ordinance, acts of discrimination include direct discrimination and indirect discrimination.

Direct and Indirect Discrimination: Operators

7. It is convenient to deal with direct discrimination first. To make out a case of direct discrimination, it is necessary to show that there is a difference in treatment on the ground of disability. By not offering concessionary fares to people with disabilities, the operators are charging people with disabilities the same regular fare as everyone else. There is no difference in treatment on the ground of disability. It is therefore **unlikely** that there is direct discrimination by the operators.
8. As for indirect discrimination, it is necessary to show first that a requirement or condition has been applied to everyone. It is then necessary to show that the requirement or condition has a disproportionately adverse impact on people with disabilities than on other people.
9. By not offering concessionary fares to people with disabilities, it may be said that the operators are imposing a requirement or condition on everyone who uses public transport to pay a regular fare. It may be further assumed that this requirement or condition have a disproportionately adverse impact on people with disabilities, because of the additional

financial burden arising from disabilities², which then further impacts on their social integration.

10. The next step is then to consider whether the operators could justify the requirement or condition. This essentially requires an objective balancing exercise where discrimination law and the court will assess the reasons of the operators in applying the requirement or condition on the one hand, and weigh them against the discriminatory effect of the requirement or condition on the other hand.
11. It seems that the reason for the operators to charge a regular fare is to raise revenue to recoup costs and to make profits. This is to be balanced against the discriminatory effect on people with disabilities in terms of financial burden and social integration. In the balancing exercise, however, discrimination law would see the issues of financial burden and social integration as matters of public policy, to be dealt with by the Administration, rather than as legal obligations on operators working on commercial principles. There is no precedent case in discrimination law suggesting that entities working on commercial principles have a legal duty to deal with social issues without specific legislation. It is therefore **unlikely** that discrimination law and the court will impose a legal obligation on commercial operators to deal with these matters of public policy by offering concessionary fares to people with disabilities.

Direct and Indirect Discrimination: Administration

12. For the Administration, the fact that the operators have not offered concessionary fares to people with disabilities does not mean that the Administration has treated people with disabilities differently than other people. In the present context, the Administration has not treated people with disabilities any differently as other people. It is **unlikely** that there is direct discrimination by the Administration.

² Factors leading to such additional financial burden include (1) generally lower income level among people with disabilities; (2) their need to spend significant expenses for treatment or auxiliary aids; (3) their need to be accompanied by carers.

13. For indirect discrimination, the requirement or condition of paying a regular fare is imposed by the operators and not the Administration. It is difficult to identify any requirement or condition imposed by the Administration to establish a claim of indirect discrimination.
14. One possible argument is that the Administration imposes a requirement or condition in the following terms: public transport in Hong Kong is provided through operators working on commercial principles, and everyone using public transport can only do so through such operators and so have to pay the fares charged by them. Let it be assumed again that this requirement or condition have a disproportionately adverse impact on people with disabilities, because of the additional financial burden arising from disabilities, which then further impacts on their social integration. The next step is to balance the reason for this requirement or condition on the one hand, and its discriminatory effect on the other hand.
15. In the balancing exercise, discrimination law and the court will take into account that the Administration is entitled to decide on the priorities between its different policy objectives, and to decide on the specific policy to pursue the different objectives. Even where there is a requirement or condition with discriminatory effect, a case of indirect discrimination will fail if the Administration could show that (1) the requirement or condition reflects a legitimate objective; (2) this objective is not discriminatory; (3) the Administration could reasonably consider that the means chosen (i.e., the requirement or condition) were suitable for attaining that objective. (*R v Secretary of State for Employment ex parte Seymour-Smith and Perez* (No.2) [2000] IRLR 263, HL)
16. It appears that the Administration's transport policy is to pursue the objective of an efficient transport environment through operators working on commercial principles. This objective is in itself non-discriminatory and legitimate. So long as there is data, information or other materials tending to support the proposition that commercial operators can provide efficient transport services, the Administration's policy can then be reasonably considered as a suitable means for attaining the objective. Furthermore, other programmes and policies are in place to deal with the objectives of relieving the financial burden of people with disabilities and to promote their social integration. For example, Rehabilitation Services; Disability Allowance; and Comprehensive Social Security Allowance. In these

circumstances, it is **unlikely** that the court will find a claim of indirect discrimination established against the Administration.

17. In Hong Kong's constitutional system, it is for the Administration to decide on the priorities between different policy objectives and then to formulate and implement specific policies to pursue these objectives. The effectiveness or otherwise of policy-making by the Administration is a matter of general public accountability, and not legal obligation.
18. Discrimination law does not dictate the particular way in which the Administration decides on the priorities of its policy objectives or the specific policies adopted by the Administration to achieve these objectives.

Policy responsibility / Corporate social responsibility

19. Although there is no legal obligation on the Administration to specifically adopt a policy of offering concessionary fares to people with disabilities to lessen their financial burden or to promote their social integration, the Administration still has general accountability and responsibility to the public to deal with these social issues effectively.
20. At present, the Administration deals with these social issues through Rehabilitation Services, Disability Allowance, and Comprehensive Social Security Allowance. Offering concessionary fares to people with disabilities is not currently part of the Administration's social policy. There are strong voices from the community that the Administration should adopt a policy of offering concessionary fares for people with disabilities. As a matter of policy, it is clearly open for the Administration to do so. The UK offers an example of making concessionary fares part of social policy, where local governments will reimburse operators for the costs of concessionary fares to disabled people.³

³ It is instructive that this policy is given specific legal basis under relevant provisions of the Transport Act 2000, which has already been mentioned in previous submission by EOC to this Subcommittee (LC Paper No.CB(1)1192/05-06(02)), and more details can be seen there. In addition, the Concessionary Bus Travel Bill is now before the UK Parliament to provide for a single national scheme of concessionary fares in place of different local schemes.

21. Given that there is now a plan to amend the Disability Discrimination Ordinance to explicitly clarify and permit concessionary fares for people with disabilities, there will be no litigation risk for the Administration or the operators. The only question is how the Administration wishes to shape its social policy.
22. But even if the Administration does not want to include concessionary fares for people with disabilities as part of its overall social policy, but is only willing to work under the present transport policy framework, there is still room for the Administration to encourage the operators more effectively by using its shareholding in and / or representation on the boards of some of the operators. Commercially, some of these operators appear to be well able to afford concessionary fares to people with disabilities to lessen their financial burden and to promote their social integration.
23. Although operators do not have a legal obligation to provide concessionary fares to people with disabilities to lessen their financial burden or promote their social integration, they are corporate citizens with responsibility to the society in which they operate. There is a growing international movement recognizing the value of corporate social responsibility. Paying proper regard to social justice is clearly an important component of corporate social responsibility. In the present context, the responsibility should be heightened and further emphasized in that the operators are operating in an area that the general public clearly has a strong interest, namely, public transport.
24. Addressing social issues such as the financial burden of people with disabilities and their social integration by offering concessionary fares is an obvious way of discharging corporate social responsibility. Where a significant section of people with disabilities have difficulty to fully participate in society through lack of financial means, there will be risks of discontent and disruption affecting business. Business success and shareholder value in the long-term are best achieved in an environment of social harmony.
25. The issue as to whether corporate social responsibility should be made a matter for legislation or whether it should be voluntary action on the part of businesses is a matter of ongoing international debate. The preponderance of opinions seems to be that there should

be a mixture of legislation and voluntary action depending on the specific matter in question. This would leave room for enacting legislation imposing an obligation on operators to offer concessionary fares to people with disabilities.

26. But even leaving aside legislation, and proceeding on the basis that corporate social responsibility should be voluntary, operators with Administration shareholding or board representation are expected to place heavy emphasis on discharging corporate social responsibility. The Administration in its capacities as shareholder or board member should take the lead and set an example for the proper discharge of corporate social responsibility by calling for concessionary fares to relieve the financial burden of people with disabilities and to promote their social integration.
27. Another option open to the Administration is to stipulate in the franchise or licence of the operators that they have to offer concessionary fares to people with disabilities. This can be done when a fresh franchise or licence is granted, or it can be done using interim review mechanism (if any) for current franchise or licence. An example of similar stipulation can be found in Victoria, Australia, where the Victorian Government stipulated in the privatization process that concessions for those in need would continue to be provided by operators after privatization⁴.

Conclusion

28. With the present plan to amend the Disability Discrimination Ordinance to explicitly permit concessionary fares for people with disabilities, there is no longer any question of litigation risks. As a matter of reference, there are many overseas examples where a policy of concessionary fares for people with disabilities is adopted, as reflected in information previously provided by the Administration (LC Paper No.CB(1)394/05-06(01)). It is now a matter of policy for the Administration to decide whether to include concessionary fares as

⁴ This is reflected in the audit report published by the Victorian Auditor-General's Office, "Public transport reforms, Moving from a system to a service", 1998.

part of its social policy for people with disabilities, or whether it should be positioned as a matter for corporate social responsibility. Either way, the Administration has a pivotal role to play and is accountable to the public for its decision; it has to discharge its responsibility effectively, whether by legislation or otherwise. The EOC will continue to follow development on this issue.

Equal Opportunities Commission

April 2007