

**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.~~

in LC Paper No. CB(2)658/07-08(01)

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

**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.