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**Paper for the House Committee meeting
on 5 June 2009**

**Report of the Subcommittee on Race Discrimination
(Proceedings by Equal Opportunities Commission) Regulation**

Purpose

This paper reports on the deliberations of the Subcommittee on Race Discrimination (Proceedings by Equal Opportunities Commission) Regulation (the proposed Regulation).

Background

2. The Race Discrimination Ordinance (Cap. 602) (RDO) was enacted on 10 July 2008 to make racial discrimination and harassment and other related acts unlawful in specified areas of activities, including employment, education and provision of goods, facilities, services and premises, in both the public and private sectors. Section 83 of the Ordinance, which came into operation on 3 October 2008, empowers the Secretary for Constitutional and Mainland Affairs (SCMA) to make regulations -

- (a) where any person may bring proceedings under section 70 of RDO but has not done so, empowering the Equal Opportunities Commission (EOC), in such circumstances as are specified in the regulations, to bring and maintain those proceedings as if EOC were that person ; and
- (b) specifying the remedies which EOC may seek to obtain in such proceedings.

The proposed Regulation

3. SCMA gave notice on 11 March 2009 to move a motion at the Council meeting on 1 April 2009. The motion seeks the Council's approval of the proposed Regulation which provides that -

- (a) EOC may bring proceedings where the case raises a question of principle and it is in the interests of justice to do so and it appears to EOC that the claim is well-founded; and
- (b) in any such proceedings EOC may apply for any remedy available to a claimant, including a declaration or an injunction or both.

4. The Regulation, if approved, will come into operation on a day to be appointed by SCMA by notice published in the Gazette. It is the Administration's plan to bring into operation the substantive provisions of RDO around mid-July 2009, together with the proposed Regulation at the same time.

The Subcommittee

5. At the House Committee meeting on 20 March 2009, Members formed a Subcommittee to study the proposed Regulation. The membership list of the Subcommittee is in **Appendix I**. At the request of the House Committee, SCMA withdrew his notice for moving the motion at the Council meeting on 1 April 2009 to allow time for the Subcommittee to study in detail the proposed Regulation.

6. Under the chairmanship of Hon Paul TSE, the Subcommittee has held three meetings with the Administration and EOC. At the invitation of the Subcommittee, a number of organizations and individuals have submitted written views on the proposed Regulation. A list of these organizations and individuals is in **Appendix II**.

Deliberations of the Subcommittee

Provisions of the proposed Regulation which are different from those in the Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation

7. The Subcommittee notes that the proposed Regulation is closely modeled on corresponding regulations made by Secretary for Home Affairs under the Sex Discrimination Ordinance, Cap. 480 (SDO) and Family Status Discrimination Ordinance, Cap. 527 (FSDO). However, in the Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation made by the former Secretary for Health and Welfare under the Disability Discrimination Ordinance (Cap. 487) (DDO) subsequent to those made under SDO and FSDO, different provisions are made, e.g. -

- (a) instead of a requirement that it appears to EOC that the claim is 'well-founded', a requirement is imposed that EOC has reason to believe that a person committed an act of discrimination, harassment, vilification or which is otherwise unlawful under DDO;

- (b) there are clear procedures to establish that the aggrieved person will not bring proceedings; and
- (c) there is also a pre-requisite that EOC has offered assistance to the aggrieved person by way of conciliation but failed to effect a settlement.

8. The Subcommittee also notes that EOC has not brought any proceedings in its own name as if it were the victim under SDO, FSDO and DDO.

The threshold provision

9. The Administration has provided the following justifications for adopting the threshold of "it appears to the Commission that the claim of the person is well-founded" for EOC to bring proceedings under the proposed Regulation, -

- (a) as RDO and DDO serve different policy objectives, the drafting adopted for the respective regulations made could be different;
- (b) the differences between the Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation on the one hand and the corresponding Regulations under SDO and FSDO on the other hand lie not only in the two different expressions of "the Commission has reason to believe that a person has committed an act of discrimination..." and "it appears to the Commission that the claim ... is well founded" but also in the procedural requirements on EOC bringing proceedings. The Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation imposes additional procedural requirements which do not exist in the corresponding Regulations under SDO and FSDO; and
- (c) proceedings under section 83(1) of RDO relate to exceptional circumstances, namely, a victim may bring proceedings under section 70 of RDO but has not done so, and EOC brings such proceedings in its own name as if it were the alleged victim. EOC needs good reasons before it should bring such proceedings. These considerations are reflected by both expressions of "the Commission has reason to believe that a person has committed an act of discrimination..." (adopted in the Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation) and "it appears to the Commission that the claim ... is well founded" (adopted in the corresponding Regulations under SDO and FSDO).

10. The Administration stresses that the circumstances in which EOC may bring proceedings under the proposed Regulation and the corresponding regulations under SDO and FSDO are identical. Although the Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation adopts a more elaborated drafting,

i.e. "that the Equal Opportunities Commission has reason to believe that an unlawful act under the Disability Discrimination Ordinance was committed", the same purpose is served and there is no material difference, despite the difference in expression. The Chief Legal Counsel to EOC has also advised the Subcommittee that despite that difference in expression, there is as a matter of practice not much difference in implementation between the Regulations made under SDO and FSDO on the one hand and the Regulation under DDO on the other. Moreover, it would be useful to have specified criteria for EOC to consider in deciding whether to bring proceedings in its own name. The Administration has agreed that when moving the motion on the proposed Regulation at a future Council meeting, SCMA would inform the Council of EOC's undertaking to issue a public statement explaining that the standard for deciding whether to bring proceedings in its own name would be essentially the same across all the anti-discrimination ordinances.

11. A majority of members including Mr TAM Yiu-chung, Mr IP Kwok-him and Mr Paul TSE find the threshold provisions in the proposed Regulation acceptable on the considerations that -

- (a) it is reasonable to specify the criteria under the proposed Regulation for EOC to consider in deciding whether to bring proceedings in its own name which would only be instituted under exceptional circumstances when the victim does not bring proceedings; and
- (b) the provisions are modeled on the respective regulations made under SDO and FSDO and the proposed Regulation has not imposed additional restrictions on EOC to bring proceedings in its own name.

12. Dr Margaret NG has, however, queried why a higher threshold of "well founded" is adopted in the proposed Regulation. She is of the view that as the purpose for EOC to institute proceedings in its own name is to ensure equality, the crux of the question is whether the threshold is too high that it will go against the mission of EOC to promote equality of opportunity. Dr NG has expressed concern that whether the proposed Regulation as presently worded would narrow down the legal assistance which could be provided by EOC under section 79 of RDO, as well as the functions and powers of EOC under section 59 of RDO.

13. The Administration has explained that section 79 of RDO and the proposed Regulation operate in different contexts. The effect of the proposed Regulation made under section 83 of RDO is to empower EOC to bring proceedings as if the EOC were the alleged victim under specified conditions and such conditions would apply only when the alleged victim does not bring proceedings. On the other hand, section 79 of RDO does not refer to any regulation-making power to further govern the granting of assistance under section 79 for an alleged victim to bring proceedings. Legal assistance that could be provided by EOC under section 79 of RDO therefore would not be narrowed down by the proposed Regulation.

14. The Administration has further explained that section 59 of RDO provides for the functions and powers of EOC, including (among others) working towards the elimination of discrimination, harassment and vilification, in the case of any act alleged to be unlawful by virtue of RDO, encouraging persons who are concerned with the matter to which the act relates to effect a settlement of the matter by conciliation, whether under section 78 or otherwise, and performing such other functions as are imposed on it under the Ordinance or any other enactment¹. EOC may also do all such things that are necessary for, or incidental or conducive to, the better performance of its functions. Such functions and powers of EOC, including those of bringing proceedings, would not be narrowed down by the proposed Regulation made under section 83 of RDO. To avoid doubt, section 83(3) of RDO explicitly provides that "this section (section 83) is without prejudice to the Commission's power to bring proceedings by way of judicial review, in relation to this Ordinance (RDO) or any other law, pursuant to its functions under section 59(1)" (of RDO).

Procedural requirements in the proposed Regulation

15. Regarding the differences that involve procedural requirements and prerequisites which appear in the Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation but not in the proposed Regulation, the Administration has explained that its intent when drafting the proposed Regulation is to allow flexibility for EOC to bring proceedings as provided for in section 83 of RDO. There is already a requirement under section 83(1)(a) of RDO that the person who may bring proceedings under section 70 has not done so. It may not be necessary to provide further procedural requirements in the proposed Regulation. For the Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation, necessary steps are set out for EOC to notify the aggrieved person with disabilities before bringing civil proceedings concerning that person in EOC's name. According to the Labour and Welfare Bureau (LWB), the existing provisions under the Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation serve well to achieve the objectives of the legislation and provide procedural safeguards to ensure that the aggrieved persons with disabilities are informed without restricting EOC's power to initiate legal proceedings.

Harmonization of the provisions for EOC to take proceedings in its own name under anti-discrimination ordinances

16. The Subcommittee notes that there is a general consensus among the written views received that it is desirable to have identically phrased provisions of the threshold for EOC to bring legal proceedings and to allow more flexibility for EOC in doing so. The Subcommittee takes the view that the Administration should have made the best effort to use identically phrased provisions which is consistent with its

¹ Section 59 of the RDO has equivalents in the 3 existing anti-discrimination ordinances (section 64 of the Sex Discrimination Ordinance (Cap. 480), section 62 of the Disability Discrimination Ordinance (Cap. 487) and section 44 of the Family Status Discrimination Ordinance (Cap. 527)).

policy objective of affording flexibility for EOC to bring proceedings in its own name.

17. The Administration has explained to the Subcommittee that -

- (a) when compared with the Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation which gives an objective connotation with the word "reason" and a threshold with the expression "reason to believe", the proposed Regulation gives a subjective flavour with the word "appear", but EOC has to assess whether the claim is "well-founded" on an objective basis in the light of facts and circumstances known to him or established to his satisfaction. It is therefore submitted that there is no material difference between the two formulae; and
- (b) the detailed procedural requirements and prerequisites which appear in the Disability Discrimination (Proceedings by Equal Opportunities Commission) Regulation are not included in the proposed Regulation. Therefore, the proposed Regulation as presently worded would provide greater flexibility for EOC to bring proceedings in its own name.

18. Dr Margaret NG has expressed the views that -

- (a) the threshold of "well-founded" adopted in the respective regulations under SDO, FSDO and RDO is higher than "has reasons to believe" adopted in DDO. In order to allow EOC greater flexibility, the Administration should consider adopting the latter version; and
- (b) on the procedural requirements for instituting proceedings, DDO has adopted an elaborated and more rigid approach when compared with the corresponding regulations under SDO, FSDO and RDO. In order to allow EOC greater flexibility, the Administration should consider adopting the latter version.

She, however, considers that RDO should be implemented as soon as possible and the Administration should in the long term introduce legislative amendments to the effect that provisions relating to EOC bringing proceedings in its own name under the respective anti-discrimination ordinances would be made consistent as far as possible and that the relevant threshold provisions for doing so should be standardized.

19. While Mr IP Kwok-him supports that the drafting of the threshold provisions in the respective regulations made under anti-discrimination ordinances should be standardized, he prefers the version adopted in SDO, FSDO and RDO to the one adopted in DDO. He has suggested that amendments to the threshold provision of DDO should be made at an appropriate time when the Ordinance is to be amended.

20. In response to members' request for standardizing the threshold provisions governing the circumstances in which EOC could bring proceedings in the respective anti-discrimination ordinances, the Administration has informed the Subcommittee that LWB which is the policy bureau for the implementation of DDO had been advised of members' concern about the inconsistency in drafting the threshold provisions among the existing anti-discrimination ordinances. Given that the rehabilitation sector had been consulted on the making of the relevant regulation under DDO, LWB would have to consult them if amendments are to be made. Nevertheless, the Administration would further relay members' views to LWB.

Drafting of section 3 of the proposed Regulation

21. Section 3 of the proposed Regulation specifies the remedies which EOC may seek to obtain in the proceedings brought by the Commission in its own name. At the suggestion of the legal adviser to the Subcommittee, the Administration has agreed to add the word "出" between the words "指" and "屬" in line 2 of the Chinese version of section 3 in order to make the provision consistent with the wording of the corresponding provision in the respective regulation under FSDO.

Recommendation

22. The Subcommittee supports SCMA giving fresh notice to move the motion on the proposed Regulation at a Council meeting.

Advice sought

23. Members are invited to note the recommendation of the Subcommittee.

**Subcommittee on Race Discrimination
(Proceedings by Equal Opportunities Commission) Regulation**

Membership list

Chairman Hon Paul TSE Wai-chun

Members Dr Hon Margaret NG
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP
Hon Abraham SHEK Lai-him, SBS, JP
Hon LEUNG Kwok-hung
Hon Starry LEE Wai-king
Dr Hon Priscilla LEUNG Mei-fun
Hon CHEUNG Kwok-che
Hon IP Kwok-him, GBS, JP
Dr Hon Samson TAM Wai-ho, JP

Total : 11 Members

Clerk Miss Flora TAI

Legal Adviser Ms Clara TAM

Date 26 March 2009

《 種族歧視(平等機會委員會提起的法律程序)規例 》
小組委員會
Subcommittee on Race Discrimination
(Proceedings by Equal Opportunities Commission) Regulation

曾向小組委員會表達意見的團體/個別人士名單
List of organizations/individuals which/who have
given views to the Subcommittee

<u>團體/個別人士名稱</u>	<u>Name of organizations and individuals</u>
1. 民主黨	Democratic Party
2. 香港工業總會	Federation of Hong Kong Industries
3. 香港大律師公會	Hong Kong Bar Association
4. 香港人權監察及香港融樂會有限公司	Hong Kong Human Rights Monitor and Hong Kong Unison Limited
5. 余仲賢先生 北愛爾蘭少數族裔議會執行總監	Mr Patrick YU Executive Director Northern Ireland Council for Ethnic Minorities
6. Carole Petersen 教授	Professor Carole Petersen
7. 香港社區組織協會	Society for Community Organization